Strategic Worldwide Assets Ltd *v* Sandz Solutions (Singapore) Pte Ltd and others (Tan Choon Wee and another, third parties)
[2013] SGHC 162

Case Number : Suit No 506 of 2009

Decision Date : 26 August 2013

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Devinder Rai (ACIES Law Corporation) for the plaintiff; Low Chai Chong, Daryl Ong and Benjamin Yam (Rodyk & Davidson LLP) for the 1st to 4th defendantsRajendran Kumaresan and Ronnie Tan (Central Chambers Law Corporation) for the 1st Third PartyKelly Yap and Morgan Chng (Oon & Bazul LLP) for the 2nd Third Party.

Parties : Strategic Worldwide Assets Ltd — Sandz Solutions (Singapore) Pte Ltd and others (Tan Choon Wee and another, third parties)

26 August 2013 Judgment reserved.

Judith Prakash J:

1 The plaintiff's claim in these proceedings was, ostensibly, a simple one by a shareholder for payment of dividends. The claim was, however, made not only against the company concerned but also against three other persons who were shareholders of the company at the material time. The defendants then brought third party proceedings against two individuals for contribution and/or indemnity and a counterclaim against the same individuals and the plaintiff itself for conspiracy.

2 The entities involved in the action are as follows:

1 Strategic Worldwide Assets Limited ("Strategic"), a company incorporated in the British Virgin Islands, the plaintiff;

2 Benjamin Ng Chee Yong ("Mr Ng"), a businessman and property agent, the sole shareholder and director of the plaintiff;

3 Sandz Solutions (Singapore) Pte Ltd ("Sandz"), a company incorporated in Singapore, the first defendant;

4 Lawrence Liaw Shoo Khen ("Mr Liaw"), the founding director and majority shareholder (66% of the shares) of Sandz and its moving spirit, the second defendant;

5 Koh Siang Ling Alina ("Ms Koh"), Mr Liaw's wife, a director and minority shareholder (6% of the shares) of Sandz, the third defendant;

6 Tan Jeck Min ("JM Tan"), a director and minority shareholder (3% of the shares) of Sandz, the fourth defendant;

7 Tan Choon Wee ("Mr Tan"), a venture capitalist and an executive director of a listed company, The Lexicon Group Limited ("Lexicon"), the first third party; and

8 John Poon Seng Fatt ("Mr Poon"), a businessman and good friend of Mr Tan, the second third party.

Strategic, Mr Tan and Mr Poon are also the defendants to the counterclaim brought by Sandz, Mr Liaw, Ms Koh and JM Tan. I shall refer to Mr Liaw, Ms Koh and JM Tan collectively as "the Liaw Group".

3 The outline of the dispute is as follows. In 2007, Sandz paid out dividends of $4m. These dividends were paid to the Liaw Group. In 2009, Strategic started this action against Sandz and the Liaw Group in order to recover 25% of those dividends on the basis that it was a 25% shareholder of Sandz at the material time. The defendants put forward a four-pronged defence relying, *inter alia*, on representations allegedly made that the Liaw Group could keep the dividends for themselves. Details of the defence are in [33] below. The defendants claimed an indemnity from the third parties in the event that they were found liable to the plaintiff and also counterclaimed for damages for conspiracy.

Background

4 In January 2007, Mr Liaw was the managing director and chairman of Sandz. He had set up Sandz in 1999 and together with JM Tan had built it up into a regional enterprise solutions provider which provided professional services in information technology. By 2007, Sandz had a paid up capital of $3m comprising 3 million ordinary shares. Together, the Liaw Group held 75% of the paid up capital. The remaining 25% ("the SES stake") was held by SES Systems Pte Ltd ("SES") which had invested $2m in Sandz in 2004.

5 Mr Liaw wanted to expand Sandz and needed further working capital in order to do so. In 2006, he made plans to list the company on the Malaysian Stock Exchange but these plans did not materialise. He continued to look for a listed company which could act as a vehicle to raise working capital for Sandz. In early 2007, SES appointed an accountant's firm, KPMG, to explore the possibility of a trade sale of its stake.

6 On or about 19 January 2007, Mr Liaw was introduced to Mr Tan by a mutual acquaintance. Mr Liaw informed Mr Tan that he was looking for a suitable vehicle into which he could inject Sandz. He explained the nature of the company's businesses and the shareholders' intention to raise working capital through either a trade sale or a public listing. He showed Mr Tan figures indicating that Sandz had been making a net profit after tax of around $2m to $3m per year.

7 Mr Tan told Mr Liaw that he could provide assistance in finding a suitable vehicle for Sandz to be injected into. He was quite impressed with Mr Liaw's figures. At the time, Mr Tan thought that Lexicon (then known as Sun Business Network Ltd and referred to as "SBN" in the parties' correspondence) could be the possible vehicle but he did not mention it to Mr Liaw as he wanted to discuss the proposition with the managing director of Lexicon, Ricky Ang Gee Hing ("Mr Ang"), before doing so. In the course of the meeting, Mr Liaw showed Mr Tan preliminary proposals which had been prepared by KPMG in connection with a possible trade sale and Mr Tan said that he believed he could procure better terms than KPMG could.

8 At this point, the parties' accounts diverged slightly. Mr Liaw said that during the meeting, they discussed the issue of how to handle the SES stake. According to him, Mr Tan said that if he could find Mr Liaw a suitable listed vehicle, he would require Mr Liaw to buy out the SES stake and then sell it to Mr Tan's partners at cost so that they could make a profit from a subsequent on-sale to the proposed investment vehicle into which Sandz was to be injected. Mr Liaw remarked that this would be discussed with SES directly but Mr Tan indicated that he did not wish to deal with SES himself and

that Mr Liaw should do so.

9 Mr Tan's account is that it was Mr Liaw who told him that Mr Liaw did not want SES to know he was looking for the best deal for himself and that his preference was to sell Sandz to a listed company rather than to effect a trade sale. Contrary to what Mr Liaw had alleged, it was Mr Liaw who suggested that SES be bought out before any deal was to take place because he felt that SES' involvement would slow down considerably the pace at which the deal was completed. Mr Liaw asked if Mr Tan could find a willing investor to buy out the SES stake and Mr Tan indicated that he had contacts who were private equity investors who might be willing to help out as long as they received suitable incentives. Mr Tan suggested that Mr Liaw approach SES to sell their stake to him since he had a relationship with SES. In the meantime, Mr Tan would sound out possible investors. The idea was that the investors would provide Mr Liaw with funds to buy out the SES stake which would thereafter be transferred to the investors.

10 On 6 February 2007, Mr Liaw sent Mr Tan the group financial report of Sandz. Mr Tan was encouraged by the figures and replied that he had instructed his lawyer to draft a subscription agreement with the aim of drawing funds by the end of February 2007.

11 During the next few weeks, further discussions took place between Mr Tan and Mr Liaw regarding the terms of the transaction with the proposed vehicle. Mr Liaw informed Mr Tan of his requirements for the transaction. These included the following:

1 Mr Liaw was to be released from his personal guarantees given to the banks to support credit facilities for Sandz;

2 there would be an injection of $5m in cash to provide additional working capital for Sandz; and

3 control and management of Sandz would remain with him.

According to Mr Liaw, Mr Tan agreed to those requirements. Mr Liaw asserted that he trusted Mr Tan completely because he seemed to be a genuine man and was a churchgoing person who had been actively involved in church activities for many years. Moreover, he had been introduced to Mr Liaw by a long-time business associate.

12 In the meantime, Mr Tan had spoken with Mr Ang of Lexicon about Sandz and had been given the go ahead to try and effect the transaction. At some point (he believed it was before 2 February 2007) Mr Tan told Mr Liaw that the listed vehicle was Lexicon.

13 Strategic came into the picture in February 2007. It had been incorporated as an investment vehicle by Mr Poon. Mr Poon was an old friend of Mr Tan and they frequently did business together. They also shared office premises in UIC Building. Mr Poon had another old friend, Mr Ng, who was involved in property investments. According to company records produced in 2009, in December 2006, Mr Poon had transferred his shares and directorship in Strategic to Mr Ng.

14 In early 2007, Mr Tan told Mr Poon that Mr Poon could buy shares in Sandz and then sell them at a profit to Lexicon. He explained that Mr Liaw wanted to facilitate SES's exit from Sandz so that the sale to Lexicon could go through smoothly. The idea was for Mr Liaw to buy the SES stake but since he did not have enough funds to do so, he needed a third-party investor who could provide $2.5m as the purchase price. Mr Poon was interested and in February 2007, he met Mr Liaw for the first time. According to Mr Poon, there were no negotiations during this meeting and all that they

talked about was when Mr Liaw would need the money and to whom it was to be remitted. According to Mr Poon, whilst he met Mr Liaw again two or three times after the first meeting, the subsequent meetings were purely social in nature and no business was discussed.

15 Mr Poon asserted that after his first meeting with Mr Liaw, he decided that he should not purchase the SES stake as he was involved in another transaction involving Lexicon which could cause him to be in a conflict of interest. Therefore, he asked Mr Ng if the latter would like to participate in the Sandz deal in his stead. Mr Ng agreed but asked Mr Poon to help him do what was necessary to complete the transaction as Mr Ng had no experience in private equity investments. It was agreed that Strategic would be the investment vehicle and that Mr Poon would assist it in finalising the transaction.

16 With Mr Ng's authority, Mr Poon instructed lawyers to draft an agreement for the sale and purchase of the SES stake between Mr Liaw and Strategic ("the Strategic SPA"). This draft was sent to Mr Liaw by Mr Tan on 27 February 2007.

17 Mr Liaw asserted that at all material times, there was no doubt in his mind that Mr Tan and his friends wanted to profit from the SES stake. On 6 March 2007, he sent Mr Tan an email in which he mentioned "For now, it's merely you individuals taking out [SES] shares and I am fronting it". Mr Liaw told the court that he could actually have made the profit himself, but that Mr Tan's response was that he should allow Mr Tan's partners to "earn some money".

18 Mr Liaw first met Mr Ang on 6 March 2007. Thereafter, he, Mr Ang and Mr Tan had several discussions regarding the injection of Sandz into Lexicon. Mr Liaw said that during these discussions, he was given repeated assurances by the two men that after the transaction, he would control Lexicon and Sandz and that they had no interest in interfering with his running of Sandz. They told him that Lexicon would be his listed company.

19 On 12 March 2007, Mr Liaw made an offer to SES to purchase its stake. On 26 March 2007, Strategic, acting through its solicitors, paid $2.5m into Mr Liaw's bank account in order to provide funds for the purchase. However, SES did not agree to the price of $2.5m; it wanted $2.7m. Mr Liaw funded the extra $200,000 and the deal went through. On 9 April 2007, SES transferred its shares to Mr Liaw. In the meantime, in late March 2007, the Strategic SPA had been signed, Mr Poon being the authorised signatory of Strategic in this regard.

20 Mr Liaw in his affidavit of evidence in chief ("AEIC") said that it was subsequent to his acquisition of the SES stake that Mr Tan asked him to transfer the stake to Strategic on the understanding that Strategic would owe him $200,000 and that:

> 1 Strategic's only interest was to flip the SES stake for a quick profit in view of the intended acquisition by Lexicon;
>
> 2 Strategic would not be involved in or interfere whatsoever in any of the affairs or management or business of Sandz as this was solely an opportunity for Mr Tan and his friends/business associates to benefit and earn a quick profit; and
>
> 3 accordingly, Strategic would not have any claim or interest in or against Sandz, its profits, or cash or any money thereof including any entitlement to dividends.
>
> The representations set out above ("the Representations") are also set out in para 13 of the Defence and Counterclaim (Amendment No 2) in precisely the same language. It is the third

representation which I shall call "Representation C" that the defendants placed the weight of their case on.

21 Mr Liaw said that had it not been for Strategic's proposal (through Mr Tan), he could well have acquired the SES stake for himself and sold the same to Lexicon. Had it not also been for his reliance on the above, he would never have gone through with the proposed scheme. However, given Mr Tan's position as a director of Lexicon who could influence negotiations for Lexicon's acquisition of Sandz, he was asked to accommodate Mr Tan's request and did so by entering into the Strategic SPA. On 20 April 2007, Strategic became the registered shareholder of the 750,000 shares which had made up the SES stake.

22 The discussions between Mr Liaw, Mr Tan and Mr Ang regarding the Lexicon deal went through several phases with several draft term sheets being produced. Finally, on 8 May 2007, the parties signed a term sheet. This term sheet provided that Lexicon would purchase all issued shares in Sandz at a price of $36m based on nine times the company's price-to-earnings ratio. The price was to be paid partly in cash and partly by shares in Lexicon. It also provided that Lexicon and Mr Liaw would each have to make a loan of $2.5m to Sandz to provide it with working capital.

23 The next part of the narration deals with the events that are most contested. These relate to the declaration of dividends by Sandz. There are two versions: Mr Liaw's and Mr Tan's.

24 According to Mr Liaw, in May 2007, he told Mr Tan that Lexicon would require Sandz to provide a warranty as to its net asset value (NTA) and that Lexicon would be happy if Sandz had an NTA of $8m. Mr Liaw replied that Sandz' NTA was around $12m and Mr Tan then said that if that was the case, Mr Liaw could take the excess for himself. When asked how the NTA of Sandz could be reduced, Mr Tan replied on 14 May 2007 by a short text message which stated:

> Yr acct need to be more creative. Once dividend declared co owe u. u then thru agrmt loan money to coy. [*sic*]

25 According to Mr Liaw, what this meant was that Mr Liaw was to get Sandz to declare dividends of $4m so that the NTA of Sandz would be reduced to $8m consistent with what Mr Tan had previously said. Mr Tan and Mr Ang gave him their assurances that they did not mind him taking the $4m as dividends prior to the completion of the transaction. Mr Liaw declared that there could be no doubt that at this time Mr Tan was acting and speaking on behalf of Strategic. Had Mr Tan or Strategic asked for any share of the dividends, dividends would not have been declared.

26 Mr Liaw went on to say in his AEIC that the only point in time when the members of the Liaw Group were together the 100% owners of Sandz was during the period between 9 and 20 April 2007. Accordingly, he backdated the declarations of dividends to that period. He and the third and fourth defendants then signed the following directors' resolutions:

> 1 the first was dated 11 April 2007 and provided for the payment of an interim dividend of 83.3333% tax exempt (1-tier) amounting to $2,500,000 net in respect of the financial year ending 31 December 2007 and approved the payment of such dividend to the shareholders on 11 April 2007;
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> 2 the second was dated 16 April 2007 and provided for the payment of a second interim dividend of 50% tax exempt (1-tier) amounting to $1,500,000 net in respect of the financial year ending 31 December 2007 and approved the payment of such dividend to the shareholders on 16 April 2007.

In the same AEIC, Mr Liaw confirmed that he was the only person who negotiated with Mr Tan in respect of Strategic's intended purchase of the SES stake. The other individual defendants left all negotiations and decisions to him and neither of them received any of the dividends. They passed their shares of the same to him and he used the funds to provide a loan of $2.5m to Sandz and for his personal account.

27 Mr Liaw's AEIC was filed on 9 January 2012. On 28 March 2012, he made a supplementary AEIC. In this, he stated that the defendants had managed to retrieve email correspondence from the company secretary of Sandz relating to the declaration of dividends in 2007. On the basis of the documents found, he stated that paras 61 to 67 of his AEIC were not accurate as regards the dates of the declaration of dividends and which resolutions were backdated. From the newly discovered documents, it was clear that:

1 the first interim dividend of $2.5m was not backdated but declared between 11 and 20 April 2007 (*ie*, during the time when the Liaw Group comprised all shareholders of Sandz); and

2 the second interim dividend of $1.5m was the backdated one *ie* it was only declared sometime between 14 and 22 June 2007.

28 It should be noted that neither the first nor the second interim dividend was paid in full upon declaration. Payment of the dividends was broken into smaller amounts and the first payment was made on or around 16 May 2007. By 31 May 2007, $1.872m worth of the first dividend had been paid out.

29 Mr Tan's version was that around May 2007, Mr Liaw had gone to him with a sob story as to how he had not taken any money out of Sandz after working there for so many years. He told Mr Tan that Sandz had an NTA of $12m and Mr Tan replied that if that was the case then in principle, he would not have any issue if Mr Liaw was to take some profits out of Sandz. Mr Tan also added that Mr Liaw should not overdo it. He did not specify how much should be taken out and certainly did not say that Mr Liaw could take out $4m as dividends nor that he could do so at the expense of Strategic. Mr Tan added that distribution of dividends was not allowed under the sale and purchase agreement which the shareholders of Sandz signed with Lexicon and therefore it was preposterous for the defendants to allege that Strategic would not have any claim or interest in or against Sandz or its profits including any entitlement to dividends. Mr Tan further vigorously denied that he had made the Representations.

30 The sale and purchase agreement between Lexicon and the shareholders of Sandz ("the Lexicon SPA") was signed on 30 May 2007. Strategic was one of the parties to the Lexicon SPA and that document was signed on its behalf by Mr Poon. Thereafter, the Securities Industry Council ("the SIC") raised queries regarding the ownership of Strategic. On 16 July 2007, Sandz informed the SIC that Strategic was the investment vehicle of Mr Poon. Subsequently SIC asked Sandz to confirm that Mr Poon was not related to the current directors and substantial shareholders of Lexicon. In response, on the basis of information from Mr Poon, Sandz corrected its statement and said that Mr Ng was the sole shareholder and director of Strategic and that Mr Poon was an investor and a venture capitalist and was not related to any of the current directors and substantial shareholders of Lexicon. Further, Mr Ng had advised that Mr Poon had fully divested his interest in Strategic to Mr Ng in December 2006. This was the first time that Mr Ng had been mentioned in connection with Strategic or brought to the attention of Sandz as being the owner of Strategic.

31 The Lexicon SPA was completed on 2 October 2007. Soon thereafter, disagreements arose between Lexicon and the defendants and these resulted in an unwinding of the Lexicon SPA.

Consequentially, Strategic, Mr Liaw and JM Tan regained their shares in Sandz and Lexicon relinquished its interest in their favour. In May 2009, Strategic through its solicitors wrote to Sandz asking for a full and complete account of all dividends which had been declared and paid by Sandz from the time at which Strategic became a shareholder until the date of the letter. Mr Liaw responded that Strategic had no shareholding interest in Sandz at the material time and there was no basis for its request. The present action was commenced soon thereafter.

Summary of pleadings

32 Strategic's claim is straightforward: it is an action in debt for dividends declared by Sandz which remained unpaid. Strategic is also claiming that the defendants conspired to injure it.

33 The defence can be summarised as follows:

1 that Mr Tan had represented to Mr Liaw that the latter could take out the $4m in dividends from Sandz and keep the same for himself;

2 that Mr Tan's representations bound Strategic because:

(i) Mr Tan was the owner or one of the owners of Strategic;

(ii) alternatively, Mr Tan was Strategic's agent and had the actual or ostensible authority or approval of Mr Poon (the true owner of Strategic) to make such representations;

(iii) alternatively, if Mr Poon was not the true owner of Strategic, he was the agent of Mr Ng and had unlimited powers to transact on Strategic's behalf;

3 second, Strategic was not a shareholder of Sandz when the dividends were declared; as such Strategic has no right to any dividends; and

4 third, in any event, whatever rights might have accrued to Strategic as a shareholder of Sandz such rights had been transferred by it to Lexicon and therefore it had no residual right to claim any dividends from the defendants.

34 In the event that the defendants are found to be liable to Strategic, they claim that they should be indemnified by the third parties due to a breach of warranty of authority. The defendants are also claiming against the plaintiff and the third parties for damages arising out of the tort of conspiracy.

35 Mr Tan avers that there were no representations made that Mr Liaw could keep the entirety of the dividends for himself. Even if he had made representations, he did not do so as the owner of Strategic; nor did he have actual or apparent authority from Strategic to make any representations on its behalf. Mr Tan also alleges that he did not represent that he had authority to make any representations. He asserts that there is no evidence of any conspiracy to injure the defendants.

36 Mr Poon's pleadings are similar to those of Mr Tan. He avers that there were no representations made that Mr Liaw could keep all of the dividends. Further, Mr Poon cannot be made liable for breach of warranty of authority because he did not represent that Mr Tan had such authority. There is also no evidence of any agreement to injure the defendants.

Issues

37 The following main issues arise from the pleadings and the evidence:

1 did Mr Tan, either as owner of Strategic or otherwise, represent Strategic in the negotiations with Sandz and Mr Liaw?

2 did Mr Tan represent to Mr Liaw that Mr Liaw could declare and keep the $4m in dividends for himself?

3 quite apart from any representations that may have been made by Mr Tan, was Strategic entitled to the dividends when they were declared because:

(i) it was not a registered shareholder of Sandz when the first interim dividend was declared; and

(ii) under the Lexicon SPA, Strategic had agreed to transfer all its rights and benefits in respect of the Sandz shares to Lexicon?

4 whether the third parties are jointly or singly liable to indemnify the defendants against the plaintiff's claim or to make any contribution to the same on the basis of:

(i) Mr Tan and/or Mr Poon's breach of warranty of authority; and

(ii) an inducement by Mr Tan and/or Mr Poon on Strategic to breach a collateral contract between it and the defendants.

5 whether there was a conspiracy by the plaintiff and the third parties to injure the defendants.

Analysis

Relationship between Strategic and Mr Tan

38 There are two sub-issues here. The first is whether Mr Tan owned Strategic and the second is whether he had actual or ostensible authority to make representations on Strategic's behalf.

39 The plaintiff's position is that the question who owned or controlled Strategic is not a fundamental issue in this case. It, however, submits that the evidence does not establish that Mr Tan is the owner of Strategic. As for whether Mr Tan had actual or ostensible authority to make the Representations on behalf of Strategic, the plaintiff's position is as follows:

1 the evidence is that Mr Tan was the go-between between Strategic and Mr Liaw but that did not mean that he had actual authority to make any representation that Strategic would not claim the dividends declared by Sandz;

2 there is no evidence that the Strategic SPA was negotiated between Mr Tan and Mr Liaw. The evidence is that Mr Liaw wanted to take out SES as a shareholder of Sandz and he acted as a front to purchase the SES stake for Strategic. Even if Mr Tan is taken to have agreed the price for the SES stake, that evidence does not establish that Mr Tan had actual authority to make the representation on dividends; and

3 on the evidence and the law, the defendants could not establish that Mr Tan had ostensible authority to make the representation on dividends.

40 Mr Tan's position is that his involvement in the deal that led to the Strategic SPA was to find a suitable investor as requested by Mr Liaw. Subsequent to finding this investor, he had played the role of a post box so as to facilitate the signing of the Strategic SPA. He had no personal interest in the Strategic SPA and he had made no representations that would preclude Strategic's claim for dividends. In the initial period, both Mr Liaw and Mr Poon were more comfortable with Mr Tan than with each other and had sought his assistance to communicate information to each other.

41 Mr Tan says that he is not an employee or servant of Strategic and he was not an agent of Strategic at the material time. Mr Ng's evidence was that he had not authorised Mr Tan to act and/or speak for Strategic and Mr Poon's evidence was that he had simply sought Mr Tan's assistance to obtain and convey information with regard to the Strategic SPA. Mr Tan says that he never had actual or ostensible authority to deal on behalf of Strategic.

42 Mr Poon's position accords with that of Mr Tan. He says that the true owner of Strategic at the material time was Mr Ng and not himself. The evidence before the court was that Mr Ng was the sole shareholder of Strategic and he was appointed a director of that company on 9 December 2006 when he acquired the company from Mr Poon. Mr Poon's position on agency is that even if Mr Tan had made the Representations without authority from Strategic, Mr Poon could not be made responsible for Mr Tan's breach of warranty of authority.

43 Having considered the evidence and the submissions, I am satisfied that, in all probability, although Mr Tan is not the legal owner of Strategic, at all material times, he had a personal interest either in Strategic or in the transaction whereby Strategic acquired the SES stake and in the second transaction in which Strategic sold the SES stake on to Lexicon. I am also satisfied that Mr Poon continued to have an interest in Strategic although on paper he had transferred it to Mr Ng and was also interested in the transactions involving the SES stake. Mr Ng may be the legal owner of Strategic but I believe that any gains that Strategic realised from the SES stake would be shared with Mr Poon and Mr Tan.

44 Mr Tan's conduct and language in the course of the negotiations showed that he was taking a personal interest in the transactions and was not simply acting as either an adviser or a director of Lexicon which would be the vehicle acquiring Sandz. The degree and manner of Mr Tan's interest indicates a personal involvement. It was agreed in evidence that the possibility of an interested party taking out the SES stake was discussed at the very first meeting of Mr Liaw and Mr Tan in January 2007. This possibility was not something that had to happen for Sandz to be injected into a listed company. There was no discernible reason why it could not have been injected as it was, with all existing shareholders including SES participating in the sell-out to Lexicon. However, from the outset Mr Tan seemed intent on a structure in which the SES stake was sold to another party which could then on-sell the same to Lexicon.

45 The result of the parties' initial discussions was set out in an email dated 2 February 2007 which Mr Liaw sent Mr Tan. It was proposed in that email that the acquisition would take place in two stages – the first stage being the acquisition of 50.1% of Sandz by Lexicon (comprising two parcels of shares, 25% from the SES stake and the remaining 25.1% from the other shareholders) followed by a deferred acquisition of the remaining 49.9% at the end of 2007 and 2008. In the email, Mr Liaw said "you" (meaning Mr Tan) would "provide $2.5 million in the next couple of weeks … for your 25%". That sentence was consistent in timing and purport with what in fact happened, that the money for the acquisition of the SES stake would come from Mr Tan's sources and that it was sent to Mr Liaw's account on 25 March 2007 prior to his paying SES for the same. At that point, clearly, Mr Liaw thought that the plan was for Mr Tan (either alone or with friends) to acquire the SES stake for

$2.5m and then on-sell it to Lexicon as part of the first stage of the injection.

46 Mr Tan confirmed in cross-examination that the 2 February 2007 email from Mr Liaw was a fair summary of the discussions between himself and Mr Liaw up to that point in time.

47 Shortly thereafter, on 6 February 2007, Mr Liaw sent Mr Tan the consolidated group accounts of Sandz and asked the latter whether the numbers were good enough. Mr Tan's response was:

> Very good. Have instructed *my lawyer* to draft subscription agreement. Let's target funds to be drawn end of Feb? [emphasis added]

In his AEIC, Mr Tan confirmed that what he meant in this email was that he was "instructing lawyers to draft a subscription agreement on behalf of the investors", *ie*, Strategic and not Lexicon. That explanation seems contrived. To me, it is significant that he referred to "my lawyer" rather than stating that he would ask the investors' lawyer to draft the document.

48 That Mr Tan had been referring in the 6 February 2007 email to the acquisition of the SES stake was confirmed on 27 February 2007 when he forwarded to Mr Liaw a draft agreement pertaining to the acquisition of that stake and its on-sale to the "Purchaser". The identity of the purchaser in the draft agreement was left blank. The draft agreement also contained statements regarding Sandz on which input was required. On 6 March 2007, Mr Tan asked Mr Liaw to provide the information that was left blank in the draft agreement. Mr Liaw replied by pointing out that he thought this information was only required by Lexicon and stated:

> For now, it's merely you individuals taking out [SES] shares and I am fronting it … I am not even benefiting from this bro.

It is obvious from the email that Mr Liaw considered Mr Tan to be behind the scheme to purchase the SES stake. Mr Tan, significantly, did not respond to correct that impression held by Mr Liaw. Instead, he replied the same day:

> No worries bro. I am in the process of getting this done at [Lexicon] internally *as well*. It is just that those documents should be out so fast as we are public company and there are disclosure requirements lah. [*sic*] Don't worry, your case has been mentioned in the last Board meeting and we are now in process of putting the paper for them to clear. Once done our paper work which should be concurrent can then be concluded and announcement made. [emphasis added]

I agree with the defendants' submission that the email quoted shows that Mr Tan was performing two roles, *ie*, representing both Strategic and Lexicon, as he was saying that the information was required by both these companies and not just by Strategic.

49 Another exchange of email correspondence is significant. On 12 March 2007, Mr Tan wrote to Mr Liaw stating that he had a copy of the Strategic SPA signed by Strategic and enquiring when Mr Liaw wanted to exchange signed copies of the document. I note that this document was with Mr Tan although it had been signed by Mr Poon on behalf of Strategic and, Mr Poon having met Mr Liaw by then, he could very well have corresponded directly with the latter and made the arrangements for the exchange.

50 Mr Liaw responded to Mr Tan the same day to report that SES would not accept $2.5m for its stake but had asked for $2.7m and that it wanted a formal letter of offer. Mr Tan replied to remind Mr Liaw that Mr Liaw was fronting the transaction and said:

> Don't be mistaken. *We* are not engaging [SES] directly from here. It's just a mere mention of condition precedent to trigger *drawdown from my side* to you that's all. [emphasis added]

In that email, Mr Tan was obviously acting on behalf of Strategic and referring to the acquisition of the SES stake. He specifically referred to the "drawdown" taking place "from my side" indicating that the funds would come from him and/or his friends. The defendants submitted that the phrase "from my side" showed that Mr Tan had a vested interest in Strategic. If he had no personal interest in the transaction, then he would have used language to the effect that the drawdown was from the buyer's side. This submission has a great deal of force.

51 It was clear from Mr Tan's performance in the witness box that he was well versed in the English language and used it carefully. The correspondence between him and Mr Liaw demonstrated the following:

> 1 Mr Tan consistently used personal pronouns in referring to the affairs and activities of Strategic; and
>
> 2 he did not correct or rebut Mr Liaw's statements which referred to or implied a personal involvement on Mr Tan's part.

52 At all times it was Mr Tan who negotiated on behalf of the "investors" who were taking over the SES stake. Although Mr Poon met Mr Liaw on one occasion, no negotiations took place at that meeting. The price for the SES stake was discussed but it was not negotiated; it was accepted as a fixed figure that Strategic was willing to pay. Mr Poon's evidence was that he had no discussions about the transaction with Mr Liaw after the first meeting. Mr Liaw himself did not assert that any serious conversation with Mr Poon regarding the transaction had taken place. As for Mr Ng, he was a mystery figure who kept such a low profile at this stage that not even his shadow was apparent. Mr Ng only surfaced after the Lexicon SPA was signed and SIC was asking questions about Strategic. He never met Mr Liaw at all.

53 The evidence does, in my view, establish Mr Tan's personal interest in the acquisition of the SES stake. It is not necessary for me to find that he was an owner of Strategic in order to hold that he had such interest. He need not be either a legal or beneficial owner of that company in order to have an agreement with it or its actual owners to benefit from any gains obtained by Strategic in its dealings with Sandz and Lexicon. There was undisputed evidence as to the close relationship between Mr Tan and Mr Poon on the one hand and Mr Poon and Mr Ng on the other. It is quite likely that all of them were involved together. Alternatively, it could have been only Mr Poon and Mr Tan, and Mr Ng could have been a front for them rather than a participant as well.

54 Mr Tan was not in a position to be frank to the court about his personal involvement in the acquisition of the SES stake. He was a director of Lexicon and once he conceived the idea of injecting Sandz into Lexicon, his duty was to get Lexicon the best possible price. At that stage, he should have had nothing to do with the SES stake. He should not have introduced Strategic or Mr Poon to Mr Liaw but should have negotiated on behalf of Lexicon to buy the SES stake directly from SES at the same time that Lexicon purchased the shares of the Liaw Group. Even if Mr Tan did not stand to gain from Strategic's purchase of the SES stake, he had acted in breach of his fiduciary duty to Lexicon in suggesting to Mr Liaw that that stake be purchased by a third party. Even if, as he testified, it was Mr Liaw's desire to sell (or take over) the SES stake, he should not have encouraged or assisted the fulfilment of that aim as it meant that Lexicon was likely to pay more for the SES stake than it needed to.

55 The defendants also submit that it was significant that Strategic never conducted any due diligence exercise in respect of Sandz. Nor did Mr Ng or Mr Poon ask for its financial statements before remitting the $2.5m to Mr Liaw. They submit that this did not happen because Mr Liaw had on 19 January 2007 furnished Mr Tan the *pro forma* results of Sandz for 2006 which showed gross half year profits of $1.9m. Further, on 6 February 2007, Mr Tan had obtained the consolidated statements of Sandz showing operating profits after tax of $2.052m for financial year 2006 and $2.441m for financial year 2005. Since Mr Tan had all this information and he was Strategic's eyes and ears, Strategic itself did not need to make a separate request for the figures or to go through them. There was no email or letter in evidence showing that Mr Tan had passed the financial papers onto Mr Poon or Mr Ng and no assertion was made by either of them of having seen these papers at any time. Mr Ng's evidence was that he had no experience in this type of deal and was content to leave the transaction in the hands of Mr Poon and clearly Mr Poon was happy for his old friend and business associate Mr Tan to act on his behalf.

56 I agree with the defendants that the evidence shows that Mr Tan was satisfied with the financial information that Mr Liaw furnished him. He supported the acquisition of Sandz by Lexicon on the basis of that information. I also agree that insofar as Strategic needed to be satisfied about Sandz' financial position, it relied on Mr Tan's knowledge and assessment and that it did so not only because of the relationship between Mr Tan and Mr Poon but also because, on the balance of probabilities, Mr Tan had a personal interest in the transaction.

57 As stated above at [43], I am also satisfied that Mr Poon despite his protestations, was involved in the transaction throughout. He was the original owner of Strategic and at all material times before August 2007, the impression given to Mr Liaw and his office was that Mr Poon was the man behind Strategic. On 16 July 2007, Ms Abigail Tan, who was Sandz' in-house counsel, set out Sandz' understanding of the ownership of Strategic in response to enquiries made by the SIC. She said "John Poon is a private investor and Strategic Worldwide is his investment vehicle". On 25 July 2007, she sent a further email to SIC stating that "Mr Poon has a controlling interest in Strategic".

58 Mr Poon's position was that he had passed his initial interest in participating in the acquisition of the SES stake on to Strategic (*ie*, Mr Ng) when he realised that because of his interest in Lexicon through another transaction, he might be in a conflict of interest. However, the evidence showed that although Mr Poon on his own account was not the owner or shareholder of Strategic in 2007, he had nevertheless given instructions to ACIES Law Corporation regarding Strategic's acquisition of the SES stake and had signed the Strategic SPA on behalf of Strategic. Further, in April 2007, Mr Poon had used Strategic's name for the purposes of his purchase of a condominium unit in Singapore. The option to purchase this unit was issued in favour of Mr Poon and/or his nominee. The option was exercised by Strategic but it was Mr Poon who signed the acceptance of the option on Strategic's behalf. Strategic subsequently sold the unit but the proceeds of sale went back to Mr Poon and not to Mr Ng. At the trial, Mr Ng disclosed that all funds for the purchase had come from Mr Poon.

59 I am satisfied that Mr Ng, if indeed he was the true owner of Strategic and not (as the defendants allege) a nominee brought in by Mr Poon to satisfy the SIC that there was no conflict of interest between Strategic and Lexicon, was only a minor partner in the whole Sandz transaction. His evidence was that his main business is that of real estate agency and that he had an annual income of between $60,000 and $100,000. In 2007, he was living in a rented HDB apartment. On the face of it, he did not have the resources to fund a $2.5m deal. Further, there was no apparent reason for him to acquire an interest in a BVI company in December 2006. Mr Ng asserted that he wanted to undertake private equity deals and that was why he took over Strategic from Mr Poon. He also confirmed, however, that at this time there were no deals on the horizon. He was rather vague on the circumstances of his acquisition of the company and how it took place. When it came to the

opportunity to use Strategic for a private equity investment, Mr Ng showed no interest in the mechanics of the deal at all. He left everything to Mr Poon. Subsequently, when the deal fell apart, Mr Ng did not play a role in settling the disputes. He did not even know who acted for Strategic in negotiating the settlement between it and Lexicon.

60 Whilst Mr Ng's business profile was decidedly modest, Mr Poon's showed a much more enterprising individual. Mr Poon founded a fund management company called Value Capital Asset Management Pte Ltd ("VCM") which operates fund management activities under licence from MAS. VCM has a paid up capital of $1m and Mr Poon is its sole shareholder. He confirmed in court that he is director and shareholder of many companies and is a major shareholder in a well-known Chinese restaurant group in Singapore.

61 All in all, I am satisfied that Mr Poon, Mr Tan and Mr Ng were working together in Strategic in relation to its investment in Sandz and the subsequent divestment to Lexicon. Thus, I find that Mr Tan was authorised (by which I mean he had actual authority) to negotiate with Mr Liaw on behalf of Strategic and to bind Strategic in relation to its dealings with Mr Liaw and Sandz.

Did Mr Tan make the Representations and if so would the same be effective?

62 In their closing submissions, the defendants deal with the circumstances in which they allege the Representations were made. They emphasise that from the outset Mr Liaw was looking to expand Sandz and it was an important condition of any acquisition involving Sandz that the investor provide additional working capital of $5m. This term was accepted in principle by Mr Tan as shown by an email dated 15 March 2007 but subsequently Mr Ang indicated that instead of providing the entire sum Lexicon would loan Sandz $2.5m with the balance coming from a loan to be made by Mr Liaw himself. Mr Liaw was very disappointed as he was not keen to provide the loan. Mr Liaw wanted the original understanding reinstated but Mr Tan was unable to change Mr Ang's decision.

63 Mr Tan then proposed a creative solution to the problem. He suggested that Mr Liaw declare dividends from Sandz and thereafter use the dividend moneys to make a loan to Sandz. That way, Mr Liaw would benefit from the declaration of dividends because when the whole exercise was over and when Sandz had sufficient cash-flow Mr Liaw could take back the loan moneys as his own. The basis of Mr Tan's suggestion was that Sandz had good amount of cash reserves and an NTA of $12m and that he had persuaded Mr Ang to accept an NTA of $8m. This would allow Mr Liaw to take out $4m in dividends, furnish a loan of $2.5m and still receive some money at the end of the day.

64 The defendants point out that under cross-examination, Mr Tan had accepted:

1 that since the outset, Mr Liaw had required a working capital injection of $5m to be a term of the acquisition;

2 that Mr Ang did not approve the $5m but wanted Mr Liaw and Lexicon to provide $2.5m each;

3 that Mr Liaw became very upset over the change of plans and could have pulled out of the deal;

4 in order to "facilitate" the transaction and keep the deal alive, he came up with the suggestion that Mr Liaw declare dividends and lend the same back to Sandz; and

5 he had proposed that the warranty to be given by Sandz in the Lexicon SPA as to its NTA

should be $8m though he knew that Sandz had an NTA of $12m.

65 The defendants submit that at all material times, specifically with regard to Strategic, it was also clear that:

1 Strategic's only interest was to purchase the SES stake and "flip" the same to Lexicon for a quick profit;

2 Strategic would not be involved in or interfere in any of the affairs or management of Sandz as this acquisition was solely an opportunity for Mr Tan and/or his business associates to earn a quick profit; and

3 accordingly, Strategic would not have any claim in or interest in or against Sandz, its profits, cash or money and was not entitled to share in any dividends.

This, the defendants said, was the very basis of the deal and there was a common understanding and collateral agreement to that effect.

66 The plaintiff's position is that the defendants had failed to prove that there was indeed a specific representation made to Mr Liaw that Strategic would not be claiming dividends from Sandz. Strategic had denied that such a representation was made; Mr Poon had denied making such a representation and so had Mr Tan. Not a single question had been put by defence counsel to Mr Ng to the effect that a specific representation had been made on behalf of Strategic that it would not claim any dividends. Further, when Mr Poon and Mr Tan were cross-examined, it was not put to them that either one or both of them had made a specific statement to Mr Liaw that Strategic would not be entitled to dividends declared by Sandz. The only person who gave evidence of the alleged Representations was Mr Liaw himself and in the closing submissions, the defendants did not analyse their pleaded case or Mr Liaw's evidence. Instead, they surmised that the Representations "must have been made". However, under cl 3.1 of the Strategic SPA, Strategic had purchased the SES stake from Mr Liaw "with all rights and benefits attaching thereto from the date of this Agreement" and this clause had to be given effect to. Clause 6.8 of the same further provided that:

This Agreement (and the documents to be executed pursuant to it) contains the whole agreement between the Parties relating to the subject matter of this Agreement and no variation of this Agreement shall be effective unless in writing and signed by or on behalf of each of the Parties.

Thus, because of cl 6.8, cl 3.1 could not be overridden by extrinsic evidence which would vary or contradict it, much less by a mere inference. In any case, the plaintiff submitted, Mr Liaw's evidence on the Representations was unbelievable. The third parties adopted positions similar to that of the plaintiff.

67 I deal first with the factual position. There is much force in the submissions made by the plaintiff and the third parties that the defendants' case on the Representations changed during the course of the proceedings.

68 At para 13 of the Defence (Amendment No 2), it is pleaded that:

At all material times in all of the aforesaid discussions, [Mr Tan] represented both the Plaintiff and/or [Mr Poon] and/or Lexicon, and [Mr Tan] **expressly** agreed with and/or represented to the Defendants in relation to the proposed scheme that:

a) the Plaintiff's only interest was to "flip" STE's 25% stake for a quick profit in view of the intended acquisition by Lexicon;

b) the Plaintiff would not be involved in or interfere whatsoever in any of the affairs or management or business of the Company as this was solely an opportunity for TCW and his close friends/business associates (through the Plaintiff) to benefit and earn a quick profit; and

c) **accordingly**, the Plaintiff would not have any claim or interest in or against the Company, its profits, or cash or any money thereof including any entitlement to dividends.

[emphasis added]

Although that paragraph contained an assertion that there were express representations by Mr Tan, Mr Liaw in his AEIC said at para 51:

> Subsequently, [Mr Tan] asked me to transfer the 25% shares to Strategic, **on the understanding** that Strategic would owe me $200,000 and that:-
>
> … [the Representations are then set out in full]
>
> [emphasis added]

This change in the evidence is material. Whilst the defendants had pleaded an express representation, when it came to putting his case on oath, Mr Liaw was only willing to say that there was an understanding that the Representations applied. It is also arguable that his use of the word "accordingly" in Representation C indicated that that was a conclusion that Mr Liaw himself had reached after hearing the first two Representations.

69 Additionally, both the pleadings and the evidence in the AEIC point to Mr Tan as the one who made the alleged Representations or collateral promises. However, when cross-examined, Mr Liaw was evasive and did not definitively assert that Mr Tan made the Representations or promises:

Q:	So you are the human being we're talking about right? So I'm now looking at the person who made the statement and the person who heard the statement. Who is the person who made the statements in relation to (a), (b), (c)? Was it just Mr Tan Choon Wee or was it Mr John Poon, or both of them spoke simultaneously to you?
A:	I viewed them as one, Mr. Rai.
…	
COURT:	No, you might view them as one.
A:	Yes, your Honour.
COURT:	But they are not one body. They are two bodies with two separate mouths, two separate brains. So –
A:	I'm sorry, your Honour.
COURT:	Yes. So who said (a), (b) and (c)?

A: I'm – when I meant "as one" is as one entity.

COURT: You cannot view two people as one entity, even husband and wife.

A: I'm sorry, then. Yeah. Because communications were done and –

COURT: It's a simple question, Mr. Liaw. Who said (a), (b) and (c)?

A: Mostly Mr Tan Choon Wee.

MR. RAI: No, I will not accept that as an answer. You have to answer her Honour's question. Who said (a) – I'll stop there. Who said (a)?

A: Mr. Tan.

Q: Mr. Tan? Only Mr. Tan?

A: I don't agree with it, there were some expression from Mr Poon on the lesser – lesser degree.

COURT: Sorry: "The Plaintiff's only interest was to 'flip' STE's 25% stake for a quick profit…" So that is what Mr. Tan said. What was the lesser bit that Mr. Poon said?

A: Your Honour, I was speaking to them. Then there were a [*sic*] communication with both party [*sic*].

COURT: Yes, what did Mr. Poon say?

A: Mr. Poon was –

COURT: I'm talking about (a). In respect of (a), what did Mr. Poon say?

A: Mr. Poon said they are not interested in the management of the company, they are not –

COURT: No, no, this is (a). I'm talking about (a): "The Plaintiff's only interest was to 'flip' … 25% stake for quick profit …" You said Mr. Tan said that ---

A: Yes.

COURT: -- and Mr. Poon said something lesser, so what lesser did he say in relation to "flip"?

A: Well, following what Mr. Tan has communicated to you, these are the instruction that he's taking from Mr. Tan that he's following up with all the paperwork.

COURT: That's what he said?

A: Along that line.

COURT: No, no, what did he say please?

A: Your Honour, I can't exact – remember the exact words, but the impression of how this whole exercise for Strategic was –

COURT: No, no, I'm not interested in the whole exercise at the moment.

A: Yes, your Honour.

COURT:	Here you say Mr. Tan said all these things… So in relation to (a), you said eh said something less. So what did he say in relation to (a)?
A:	**Something like, we're not here to run the business, we're here just to do a flip. To that extent too, substantiated.**
COURT:	So he said the same thing that Mr. Tan said?
A:	Along the line …

[emphasis added]

70 Other evidence which Mr Liaw gave on the stand supports the argument that para (c) of the Representations was a self-wrought conclusion:

> Q: All right. I'm not agreeing with you that these representations were made, but let me ask you these questions: when was it said to you?
>
> A: The dividend?
>
> Q: Yes.
>
> A: Mr. Tan failed to deliver the $5 million cash injection and we couldn't move forward any more, so to placate me, he came up with the dividend idea, look, I can only raise $2.5 million, so we want you to match. Why would I want to loan company – two and a half million to the company? I said, I don't have those money. So, then, creatively, he said, "We loan in the company first, you issue yourself a dividend and put those money back." And I went with it.
>
> …
>
> A: Mr Tan said, okay, we declare this dividend for you. You loan it back. So if you want me to agree with you saying that, oh, **I don't want the dividend, this is all yours, they are not put in those words**, Mr Rai.
>
> [emphasis added]

The last answer set out above is practically an admission that there was no explicit representation or promise on the part of Mr Tan that he did not want any dividends if dividends were to be declared. All the evidence establishes is that Mr Tan came up with a scheme to allow Mr Liaw to tap into the hitherto illiquid value of the company via the device of declaring dividends. It would be a *non sequitur* to make the leap and hold that Mr Tan said that he did not want a share of the dividends.

71 Mr Liaw's evidence on the Representations, as can be seen from the extracts quoted above, was not satisfactory. He kept vacillating. He was not able to say when the Representations were made and he was not able to specify precisely who made which Representation. He also had considerable difficulty in testifying as to precisely what Mr Tan had told him. In the Third Party Statement of Claim, the defendants specifically pleaded that Mr Poon had also made the Representations. In his AEIC, Mr Liaw made no reference to Mr Poon as having made the Representations but in court, at one stage, he put his evidence on the basis that Mr Tan had done so and that he had treated Mr Tan and Mr Poon as one. At another point Mr Liaw, after a great deal of prevarication, asserted that both Mr Tan and Mr Poon had made Representation (c) at different times but was not able to say when this was done. Another extract from the evidence shows his confusion:

A: I'm not sure, but it was very clear to me, Mr. Rai. It was made crystal clear to me. Whether you want to know that it's 2 per cent [*sic*] or not, I can't tell you exactly when the two person [*sic*] tell me, but it was very clear that the dividends were for me.

COURT: Made very clear to you by both of them?

A: **Understanding from both of them, yes**.

COURT: What do you mean by "understanding from both of them"?

A: Yes, your Honour, very clear.

COURT: It's your understanding, not their understanding. What did they tell you?

A: They told me that their interest is to flip that and sell it to Lexicon and they are not interested in running the business, they're not interested in anything, which is why I have a profit guarantee for Lexicon and they don't partake in it.

…

COURT: So Mr Tan said that?

A: Yes.

COURT: And Mr Poon said that, the exact same thing?

A: Not exact same words, but along the line, your Honour.

…

[emphasis added]

72 The plaintiff points out that when it came to cross-examining Mr Tan, counsel for the defence did not ask him whether he had made Representation C to Mr Liaw, namely that Strategic would not claim its share of any dividends. The cross-examination merely established that Mr Tan had agreed with Mr Liaw that Mr Liaw could take money out of Sandz by declaring dividends. It did not amount to an agreement to exclude Sandz from participating in the dividends. When counsel for the plaintiff cross-examined Mr Tan, he asked the witness whether he and Mr Liaw had ever discussed which shareholder should receive the dividends. Mr Tan replied that there was no such discussion and under further questioning also said that they had never discussed which shareholder of Sandz would not receive dividends.

73 The defendants in their reply submit that "the representation made by Mr Tan to Mr Liaw was that Mr Liaw could take out profits from Sandz for himself". The following is an extract from the cross-examination of Mr Tan:

Q: You agreed with him that he could take some profits out from the company, yes?

A: Yes.

Q: The only qualification that you make in your affidavit was that he shouldn't overdo it; am I correct?

A: Yes.

74 The defendants also pointed to certain strange features of the transaction: Strategic never conducted any valuation (independent or otherwise) of Sandz's worth, never conducted any due diligence or inspection of Sandz, and parted with money before Mr Liaw had even acquired the SES stake.

75 However, the defendants did not refer to another exchange during Mr Tan's cross-examination that is even more illuminating:

Q: I am interested in what you told him. You told him that if that was the case, then in principle, you would not have any issue if he was to take some profits out of Sandz. That is correct, isn't it?

A: Yes, indeed.

Q: Yes. It is your evidence that you would not have any issue if he was to take some profits out of Sandz?

A: As declare dividends, yes.

Q: Yes, of course the only way he could take profits out of Sandz was by way of dividends; correct?

A: Cash bonus. Well, same thing.

Q: So this is what you agreed with him, that he could take some profits out of Sandz?

A: Yes.

Q: Yes. And if we narrow it down further, you agree with him that it was only he that could take profits out of Sandz?

A: Disagree.

[emphasis added]

76 If I accept that evidence as truthful, it means that Mr Tan represented that Mr Liaw could take *some profits out of Sandz*, but did not further represent that Strategic did not want its proportionate share of the declared dividends. Although I consider that Mr Tan did not tell me the truth in relation to his involvement in Strategic, this does not mean that he was untruthful in every aspect of his evidence. Bearing in mind that my finding that Mr Tan had an interest in the transaction means that he stood to gain financially from it, I am of the opinion that at all times Mr Tan's actions were largely motivated by his financial interests. It would not have been consistent with those interests for him to agree that Mr Liaw could take dividends out of Sandz without paying Strategic its proportionate share of the same.

77 The plaintiff presented nine "objective" reasons why it was inconceivable that Mr Tan had made Representation C. The following have especial force:

1 there was no document or message which shows or hints that such a statement was made

by Mr Tan despite the fact that the parties exchanged several emails and short text messages;

2 when Strategic's lawyers made a written demand on 25 September 2009 for the dividends to be paid to their client, the defendants' solicitors' response did not mention the Representations as a ground for rejecting the demand;

3 in an affidavit dated 25 March 2008 which Mr Liaw filed in Suit 176 of 2008, an action he, Ms Koh and JM Tan had taken against Mr Ang, Mr Tan and Lexicon, he stated that he "assumed all along" that since Mr Tan had agreed to the declaration of dividends, Strategic too "would have no issue with the declaration of the dividend"; and

4 if Mr Tan had agreed or represented on behalf of Strategic that it would not claim any dividends, why did the defendants have to backdate the resolutions so as to make it appear as if the dividends had been declared on dates before Strategic became a registered shareholder of Sandz? I asked counsel for the defendants about this in the course of the trial but was not given a persuasive answer.

78 Having considered the evidence and the submissions of parties, I find that on a balance of probabilities, Mr Tan never represented to Mr Liaw that Strategic would not be interested in any dividends declared by Sandz during the period that Strategic was a shareholder of Sandz. Mr Tan did suggest to Mr Liaw that he declare dividends in Sandz and thereafter use his portion of the dividends to make a loan to Sandz. This suggestion did not go so far as to relinquish any interest that Strategic might have in such dividends. Mr Tan confirmed in court that he did not have, in principle, any issue if Mr Liaw was to take some profits from Sandz but said he had told Mr Liaw not to overdo it.

79 As I have found that Representation C was not made by Mr Tan or, for that matter, by Mr Poon, there is no need for me to consider whether in any case reliance on the Representation would have been precluded by the terms of cl 3.1 of the Strategic SPA (read with cl 6.8). I should also state here that I found Mr Liaw's evidence with regard to the Representations and the course of events leading to the declaration of dividends to be totally unsatisfactory. On these aspects he was an inconsistent, evasive and vacillating witness.

Is Strategic entitled to the dividends?

80 As indicated at [37(3)] above, there are two issues to be considered here, one relating to each dividend declaration. In relation to the first dividend, the defendants' argument is that the proper date to be placed as the date of declaration of this dividend is 12 April 2007. At that time, Strategic was not a registered shareholder of Sandz and therefore, according to the defendants, it cannot claim any part of the first dividend.

81 The defendants' argument does not take into account the full facts. On 9 April 2007, SES transferred the SES stake to Mr Liaw. The evidence both oral and documentary indicates that Mr Liaw's acquisition of the SES stake was pursuant to an arrangement between himself and Strategic. As I mentioned earlier, in his email of 6 March 2007, Mr Liaw wrote to Mr Tan in respect of the SES stake that "[f]or now, it's merely you individuals taking out [SES] shares and I am fronting it". Mr Tan in his response stated "[w]e are not engaging SES directly from here". It was not disputed that most of the money to pay for the SES stake came from Strategic – it was sent to Mr Liaw's account on 26 March 2007 by Strategic's lawyers.

82 In their closing submissions, the defendants submit that Mr Tan was personally behind the scheme to take out the SES stake and that Mr Liaw's role was to facilitate the transaction by being

the "frontman" for Mr Tan. I do not think that the defendants can have it both ways. It has always been their case that Mr Tan was the owner of Strategic or, at the least, the representative of Strategic who negotiated on its behalf during 2007. I have found in their favour insofar as I agree that Mr Tan was involved in Strategic's acquisition of the SES stake and represented Strategic and had its authority to negotiate on its behalf. It follows that Mr Liaw was the "frontman" for Strategic rather than for Mr Tan personally when he acquired the SES stake on 9 April 2007. I am satisfied from the evidence that Mr Liaw was acting as an agent for Strategic in acquiring the SES stake.

83 In *Branwhite v Worcester Works Finance Ltd* [1969] 1 AC 552 at 587, Lord Wilberforce held that:

> … while agency must ultimately derive from consent, the consent need not necessarily be to the relationship of principal and agent itself (indeed the existence of it may be denied) but may be to a state of facts upon which the law imposes the consequences which result from agency.

84 Here, Mr Tan and Mr Liaw used various synonyms in their correspondence — *viz*, "front" and "not engaging directly". Regardless of the actual language used, the intention is clear: Mr Liaw was to purchase the shares in the capacity of an agent (on behalf of Strategic). Even though Mr Tan was corresponding with Mr Liaw, it is plain that he was doing so on behalf of Strategic, and that Strategic was the true principal. All but $200,000 of the purchase price of the shares was remitted by ACIES Law Corporation, which represented and continues to represent Strategic. The shares were also eventually transferred by Mr Liaw to Strategic for no consideration.

85 It is well established that an agent must not profit from his position as an agent. On the facts, the benefit of the 25% stake in Sandz (*ie*, 25% of the dividends declared) properly belonged to Strategic by virtue of the principal-agency relationship. That the first tranche of dividends (and potentially the second) was declared before legal ownership of the 25% stake was transferred to Strategic is therefore completely immaterial.

86 In relation to the second dividend, it was declared on or around 14 June 2007 by which time the Lexicon SPA had been entered into. The defendants argued that, therefore, Strategic no longer had an interest in the SES stake and could not claim the dividend. Furthermore, it was clear that the intention behind the declaration of the second dividend was to benefit only the Liaw Group and not Strategic.

87 I see no merit in the defendants' argument. First of all, the Lexicon SPA has been unwound. Since it is no longer operative, the parties must be treated as having all the rights they would have had if the Lexicon SPA had not been entered into. On that basis, Strategic, as the beneficial owner of 25% of the issued capital of Sandz from 9 April 2007 onwards when Mr Liaw acquired the SES stake on its behalf, would be entitled to recover any dividends declared in respect of that shareholding. In any case, it does not lie in the mouth of the defendants to say that Strategic had no rights to the dividends because of the operation of the Lexicon SPA when the Liaw Group was in the same position vis-à-vis the Lexicon SPA but found no difficulty in receiving payment of the dividends. Second, the defendants' intention in declaring the dividends is irrelevant. Once the dividends were declared, they had to be paid to the persons who were beneficially entitled to them.

88 To the extent that members of the Liaw Group received dividends that should have been paid to Strategic (whether in respect of the first declaration of dividends or the second), on receipt of the same they became trustees (on the basis of a constructive trust) of Strategic's entitlement. They must therefore pay Strategic the amount by which they have been overpaid. As far as Sandz itself is concerned, by the time the dividends were paid out, Strategic was a registered shareholder and the

directors of Sandz were fully aware (at least Mr Liaw was fully aware and I think it reasonable to impute his knowledge to the others since they just did whatever he told them to) that Strategic had acquired its interest in the shares when the same were transferred to Mr Liaw on 9 April 2007. Therefore, Sandz should have paid Strategic 25% of all dividends it paid out.

Can the defendants claim an indemnity from the third parties?

89 The defendants' claim for an indemnity is based on the proposition that Mr Tan made Representation C to Mr Liaw and that this Representation was either a misrepresentation or a term in a collateral contract between the third parties and the defendants. Since I have held that no representation in terms of Representation C was made by Mr Tan, the defendants' claim for an indemnity cannot stand.

Did the plaintiff and the third parties conspire against the defendants?

90 The defendants' cause of action in conspiracy is pleaded in para 28 of their Defence and Counterclaim. This alleged an unlawful means conspiracy involving breach of a collateral contract and/or action that was contrary to the common understanding between the parties. The particulars of the conspiracy alleged are more clearly contained in the defendants' closing submissions than in their pleading.

91 In their closing submissions, the defendants say that Strategic, Mr Tan and/or Mr Poon were part of a conspiracy of the defendants in the making of the present claim by the plaintiff. In essence:

1 Strategic, Mr Tan and Mr Poon were aware of the common understanding and/or collateral contract for Strategic not to obtain any benefit apart from the "flipping" of the shares;

2 after the Lexicon SPA, hostility emerged between the defendants and Mr Tan as a result of acrimonious disagreements in respect of the management and affairs of Lexicon between Mr Tan and Mr Liaw. Despite knowing that the defendants and Lexicon were then negotiating for the unwinding of the Lexicon SPA, Strategic refused to partake in the same;

3 an oral invitation was made to Strategic on 23 July 2008 to take part in the unwinding;

4 the refusal to partake in the unwinding of the Lexicon SPA was part of a plan involving Strategic, Mr Tan and/or Mr Poon to cause injury to the defendants by making this claim for dividends in breach of the common understanding and/or collateral contract. Indeed Strategic's lawyers must have been aware of the dividend declaration in the course of the 2008 legal proceedings between Lexicon and the defendants (and of course prior to that, Strategic's representatives Mr Tan and/or Mr Poon knew of the same by virtue of the representations made and/or in any event through the legal and financial due diligence reports rendered by Deloitte and Colin Ng & Partners);

5 Mr Poon and Strategic knew about Mr Tan's action because despite the disputes in Suits 111/2008 and 176/2008, Strategic did not start a suit against Lexicon or raise the issue of dividend declarations prior to Lexicon reaching a settlement with the defendants in relation to those suits; and

6 in furtherance of and/or evidencing the said plan, Strategic entered into a conditional deed of settlement on 24 August 2009 whereby it agreed to unwind the Lexicon SPA on terms that Lexicon not only returned the 25% shareholding but allowed Strategic to retain the 25 million

issued and paid up shares in Lexicon and the $750,000 previously paid by Lexicon to Strategic.

92 On the basis of the above recitation, the defendants submitted that the conspiracy was clear and that the present action had been commenced in bad faith purely for the purpose of trying to go away with something which the plaintiff knew it was not entitled to. The defendants asked the court to grant them judgment to put them in the position they would have been in had the tort not been committed. The defendants' position in this regard was that as a result of the conspiracy, the defendants had been made to expend substantial legal costs for an action which ought not to have been commenced.

93 As I have found that the plaintiff is entitled to the dividends, the basis of the conspiracy claim has fallen away. In any case, I find no merit whatsoever in the defendants' position. First, the "unlawful means" that the defendants relied on to establish conspiracy was the action of commencing the present law suit. There is nothing unlawful about commencing a law suit. Second, the only damage that the defendants claim to have suffered by reason of the commencement of this action is the cost incurred to defend it. That is a cost that every defendant incurs when a claim is brought against him whether the claim is well founded or not. If the claim has no basis, he will be entitled to recover costs from the plaintiff and that is the relief the law allows him as a matter of course. A defendant is not entitled to allege that there has been a conspiracy against him simply because plaintiffs bring a claim against him that he thinks is bad. Whilst a claim for malicious prosecution can be instituted in a situation where the claimant has incurred damages by reason of the malicious prosecution, that cause of action generally applies to criminal prosecution only. A majority decision of the Privy Council recently extended the cause of action to wrongful civil claims but that decision (*Crawford Adjusters and others v Sagicor General Insurance (Cayman) Limited and another* [2013] UKPC 17) has yet to be applied in Singapore and the defendants did not rely on it in any way in their submissions.

94 The defendants' alternative basis, *ie*, that the acts done in furtherance of the conspiracy were for the sole or predominant purpose of causing injury to the defendants is equally and obviously unsustainable. The plaintiff's predominant purpose in starting this action was to benefit itself. The predominant purpose of the plaintiff in reaching a separate settlement with Lexicon was to get better terms than the defendants did. The defendants alleged bad faith but adduced no evidence to prove this.

Conclusion

95 None of the parties to this action have come out looking like saints. It was clear to me as I heard the evidence that each of the main parties was acting entirely for his own financial benefit and for this purpose was willing to do things that were questionable albeit not crimes. As for the third and fourth defendants whilst they played no role in the transactions, they were content to let Mr Liaw do their thinking for them and to that extent, did not properly perform their duties as directors of Sandz. The above observations do not, however, affect the legal position. On the basis of the findings that I have made, the plaintiff is entitled to succeed in its claim and the defendants' counterclaim and third party action must be dismissed.

96 There will be judgment for the plaintiff against all the defendants as follows:

1 payment of the sum of $1m by the first defendant;

2 an account of the dividends each of the second, third and fourth defendants received from the first defendant;

3 repayment to the plaintiff by each of the second, third and fourth defendants of the amounts of dividends by which they were respectively unjustly enriched at the expense of the plaintiff;

4 interest at the Court rate on the amounts to be paid pursuant to the foregoing paragraphs from the date of the writ until the date of payment; and

5 costs.

97 The defendants shall also pay the costs of the third parties.

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