IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 195

Suit No 1159 of 2015

Between

Forest Fibers Inc

… *Plaintiff*

And

(1) K K Asia Environmental Pte Ltd
(2) Loh Choon Phing Robin

… *Defendants*

Consolidated with Suit No 226 of 2016

Between

(1) Forest Fibers Inc
(2) RGA Holdings International Inc

… *Plaintiffs*

And

(1) K K Asia Environmental Pte Ltd
(2) Loh Choon Phing Robin
(3) Loh Yin Kuan

… *Defendants*

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JUDGMENT

[Contract] — [breach]

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Forest Fibers Inc
v
K K Asia Environmental Pte Ltd and another and another suit

[2018] SGHC 195

High Court — Suit No 1159 of 2015 and 226 of 2016
Lai Siu Chiu SJ
11 – 13 April, 29 May, 21 June 2018

7 September 2018 Judgment reserved.

Lai Siu Chiu SJ

Introduction

1 These two cases were heard together. In Suit No 1159 of 2015 ("the first suit"), Forest Fibers Inc ("Forest Fibers") sued K K Asia Environmental Pte Ltd ("KK Asia") and Loh Choon Phing Robin ("Robin") as the first and second defendants respectively. In the first suit, Forest Fibers claimed various sums totalling $188,038.89 for waste materials supplied to KK Asia (which Robin guaranteed) between April and June 2015.

2 In Suit No 226 of 2016 ("the second suit") the first plaintiff Forest Fibers and the second plaintiff R.G.A. Holdings International Inc ("RGA") sued (i) KK Asia, (ii) Robin and (iii) Loh Yin Kuan (known as "Peter") for various sums in relation to a Share Sale Agreement dated 9 July 2015 ("the SSA") and for

advances made by Forest Fibers and RGA to KK Asia which Robin and Peter guaranteed. Henceforth, Forest Fibers and RGA will be referred to collectively as "the plaintiffs" while KK Asia, Robin and Peter will be referred to collectively as "the defendants". (References in the judgment to documents comprised in the agreed bundles will be prefaced by the letters "AB" and to the certified transcripts will be prefaced by the letters "NE")

The facts

3 Forest Fibers is a Canadian company with an office in Quebec, Canada while RGA is a Panamanian company. The plaintiffs carry on the business of buying, selling and recycling raw waste material and/or selling finished recycled products.[1]

4 KK Asia is a Singapore incorporated company and is in the same business as the plaintiffs. Peter is Robin's father. (Hereinafter father and son will be referred to jointly as "the Lohs"). The Lohs each hold 25% shares in KK Asia while the remaining 50% shares are held on trust for RGA by Colubriale Domenico ("Domenico") who is a director of the plaintiffs as well as the President of RGA. Domenico was a director of KK Asia until his resignation on 22 February 2016.

5 The business relationship between the plaintiffs and the defendants began back in February 2014 when KK Asia purchased 40 metric tons ("m/t") of raw materials from Forest Fibers which were supplied by its related company Canacha Inc. ("Canacha").[2]

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1 Domenico Colubriale's Affidavit Evidence-in-Chief ("Domenico's AEIC") dated 21 February 2018, at para 4.

2 Domenico's AEIC, at para 8

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6 Thereafter, KK Asia made regular purchases of raw waste materials from Forest Fibers in 2014 until January 2015 with payment being made by letters of credit.[3]

7 By an email dated 5 January 2015, Robin informed Domenico and two other staff members of Forest Fibers that KK Asia would be shifting its Singapore factory to Malaysia for cost considerations. He stated that KK Asia expected to commence operations in Malaysia by 1 March 2015. Robin requested that all purchases of KK Asia thenceforth should be shipped to Malaysia. By a subsequent email dated 21 January 2015, KK Asia instructed Forest Fibers to change the pending shipment's destination port to Malaysia (Port Klang) from Singapore and the consignee's name from KK Asia to Teguh Jaya Polymer Sdn Bhd ("Teguh Jaya"). Forest Fibers acceded to the request. The same instructions from KK Asia were repeated for a subsequent shipment.[4]

8 Between February and March 2015, KK Asia made further purchases of raw waste materials from Forest Fibers all of which were shipped to Malaysia. However unlike previous practice, KK Asia did not arrange for payment to be made by letters of credit. Domenico was concerned and contacted Robin at end March/early April 2015. Robin informed Domenico that KK Asia did not have sufficient funds to open letters of credit and requested for credit terms which Domenico refused. However, by then, the shipments were on-route to Malaysia.[5]

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3 Domenico's AEIC, at para 9.

4 Domenico's AEIC, at paras 15-20; 2AB959 and 962.

5 Domenico's AEIC, at para 21-22.

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9 Robin then proposed a different arrangement to Domenico. He suggested that KK Asia become Forest Fibers' processor of raw waste materials for a fixed fee. KK Asia would also assist Forest Fibers to sell and ship the finished products, which were plastic pellets,[6] as KK Asia had confirmed buyers in China.[7]

10 Accordingly, after numerous discussions and/or negotiations between Robin and Domenico, Forest Fibers and KK Asia entered into a Purchasing Finance Agreement dated 22 April 2015 ("the first PFA")[8]. It was Domenico's evidence that Robin kept pressing him to finalise the agreement quickly so that Forest Fibers would resume its shipments of raw materials to KK Asia.[9]

11 The first PFA contained the following salient terms:

(a) The agreement would be for three years commencing 1 May 2015 and ending on 31 May 2018 (clause 30);

(b) Forest Fibers would supply raw plastic waste materials to KK Asia without payment but with a finance fee of US$25.00 per m/t (clause 4);

(c) KK Asia would be responsible for all customs, clearing and delivery charges of the raw materials to the plant in Malaysia but no amount was stated (clause 8);

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6 Notes of Evidence ("NE"), 11 April 2018, 13:25.

7 Domenico's AEIC, at para 23.

8 1AB1-7.

9 Domenico's AEIC, at para 27.

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(d) KK Asia would process the raw materials and reship the processed goods out within 21 days of their arrival in Malaysia (clause 9);

(e) Forest Fibers would pay KK Asia US$320 per m/t for the processed goods (clause 14); and

(f) At the end of every month, KK Asia would provide a 3 months' forecast of the quantity of raw waste material required (clause 17).

12 Although Robin had indicated that KK Asia had moved its operations to Malaysia, Forest Fibers was never given any details of the location and it had not yet been set up at the time the first FPA was signed. (The place of operation of KK Asia in Malaysia was finally disclosed in the defence and counterclaim (Amendment No 2 filed on 6 November 2017 at para 6). In a draft of the revised purchasing financing agreement, the party that was supposed to contract with Forest Fibers Hong Kong ("Forest Fibers HK") (and not Forest Fibers) was stated to be KK Asia Malaysia located at BHD No. 49, Jalan LJ2, Taman Industri Lembah Jaya, 68000 Ampang, Selangor). Instead, Domenico was told by Robin that KK Asia was using a company called Teguh Jaya (see [7]) to process the raw materials shipped by Forest Fibers. Domenico subsequently ascertained from Robin that the import of raw waste material into Malaysia required a particular import licence which KK Asia did not but Teguh Jaya possessed. Domenico was concerned that Forest Fibers was shipping raw materials to KK Asia without any security or payment. He wanted a personal guarantee from the Lohs to secure KK Asia's obligations.[10]

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10 Domenico's AEIC, at paras 33-35.

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13 Subsequent to 22 April 2015, Domenico and Robin discussed the changes to be made to the first PFA. The Lohs agreed to be the personal guarantors for KK Asia's obligations. Their agreement is reflected in clause 3.5 of the SSA at [25(c)] below.

14 The Lohs' guarantee in clause 3.5 was reinforced by clause 3.7 of the SSA which states:[11]

> In light of the aforesaid undertakings, [the Lohs] further undertake not to sell their respective properties at 248 Carpmael Road, Singapore 429961 and 246 Carpmael Road, Singapore 429961.

(Hereinafter the two properties are referred to collectively as "the Properties" and individually as "No. 246" and "No. 248").

15 As Teguh Jaya had an import licence, KK Asia used Teguh Jaya as its agent to do the imports. Robin also provided Domenico with the details of another Malaysian company namely, Ethylene Polymer Recycling Sdn Bhd ("Ethylene") that would be involved in the processing of the imported raw waste materials.

16 Domenico was apprehensive about entering into a business relationship with Ethylene as it was a newly incorporated company with no track record. He did not want to have any contract with Ethylene.[12] In early May 2015, he instructed Forest Fibers' office to prepare a revised purchasing financing agreement. The revised purchasing financing agreement signed by the parties on 8 May 2015 ("the revised PFA") still named KK Asia as the contracting party with Forest Fibers. Due to an oversight by Forest Fibers, KK Asia Malaysia was named as one of the two selling parties in the revised PFA together with Forest

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11 1AB36.

12 Domenico's AEIC, at paras 37-38.

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Fibers HK even though there was no such entity as KK Asia Malaysia.[13] Under cross-examination, Robin agreed that he manually amended the term "KK Asia Malaysia" to "KK Asia Singapore" in the revised PFA.[14]

17 The revised PFA dated 8 May 2015 superseded the first PFA and contained the following terms in addition to those terms listed in [11] above:

(a) Domenico would guarantee Forest Fibers' obligations whilst Robin would guarantee the obligations of KK Asia (clause 16);

(b) Forest Fibers would be paid first by KK Asia for inventory that was over 90 days in Forest Fibers' inventory system (clause 14);

(c) Forest Fibers would be reimbursed US$80.00 per m/t for import duty from the sale proceeds of the finished product (clause 14);

(d) Either party could terminate the agreement upon giving 90 days' notice to the other (clause 19); and

(e) Any excess sale proceeds would be considered profits and would be shared equally between Forest Fibers and KK Asia (clause 15).

18 Domenico met Robin in Malaysia in mid-May 2015 and was introduced by the latter to Robert Chai ('Chai") purportedly the boss of Teguh Jaya. Robin and Domenico then flew to Qingdao in China to meet a buyer of KK Asia.[15]

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13 1AB24-33; NE, 11 April 2018, 75:10-32.

14 NE, 12 April 2018, 55:11-15.

15 Domenico's AEIC, at para 40.

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19 Pursuant to the revised PFA, Forest Fibers shipped 2,611.038 m/t of raw waste materials to KK Asia but it did not receive by end May/early June 2015 the finished goods produced from the raw waste materials shipped between February and March 2015. In fact, despite the large quantities of raw materials shipped by Forest Fibers, KK Asia failed to produce any finished products. When Domenico queried Robin, the excuses given were problems with machinery and factory installation.[16]

20 Domenico suggested to Robin that a factory or floor manager be employed; Robin agreed and one Danny Lim was employed in June 2015. However, Danny Lim resigned after just 3 weeks. When Domenico queried him, Danny Lim informed Domenico that KK Asia's processing operation was disorganised, it lacked a proper inventory and output tracking system, Peter was not actively involved in the Malaysian operations while Robin was hardly in the factory.[17]

21 In addition, Domenico was aware that KK Asia continued to face cash flow problems. KK Asia was supposed to but failed to pay import duties at US$80 per m/t. Robin had contacted Domenico on two occasions to request that Forest Fibers advance import duties payments to enable KK Asia to clear the shipments through customs. Domenico agreed and Forest Fibers remitted US$39,033.20, US$29,859.48 and US$59,165.92 to KK Asia to pay import duties. These payments totalled US$128,058.60.[18]

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16 Domenico's AEIC, at para 52.

17 Domenico's AEIC, at paras 53-54.

18 Domenico's AEIC, at para 55-57; 2AB869, 872, 878-880.

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22 Finding the situation untenable, Domenico flew to Singapore in early July 2015 to meet the Lohs. They told him they had no cash, did not want to continue the business and told him Forest Fibers should take over KK Asia. Domenico was faced with a difficult situation. Forest Fibers had already paid substantial sums as well as supplied large quantities of raw material to KK Asia without receiving any finished goods in return. If the Lohs walked away, Forest Fibers would lose everything.[19]

23 Domenico decided he would try to salvage the situation by becoming a shareholder of KK Asia. Although the Lohs wanted him to buy over the entire company, Domenico was only prepared to buy over 50% of KK Asia. The Lohs asked what Domenico considered to be a ridiculous sum of US$2m for their shares which offer Domenico promptly rejected. Eventually the parties agreed on a consideration of US$200,000 ("the purchase price") for Forest Fibers' purchase of 50% of the issued shares in KK Asia ("the shares"). In exchange, Domenico wanted an option (to which the Lohs agreed) that Forest Fibers could sell back the shares to the Lohs at the same price with interest if KK Asia did not turn in a profit within a certain timeline. Instead of Forest Fibers, Domenico decided to use a related company namely RGA to be the purchaser of the shares.[20]

24 The parties appointed solicitors to prepare the share sale agreement and that was how the SSA came into being on 9 July 2015 with the Lohs as the vendors and RGA as the purchaser of the shares.

25 The salient terms of the SSA set out in clause 3 are the following:[21]

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19 Domenico's AEIC, at paras 61-64.

20 Domenico's AEIC, at paras 66-69.

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(a) RGA had the option to sell back the shares to the Lohs at the purchase price plus interest at 5% per annum in the event that KK Asia failed to generate net profits (before tax) of US$200,000 within 10 months from the date of the agreement, namely 31 May 2016 (clause 3.3);

(b) RGA undertook to extend to the Lohs on or before 1 October 2016 a loan of up to US$30,000 to finance KK Asia (clause 3.4);

(c) The Lohs acknowledged that KK Asia was indebted to RGA for a sum of US$120,000 being a previous loan extended by RGA to KK Asia. The Lohs jointly and severally undertook that in the event KK Asia failed to full repay the said sum of US$120,000 plus interest at 5% per annum to RGA by 30 December 2016, they would pay 50% of the said US$120,000 while RGA would waive the balance 50% (clause 3.5);

(d) The parties acknowledged that there was a rolling account of accounts payable by KK Asia to Forest Fibers. In the event that KK Asia was unable to pay such outstanding sums which were overdue, the Lohs undertook to pay 50% of the said overdue sums which were outstanding and RGA undertook to pay the balance 50% to Forest Fibers (clause 3.6); and

(e) The Lohs gave their undertakings (clause 3.7 at [14] above).

26 Due to a mistake on the part of the company secretary of KK Asia, Domenico was wrongly registered as the 50% shareholder of KK Asia instead of RGA. In his affidavit of evidence-in-chief ("AEIC"), Domenico declared he

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[21] 1AB35-36.

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held the shares on trust for RGA, which paid for the shares on 15 July 2016 by wire transfer.[22]

27 Between April 2015 and May 2015, Forest Fibers remitted to KK Asia three sums totalling US$119,578.05 in payment of KK Asia's invoices for raw waste materials purchased by Forest Fibers. However, despite being paid, KK Asia failed to deliver the raw waste materials.

28 On or about 17 June 2015, Robin and Domenico agreed to convert Forest Fibers' payments into loans from RGA to KK Asia. On or about 15 July 2015. RGA remitted US$30,000.00 to KK Asia as the agreed loan under clause 3.4 of the SSA. By that date, RGA's loans to KK Asia totalled US$149,578.05 as shown in the breakdown below:[23]

No.	**Date**	**Amount in US$**
1	6 May 2015	37,487.00
2	7 May 2015	21,367.00
3	22 May 2015	60,724.05
4	15 July 2015	30,000.00
	Total	149,578.05

29 Despite the SSA, payment of the purchase price as well as the above loans from RGA, KK Asia continued to be plagued by operational and cash flow problems. It was unable to process or deliver finished products to Forest Fibers.

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22 Domenico's AEIC, at paras 75-76, and 78, pp 759-766.

23 Domenico's AEIC, at paras 80-82; 2AB866-868, and 875.

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30 In August 2015, Domenico arranged for a Forest Fibers' employee, a Colombian national called Luis Pernett Rojas ("Luis") to go to Malaysia to run and operate KK Asia's Malaysian factory.[24] Luis reported back to Domenico that there were very little raw materials or finished products at the factory of KK Asia and that raw materials as well as finished products were being held at the warehouse of Teguh Jaya. Luis further reported that 39 containers of raw waste materials supplied to KK Asia were held up at the Malaysian port as Teguh Jaya and its associate company JMC Logistics ('JMC") refused to release them. Teguh Jaya and JMC apparently told Luis that KK Asia was owing them monies for customs duties, demurrage, clearance fees and other charges and they would not release the containers until they were paid.[25]

31 Domenico wrote to Teguh Jaya on 25 August 2015 to inform the latter of the change in ownership and operations at KK Asia enclosing a copy of the SSA with his letter.[26] Domenico realised the revised PFA was not workable. He focussed instead on minimising the losses of the plaintiffs. In his AEIC, he deposed that his requests to the Lohs for assistance were met with excuses and lies.[27]

32 Worse, without Domenico's consent or knowledge, the Lohs sent a notice to Teguh Jaya and Ever Classic Plastic Industries Sdn Bhd ("Ever Classic") another company belonging to Chai, announcing the immediate closure of KK Asia's factory due to lack of materials.[28] Effectively, the Lohs had abandoned KK Asia leaving Domenico to run the company's operations.

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24 NE, 11 April 2018, 61:25-31.

25 Domenico's AEIC, at paras 85-86; NE, 11 April 2018, 14:14-21.

26 3AB1388-1389.

27 Domenico's AEIC, at para 88, 2AB1226-1232.

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33 On 1 September 2015, Peter informed Domenico that he would no longer be putting money into KK Asia and would be closing the company's Singapore office. Peter even asked Domenico to pay the loan instalments of KK Asia due to Standard Chartered Bank ("SCB"). Domenico's emails to the Lohs in September 2015 on the 39 missing containers of raw materials and finished products as reported to him by Luis met with no response.[29]

34 In anticipation of RGA's claims against KK Asia, and mindful that the latter had other creditors, Domenico instructed his lawyers to, and they did, lodge caveats on the Properties ("the Caveats") on behalf of RGA on 21 September 2015: see *RGA Holdings International Inc v Loh Choon Phing Robin and another* [2017] 2 SLR 997 ("*RGA Holdings International*") at [12].

35 Between August and September 2015, Domenico arranged for Forest Fibers and/or RGA to make advances totalling US$59,488.38 to KK Asia and/or to third parties on behalf of KK Asia. The breakdown for the payments is shown in the table below:[30]

Date	Amount in US$	Receiving party	Purpose
5 August 2015	$11,461.56	KK Asia	Payment to a subcontractor, Wawasan Aspirasi Packaging

28 Domenico's AEIC, at pp 801-802; 2AB1224; 3AB1390.

29 2AB1234-1242.

30 Domenico's AEIC, at para 94; 2AB876, 881, 888, 889, and 892-893.

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13 August 2015	$14,462.00	Genox Recycling Tech Co. Ltd ("Genox")	Payment for equipment repair and spare parts
2 September 2015	$19,913.83	Forte International (M) Sdn Bhd ("Forte")	Payment for KK Asia's office expenses, employees' wages, equipment and rental
8 September 2015	$3,950.99	Luis Pernet (*sic*) Rojas	Payment for KK Asia's office expenses, etc.
15 September 2015	$9,700.00	Teguh Jaya	Payment for handling and other charges incurred by KK Asia
Total	$59,488.38		

36 In September 2015, Domenico contacted one Eddie from JMC and Chai of Teguh Jaya and negotiated with them for the release of the detained 39 containers in exchange for payment of US$43,600 to cover terminal handling, forwarding and other charged purportedly owed by KK Asia to Teguh Jaya and JMC.[31] Forest Fibers remitted the said sum to Teguh Jaya on or about 10 September 2015. Despite the remittance, Eddie and Chai reneged on their agreement with Domenico and transported the 39 containers to their warehouse instead.[32]

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[31] Domenico's AEIC, at para 106; 2AB1257-1259.

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37 Domenico subsequently discovered that Robin had deliberately obstructed Forest Fibers' efforts to recover the goods retained by Teguh Jaya by his letter to Teguh Jaya dated 21 September 2015, inquiring about the status of the 39 containers and stating (untruthfully) that all the containers had been purchased by KK Asia from Forest Fibers.[33] On the same day, Robin wrote separately to Teguh Jaya stating KK Asia had received 154 containers all of which had been purchased from Forest Fibers.[34]

38 As KK Asia failed to pay Forest Fibers for inventory and/or waste materials supplied or to return the same, the solicitors of Forest Fibers demanded payment of US$188,038.89 from KK Asia on 13 October 2015.[35] In a separate letter of the same date, the solicitors demanded the return of Forest Fibers' raw materials of 2,390.67 m/t worth US$617,713.41.[36]

39 On 20 October 2015, Robin acknowledged the claim of US$188,038.89 but denied Forest Fibers' other claim of US$617,713.41 for various reasons. Of the US$617,713.41, Robin admitted owing a lesser sum of US$317,166.98 alleging that some containers of raw materials had been sold to Teguh Jaya.[37] He added that Forest Fibers owed KK Asia in excess of US$3,000.00. He claimed that KK Asia had delivered finished products to Ever Classic in June 2015.[38] However, Domenico deposed in his subsequent AEIC that Forest Fibers

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32 Domenico's AEIC, at paras 107-108; 2AB890-891.

33 3AB1395.

34 3AB1396.

35 3AB1407-1408.

36 3AB1409-1412.

37 3AB1416-1420.

38 3AB1420.

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never received payment from Ever Classic for the 52 m/t of goods purportedly delivered to the latter. Domenico estimated that 52 m/t of finished products meant in effect that 73 m/t of raw material had been used. However, Forest Fibers had delivered about 2,611.09 m/t of raw materials to KK Asia.[39]

40 In an effort to recover Forest Fibers' claims, Domenico instructed Malaysian lawyers to commence proceedings against Teguh Jaya (and Ever Classic) in November 2015 to recover its raw materials and finished goods. An injunction was obtained against Teguh Jaya on 22 March 2016.[40] However, Forest Fibers' action was subsequently dismissed by the Malaysian Court of Appeal on the basis that it may obtain double recovery depending on the outcome of these Singapore proceedings.[41]

41 On 15 February 2016, RGA's lawyers demanded the sum of US$74,789.02 from the Lohs pursuant to clause 3.5 of the SSA, being 50% of the total loans of US$149,578.05 extended to KK Asia, excluding interest at 5% per annum. The Lohs neither responded nor paid the sum demanded or any other sum to RGA within the deadline of 23 February 2015.[42]

42 Pursuant to clause 3.6 of the SSA, RGA's solicitors sent a separate demand letter on 15 February 2015 to the Lohs for payment of 50% of the outstanding sums set out earlier at [35], namely US$29,744.19, The defendants neither paid the said nor any other sum within the deadline of 23 February 2015 or responded to the demand.[43]

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39 Domenico's AEIC, at paras 118-119, and 123.

40 3AB1456-1458, translation at 3AB1460-1462.

41 Domenico's AEIC, at para 125.

42 3AB1451-1452.

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43 On 24 February 2016, the Singapore Land Authority ("the SLA") notified RGA that the registered proprietors of Nos. 246 and 248 (namely, Peter and Robin respectively) had applied to cancel the Caveats: see *RGA Holdings International* at [19]. Their action prompted the plaintiffs to file the second suit on 9 March 2016 followed by the filing of Summons No. 2494 of 2016 on 23 May 2016 (see [72] below).

The pleadings

The first suit

44 On 12 November 2015, Forest Fibers commenced the first suit against KK Asia and Robin, the latter as the guarantor of KK Asia's obligations. In the statement of claim (Amendment No 2), Forest Fibers referred to the revised PFA and alleged that KK Asia had breached the provisions in that KK Asia had failed to pay for the raw materials that Forest Fibers had supplied. KK Asia had also failed to deliver finished goods to Forest Fibers. Consequently, Forest Fibers claimed $184,801.92 for raw waste materials delivered to KK Asia between 27 February 2015 and 15 May 2015.[44]

45 Forest Fibers also alleged that it paid US$128,058.60 to KK Asia and/or to KK Asia's agent Teguh Jaya for Malaysian custom duties as well as US$43,600 to Teguh Jaya for forwarding and handling charges to secure the release of 39 containers of raw materials retained by Teguh Jaya which ownership remained vested in Forest Fibers due to KK Asia's non-payment.[45]

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43 3AB1453-1454.

44 Statement of claim (Amendment No 2), dated 25 September 2017 ("statement of claim (Amendment No 2) in first suit") at paras 3 and 4.

45 Statement of claim (Amendment No 2) in first suit, at para 6A.

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46 Forest Fibers further alleged that various quantities of raw waste materials had been consigned to Teguh Jaya on the instructions of KK Asia and Robin between April 2015 and June 2015 to the value of US$534,996.45.[46] At trial, the original claim of Forest Fibers for US$553,713.41 was reduced to US$534,996.81 due to two claims in the sums of US$13,087.55 and US$5,629.05 being withdrawn.[47]

47 In the statement of claim (Amendment No. 2) Forest Fibers *inter alia* pleaded that KK Asia had:

(a) failed to account to Forest Fibers and/or Forest Fibers HK for the finished products (at para 16[a]);

(b) failed to deliver the finished products for sale to third party end-buyers on the instructions of Forest Fibers and/or Forest Fibers HK (para 16[b]); and

(c) failed to ensure payment of raw materials supplied by Forest Fibers within the due dates stated in the invoices of Forest Fibers or to return the same to Forest Fibers (at para 16[d]).

48 Forest Fibers added that Robin had guaranteed the performance of the above obligations by KK Asia.[48]

49 Consequently, Forest Fibers claimed against (i) KK Asia damages for breach of contract and against (ii) Robin, a declaration that clause 16 of the

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46 Statement of claim (Amendment No 2) in first suit, at para 15.

47 Plaintiff's Consolidated Opening Statement, at Annex B, para 2.

48 Statement of claim (Amendment No 2) in first suit, at para 13B.

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revised PFA constituted a valid, binding and enforceable guarantee given by Robin for the obligations to be performed by KK Asia.

50 In the common defence (Amendment No 2) to the first suit filed by KK Asia and Robin personally (they were not legally represented), they denied that KK Asia had bought raw materials to the total value of US$184,801.92 from Forest Fibers, asserting that KK Asia was only a subcontractor for Forest Fibers under the revised PFA charging a fee of US$320 per m/t for workmanship.[49] They alleged that Forest Fibers owed KK Asia US$97,000 and US$56,217.60 for workmanship.[50] The two defendants averred that they did not sign the invoices or delivery orders for the raw materials. They added that the raw materials were invoiced to them for tracking and accounting purposes only and they were not expected to make payment for the same.[51]

51 KK Asia and Robin were relying in this regard on an affidavit that Domenico had filed in Summons No. 251 of 2017 (wherein Forest Fibers applied for summary judgment on 18 January 2017) where he deposed (at para 13):

> Although [Forest Fibers] would invoice the Defendant for the raw material supplied, this was purely for tracking and accounting purposes. The defendant was not expected to make payment of these invoices.

The above paragraph cannot be looked at in isolation as para 14 of the same affidavit stated:

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49 Defence and counterclaim (Amendment No 2) dated 6 November 2017 ("defence and counterclaim (Amendment No 2) in first suit"), at paras 3 and 4.i.

50 Defence and counterclaim (Amendment No 2) in first suit, at para 8.9, at p 12.

51 Defence and counterclaim (Amendment No 2) in first suit, at para 3.

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> Thus, both parties would only be paid after the sale of the finished product.

And para 12 had listed the terms of the revised PFA set out earlier at [11] above. It was not a case where the defendants need not pay for the raw materials supplied to them at all, Rather, there was a setoff arrangement in place which KK Asia never complied with.[52]

52 As the raw materials were shipped to Port Klang and consigned to Teguh Jaya, KK Asia and Robin's defence (at para 6) pleaded they were in no position to confirm if the raw materials were received. They added that they would not know if the same was received until the raw materials were delivered to KK Asia's plant situated at Lot 1984, Jalan Pulau Carey, 42500 Teluk Panglima Garang, Selangor, Malaysia.

53 The two defendants asserted that they had converted all raw materials delivered to them into finished products and delivered them to Ever Classic in accordance with Forest Fibers' instructions.[53] They denied they had breached the revised PFA, that Forest Fibers had provided financing to KK Asia and/or made payments to third parties on the company's behalf as alleged in the statement of claim. The two defendants asserted they had also not received the 39 containers for which release Forest Fibers had paid Teguh Jaya US$43,000.[54]

54 KK Asia and Robin further alleged that the revised PFA was only a draft and hence is not enforceable.[55] Their defence and counterclaim was lengthy if

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52 NE, 11 April 2018, 25:12-20.

53 Defence and counterclaim (Amendment No 2) in first suit, at para 6, at p 5.

54 Defence and counterclaim (Amendment No 2) in first suit, at paras 6 and 6A.iii.

55 Defence and counterclaim (Amendment No 2) in first suit, at para 7.

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not prolix. Hence, it would serve no purpose to refer to it in any great detail save for the counterclaim.

55 In regard to the claim of Forest Fibers for US$59,488.38 (which breakdown was set out earlier at [35]), the defence was as follows:[56]

Date	**Amount in US$**	**Defence**
5 August 2015	11,461.56	KK Asia paid the amount on behalf of Forest Fibers to Wawasan Aspirasi Packaging, which was allegedly a subcontractor.
13 August 2015	14,462.00	Sum paid to Genox was set off against US$42,000 invested by the Lohs jointly with Forest Fibers in a project in Colombia from which the Lohs had withdrawn from.
2 September 2015	19,913.83	Disputed as the defendants did not know the receiver, Forte.
8 September 2015	3,950.99	Disputed as the defendants were unaware of the payment and the reason thereof.
15 September 2015	9,700.00	Disputed as the defendants were unaware of the payment and the reason thereof, further, it was alleged the invoices showed the sum was for RM9,700.00.
Total	59,488.38	

[56] Loh Choon Phing Robin's AEIC dated 1 August 2017 ("Robin's 1 August 2017 AEIC"), at paras 13-17.

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56 In the counterclaim, it was alleged that the revised PFA was valid for three years from 1 May 2015 to 31 May 2018 (under clause 18). As it was never terminated under clause 19, it was still subsisting when the first suit was commenced. Under clause 2 of Annex A to the revised PFA, Forest Fibers was obliged to supply KK Asia with 1,500 m/t of raw materials every month but it failed to do so. Consequently, KK Asia and Robin counterclaimed from Forest Fibers loss of profits and damages based on the following computation:[57]

	US$
Gross profit @ US$320 per ton per mth x 1,500 m/t =	480,000.00
Less: Monthly expenses	77,000.00
	403,000.00
(1/5/15 to 26/10/16) @ US$403,000 x 17 months	$6,851,000.00

57 Based on the same profit figure of US$403,000 per month, there was a separate and alternative counterclaim of US$14,508,000.00 for loss of profits over the three years' duration of the revised PFA (US$403,000 x 36 months).[58]

58 Needless to say, in its reply and defence to the counterclaim, Forest Fibers denied all the allegations in the defence and disputed the counterclaim.[59]

The second suit

59 In the second suit, Forest Fibers and RGA were the first and second plaintiffs respectively suing KK Asia, Robin and Peter as the first, second and third defendants respectively. Forest Fibers' claim was for the sum of

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57 Defence and counterclaim (Amendment No 2) in first suit, at paras 35-60, at pp 32-37.

58 Defence and counterclaim (Amendment No 2) in first suit, at paras 61-63, at pp 37-38.

59 Reply and defence to counterclaim (Amendment No 1), dated 20 November 2017 ("reply and defence to counterclaim (Amendment No 1) in first suit"), at para 27.

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US$59,488.38 from KK Asia,[60] while RGA's claims were for (i) rectification of the SSA; (ii) the loans of US$149,578.05 extended to KK Asia and (iii) the sums of US$29,744.19 and US$74,789.02 (being 50% of the sums owed by KK Asia [US$59,488.38] and [US$149,578.05]) for which the Lohs had each furnished a guarantee under clause 3.5 of the SSA).[61]

60 The plaintiffs asserted they have an equitable charge over the Properties in order to preserve them as collateral for any debts owed to them by the Lohs.[62] In the reliefs claimed, they included a prayer for rectification of the SSA in that the personal undertaking of the Lohs should extend to all the loans extended to the Lohs which amounted to US$120,000.[63]

61 As with the first suit, the defendants in the second suit had a counterclaim. Their defence and counterclaim (Amendment No.1) filed on 28 November 2016 was lengthy and not easily comprehensible. The court will return to their defence and counterclaim later in the findings (at [90] and [148] below).

62 The breakdown for RGA's claim for loans extended totalling US$149,578.05 has been set out earlier at [28]. For ease of reading, the defence filed for this claim is succinctly set out in the table below:[64]

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60 Statement of claim (Amendment No 1), dated 9 March 2016 ("statement of claim (Amendment No 1) in second suit"), at para 10.

61 Statement of claim (Amendment No 1) in second suit, at paras 20, 22-26, 31-34; Plaintiff's Set Down Bundle ("PSDB") at pp 12-13.

62 Statement of claim (Amendment No 1) in second suit, at para 35.

63 Statement of claim (Amendment No 1) in second suit, at paras 26-28; PSDB, at p 12.

64 Defence and counterclaim (Amendment No 1), dated 28 November 2016 ("defence and counterclaim (Amendment No 1) in second suit"), at p 9.

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Date	Amount in US$	Defence
6 May 2015	37,487.00	Not a loan. The sum received was US$37,469.50. This was a payment by Forest Fibers to KK Asia as it had incurred cost and expenses by purchasing raw materials on behalf of Forest Fibers.
7 May 2015	21,367.00	Not a loan. The sum received was US$21,349.50 and it was a payment by Forest Fibers to KK Asia to pay for transport charges and import duties.
22 May 2015	60,724.05	Not a loan but payment by Forest Fibers to KK Asia for transport, import duties, raw materials, Domenico's air-ticket, sorting and processing fee for mixed colour film.
15 July 2015	30,000.00	Disputed as the purchaser under the SSA is not RGA but Domenico; the agreement is null & void.[65]

63 KK Asia counterclaimed against Forest Fibers for US$564,477.39.[66]

64 KK Asia's counterclaim included US$153,217.60 for workmanship, US$285,871.22 for total loss of banana film and defective goods, US$58,027.77 for detention and demurrage charges and US$25,100 for shipping charges. It is difficult for the court to determine the nature and quantum of the counterclaim as KK Asia referred to voluminous statements for the amount but failed to provide a breakdown or particularise the figures for many of the counterclaims.

65 Defence and counterclaim (Amendment No 1) in the second suit, at para 30, at p 14.

66 Defence and counterclaim (Amendment No 1) in the second suit, at para 36, at p 17.

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65 In the reply and defence to the counterclaim (Amendment No 1 dated 6 January 2017), the plaintiffs pointed out that the Lohs well knew that Domenico held the 50% shares in KK Asia on behalf of RGA. The registration of those shares in Domenico's name was done in error by KK Asia's company secretary.[67] It was pleaded that the Lohs were aware there was no agreement between Domenico and the Lohs that it would be Domenico instead of RGA buying the shares in KK Asia.[68]

66 The plaintiffs averred that Forest Fibers' payments for raw materials totalling US$119,578.05 had been converted to loans (see [27] and [28]) as KK Asia failed to make delivery of the raw materials.[69]

67 The plaintiffs denied that they had treated the SSA as a draft. They further disputed the Lohs' defences set out in [62] to their other claims.[70] It serves no purpose to repeat the plaintiffs' assertions in their reply as essentially they reiterated their positions in the statement of claim.

68 The plaintiffs filed Summons No. 1255 of 2016 ("Summons 1255") on 16 March 2016 to maintain the Caveats lodged against the Properties until the determination of the second suit. Their action was prompted by the discovery that, despite the personal undertaking given by the Lohs in clause 3.7 of the SSA (at [14]) not to sell the Properties, Loh had granted an option to sell No. 246 in April 2016 with completion scheduled in August 2016.

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67 Reply and defence to counterclaim (Amendment No 1) dated 6 January 2017 ("reply and defence to counterclaim (Amendment No 1) in second suit"), at para 3(c).

68 Reply and defence to counterclaim (Amendment No 1) in second suit, at para 3(e).

69 Reply and defence to counterclaim (Amendment No 1) in second suit, at para 5.

70 Reply and defence to counterclaim (Amendment No 1) in second suit, at para 7.

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69 Not surprisingly, the Lohs objected to Summons 1255 and succeeded in getting it dismissed on 13 April 2016 by another court, on the ground that the plaintiffs' contractual interest did not amount to any caveatable interest in land.

70 On 23 May 2016, RGA filed Summons No. 2494 of 2016 ("Summons 2494") applying for an injunction to restrain the Lohs from selling, charging or disposing of the Properties in any way until the final determination of the second suit. In their joint affidavit filed to oppose Summons 2494, the Lohs disclosed that the Properties had been mortgaged to their bank as collateral for lending facilities and the sale proceeds of No. 246 had been utilised to repay bank loans.

71 At the hearing of Summons 2494, the court was informed by Peter that the sale proceeds of No. 246 were insufficient to pay off all the debts owed by KK Asia.

72 This court dismissed Summons 2494 (see *Forest Fibers Inc and another v KK Asia Environmental Pte Ltd and others* [2017] 3 SLR 823) but on appeal by RGA, the Court of Appeal granted an interim injunction to restrain the Lohs from selling No. 248 (see *RGA Holding International* at [4]). However, the Court of Appeal did not grant RGA's application for a mandatory injunction to compel the Lohs to pay over to RGA's solicitors the net sale proceeds of No. 246.

The plaintiffs' case

73 Domenico was the sole witness for the plaintiffs while Robin was the only witness for the defendants. Although he was the third defendant in the

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second suit and sat in court throughout the proceedings, Peter chose not to testify.

74 As the plaintiffs' version of events narrated in Domenico's AEIC has been set out earlier at [5] to [43], I turn to the evidence that was adduced from Domenico when he was cross-examined by Robin.

75 In the course of cross-examination, Domenico revealed that not only was Teguh Jaya the clearing agent for KK Asia but the latter was renting and operating at, the premises of Teguh Jaya.[71] His testimony was not only not denied by the Lohs but confirmed by Robin who added that Teguh Jaya's plant was where the processing of the raw materials into finished products took place.[72] For that reason (according to Robin), there were no documents to show deliveries to or by Teguh Jaya of either raw materials or finished goods that were Forest Fibers'.[73]

76 In further cross-examination, Domenico testified he was not in a position to determine whether KK Asia did or did not have finished goods as those dealings were between the company and Teguh Jaya and did not involve Forest Fibers.[74] Domenico disclosed that while Forest Fibers paid KK Asia US$80 per m/t for import duties, he found out subsequently (from Forte see [35])) that the actual import duty was only US$35 per m/t. Hence, KK Asia had caused Forest Fibers to incur US$45 per m/t more in costs above the actual import duties. While it was not clear if KK Asia had profited from this, Domenico assumed

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71 NE, 11 April 2018, 36:8-9.

72 NE, 11 April 2018, 39:21-24.

73 NE, 11 April 2018, 39:19-40:1-3.

74 NE, 11 April 2018, 33:6; 40:8-16, 41:9-27.

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any profit was used to run KK Asia's plant.[75] Ultimately, if KK Asia had processed the raw materials into finished products, the import duties it paid would have been refunded to Forest Fibers indirectly when the finished goods were exported. Since KK Asia neither returned the raw materials nor the finished goods, Forest Fibers claimed the return of import duties that it had paid.[76]

77 Domenico added that because KK Asia failed to discharge its contractual obligation (under clause 9 of the revised PFA) to pay for the clearance of containers of raw materials shipped by Forest Fibers, the latter was forced to pay those charges owed to Teguh Jaya.[77] Hence, Forest Fibers claimed the payments made to Teguh Jaya especially as Teguh Jaya reneged on the agreement Domenico reached with Chai and did not return the 39 containers in exchange for Forest Fibers' payment of US$43,600.[78] Chai then retained Forest Fibers' total shipments of 2,611.038 m/t of raw materials consigned to KK Asia which were then stored in various warehouses of Teguh Jaya, for monies owed by KK Asia.[79]

78 In answer to the court's inquiry, Domenico revealed that the raw materials had a shelf life approximating 18 months. If the same was left in the open, it would eventually lose its strength.[80] Neither Domenico nor Robin or Peter could tell the court the fate of the raw materials detained by Teguh Jaya.[81]

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75 NE, 11 April 2018, 45:22-46:10.

76 NE, 11 April 2018, 47:1-6.

77 NE, 11 April 2018, 48: 24-27.

78 NE, 11 April 2018, 48:6-12.

79 NE, 11 April 2018, 50:8-27.

80 NE, 11 April 2018, 48:30-32.

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79 Robin attempted to suggest to Domenico that the revised PFA was only a draft or only a "guide" that was not meant to be enforceable. However, in answer to the court's question, Robin agreed that he had signed the document and had crossed out the word "Malaysia" and wrote as well as initialled against the replacement word "Singapore" on the first page after the words "KK Asia".[82]

80 As for the counterclaim in the first suit, Robin's cross-examination was focussed on Forest Fibers' alleged failure to supply KK Asia with 1,500 tons of raw materials every month (see [56] above). Domenico countered that the counterclaim for US$14m was false as he was misled into believing (by Robin) that KK Asia could produce 55 m/t of finished products per day when in reality the actual production was only about 6 m/t per day.[83] Moreover, KK Asia had failed to provide a forecast to Forest Fibers[84] of its requirements as stipulated under Annex A to the revised PFA which clauses 1 and 2 state:[85]

> 1 At the end of every month, KK shall supplies (*sic*) a three (3) month rolling forecast on tons need to be bought, by grade.
>
> 2 [Forest Fibers'] vice-president sales shall receive the forecast and distribute it to sales directors. The list shall clearly state what comes in from what regions and suppliers:
> a. Example:
> b. South Africa – 500 mt – Olga Lopez is responsible to buy and arrange logistics to CF Malaysia.
> c. Europe – 400mt – Pasquale Tramontano is responsible to buy and arrange logistic to CF Malaysia.
> d. USA – 300 mt – Peter Fanara responsible to buy & arrange logistic to CF Malaysia.

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81 NE, 11 April 2018, 32:1-6, 12-15, 43:2-10.

82 NE, 11 April 2018, 79:28-30.

83 NE, 11 April 2018, 82:11-26, 83:19-84:3.

84 NE, 11 April 2018, 81: 15-20.

85 1AB30.

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> e. Robin – 300 mt orders – Robin responsible buy & [Forest Fibers'] Malaysia manager is responsible to arrange logistic to CF Malaysia.

81 In regard to the second suit, Robin had drawn Domenico's attention to the fact that the company's records showed Domenico as the owner of the shares in KK Asia not RGA. Domenico candidly admitted it was due to an oversight on his part. He was taken to the office of KK Asia's accountants on or about 8 July 2015 and did not pay attention to the share transfer form(s) and the company resolution that had been prepared. He failed to notice that he and not RGA was named as the transferee. He explained that his focus then was on the problems with KK Asia's plant in Malaysia and not on the SSA.[86]

82 It only emerged during Domenico's cross-examination that the Lohs' case was that they never received the purchase price (US$200,000) for the shares transferred to Domenico.[87] This fact was never pleaded in the defence for the second suit. There was however documentary evidence before the court (at 2AB874) that RGA's related company had remitted US$200,000 to KK Asia, which Domenico testified was done on the Lohs' instructions.[88]

83 Although the Lohs had specifically acknowledged at clause 3.5 of the SSA (at [13]) that KK Asia had received a previous loan of US$120,000 from RGA, Robin asserted during his cross-examination of Domenico that no such loan was extended to the defendants by either Forest Fibers or RGA, but were instead repayments by Forest Fibers for transport, import duties, and other

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86 KK Asia's ACRA business profile information on registered shareholders at 3AB1447; NE, 11 April 2018, 86:31-87:16, 96:16-22.

87 NE, 11 April 2018, 89:1-2.

88 NE, 11 April 2018, 89:23-24.

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expenses that KK Asia had undertaken allegedly on Forest Fibers' behalf.[89] Robin took the same position on the other loan of $30,000 extended by RGA to KK Asia on or about 15 July 2015 (see [62]), and also made much of the fact that both the US$200,000 and the US$30,000 transfers were made, not by RGA in Panama, but by a related Canadian company, Gestions R.G.A. Inc ("Gestions RGA").[90]

84 Robin also pointed to an email from KK Asia's employee, Hwee Qun asserting that the US$120,000 were payments, and not loans. This ignored Domenico's reply denying this assertion, and clarifying that these were KK Asia's previous expenses.[91] In any event, even if these were *previously* payments made on behalf of KK Asia, the SSA (at clause 3.5) clearly reflected an agreement that they were now to be regarded as loans.[92] The defendants' other assertions that no other sums were owed to the plaintiffs as pleaded in the defence in the second suit were countered by Domenico's testimony and documentary evidence to the contrary, showing the sums were indeed paid to KK Asia at the request of the Lohs including the purchase price for the shares.[93]

85 During re-examination, Domenico also clarified that the Lohs were so cash strapped that KK Asia's bank was putting pressure on them to repay the trade financing that had been extended to KK Asia. In fact, the Lohs requested Domenico to pay the purchase price directly to KK Asia's bank which Domenico declined. Domenico suggested (to which the Lohs agreed) that RGA

89 NE, 11 April 2018, 90:4-5, 92:10-93:25.

90 2AB874-875; NE, 11 April 2018, 95:18-25.

91 Plaintiff's Consolidated Bundle of AEICs, Vol. 5, pp 2687-2688; NE, 11 April 2018, 93:21-25, 12 April 2018, 37:20-38:2.

92 1AB36, NE, 11 April 2018, 93:9-12, 26-29.

93 NE, 11 April 2018, 100:6-25.

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would pay the money to KK Asia and the company could in turn settle its outstanding indebtedness owed to its bank.[94] That was why the purchase price was remitted direct to KK Asia's account with HSBC via wire transfer by Gestions RGA and not to the Lohs. As for the fact that the transfer was by Gestions RGA, this was merely the means how the loan was effected. The SSA (at clause 3.4) also made clear that the loan was between the Buyer (Domenico holding on trust for RGA) and the Lohs.

86 In the course of cross-examination by Robin, Domenico disclosed Robin was instrumental in getting him to do an ill-advised investment in 2014 in Colombia. Robin apparently persuaded Domenico to do a joint investment in a Colombian company for US$500,000 each, which Robin subsequently abandoned causing Domenico to incur losses of US$650,000 and saddling Domenico with US$700,000 worth of equipment still lying in a warehouse. Robin's own investment was only US$42,000 instead (see item 2 at [55]) which Robin attempted to set-off against Forest Fibers' loans of US$59,488.38.[95]

87 Domenico explained that the US$14,462.00 (at [35]) were machine repair charges that Forest Fibers incurred on behalf of KK Asia after the Lohs moved the company's machinery to Malaysia. Apparently the Lohs used the machinery improperly resulting in it being inefficient. Peter had called Genox to repair the machinery but he did not have the funds to pay for the repairs. Hence, Forest Fibers had to step in and pay Genox.[96]

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94 NE, 12 April 2018, 41:1-32.

95 NE, 11 April 2018, 102:1-8, 102:27-103:15.

96 NE, 11 April 2018, 102:12-21.

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88 Domenico acknowledged that the payment to Teguh Jaya of US$9,700.00 on 15 September 2015 was a mistake as it should have been RM9,700.00. When Forest Fibers realised its mistake, Domenico requested Chai to refund the overpayment but Chai refused asserting that the Lohs and/or KK Asia owed him far more than US$9,700.[97]

89 In the light of Robin's repeated assertion (put to Domenico) that KK Asia had delivered finished goods to Forest Fibers, the court pointed out to Robin that delivery orders not invoices, signed on behalf of Forest Fibers would be acceptable evidence of delivery. However, no delivery orders were produced by any of the defendants nor were there shipping documents to prove finished/processed goods had been shipped out by or on behalf of KK Asia from Port Klang or elsewhere to either Forest Fibers or RGA, or to their buyers.[98]

90 Domenico's testimony under cross-examination further demolished the defendants' counterclaim in both suits. Not only was there no evidence to contradict what Domenico said but evidence was also adduced that contradicted the defendants' counterclaim. One instance was the defendants' alleged counterclaim for poor quality banana film supplied by Forest Fibers and shipped from Colombia. Domenico explained that KK Asia was already given a credit note of US$64,000 as refund for this shipment.[99]

91 Robin had referred Domenico to photographs that purportedly showed containers with the substandard banana film.[100] The photographs showing the

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97 NE, 11 April 2018, 109:23-110:15.

98 NE, 11 April 2018, 38:19-25, 112:27-32.

99 NE, 12 April 2018, 6:8-7:16; Plaintiff's Consolidated Bundle of AEICs, Vol. 4, pp 1999-2000.

100 Plaintiff's Consolidated Bundle of AEICs, Vol. 4, pp 2108-2117,

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banana film had no dates and it was impossible to determine when or where they were taken or how they related to various containers in which the banana film was shipped.[101] Domenico also testified that the banana film that was photographed by the defendants was what he saw on the floor of KK Asia's plant in Malaysia and for which Forest Fibers had already given KK Asia a credit note of US$64,000 (see [90]).[102]

92 In cross-examination by counsel for the plaintiffs, Robin admitted that the defendants had no evidence to support the counterclaim.[103] Furthermore, the banana film was not bought from Forest Fibers but from its related company Canacha (see [5]) as seen in KK Asia's own debit notes to the aforesaid seller at 2AB818-826. It was also drawn to Robin's attention that he had been sent photographs (via email) on 6 January 2015 of the banana film prior to its shipment by four containers and he had accepted the quality.[104]

93 There was evidence before the court that KK Asia (presumably due to lack of funds) failed to take prompt delivery of goods shipped by Forest Fibers that arrived at Port Klang, resulting in demurrage charges which the defendants then billed to Forest Fibers.[105] Sometimes, clearance of the arrived goods was rejected by the port authorities because the documentation (including the bills of lading) presented for clearing the goods was not in order. The court was told that Forest Fibers was a registered shipper with the Malaysia port authorities but Robin omitted to convey that information to his customers. Hence, when

101 Plaintiff's Consolidated Bundle of AEICs, Vol. 4, pp 2055-2057, 2061-2064, 2096-2117; NE, 12 April 2018, 15:15-27.

102 NE, 12 April 2018, 10:23-27, 12:10-17.

103 NE, 13 April 2018, 54:21-22.

104 2AB959; NE, 12 April 2018, 53:19-54:23.

105 2AB729-733.

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containers arrived at Port Klang for KK Asia from other (non-registered) shippers, the port authorities would not allow the shipments to be cleared through customs. Domenico testified that Robin should be but was never proactive – Robin usually acted after the fact which in such cases meant he tried to change the name of the shipper after the goods had arrived but (as the court observed) it was too late.[106]

94 In re-examination, Domenico referred to daily production reports that Luis had prepared during the short period Luis was in charge of KK Asia's plant operations in Malaysia. Luis' records clearly showed that KK Asia's production capacity approximated 5 m/t per day and not 55 m/t as Robin had represented to Domenico.[107]

95 Domenico was recalled as a witness after Robin had taken the stand. His recall was necessitated by the Lohs' late production of documents pertaining to the sale of finished goods to KK Asia's Chinese buyer, to support the defendants' contention that finished goods had been delivered by KK Asia on Forest Fibers' behalf to buyers.[108]

96 Domenico testified that although the sales contract, invoice and packing list variously dated August 2015 were between Forest Fibers HK and Qingdao Hongxin Plastics Co Ltd ("Hongxin"),[109] KK Asia had given shipping instructions to JMC that the shipper in the bill of lading was to be Teguh Jaya

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106 NE, 12 April 2018, 23:5-24:17, 31:10-21; Plaintiff's Consolidated Bundle of AEICs, Vol. 2, pp 1148-1149.

107 Plaintiff's Consolidated Bundle of AEICs, Vol. 2, p 881, NE, 12 April 2018, 38:18-40:20.

108 Defendants' Bundle of Documents DB 1-9 ("DB 1-9").

109 DB, 1-3; NE, 13 April 2018, 7:8-21.

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and the consignee was to be Hongxin.[110] It was Teguh Jaya that issued the commercial invoice for US$43,680 and Forest Fibers did not receive any payment for the transactions. Domenico testified that he contacted Hongxin to ask for payment to be made to Forest Fibers.[111] Robin, however, had told Hongxin that payment should be made to KK Asia/Robin.[112] Ultimately, Forest Fibers never received payment for the shipment to Hongxin.

97 Domenico revealed that the losses sustained by Forest Fibers and/or RGA due to their ill-fated venture(s) with KK Asia/the Lohs approximated US$4.5m. This was due to the fact that Robin never took the parties' agreements seriously.[113]

The defendants' case

98 As stated earlier (at [73]), Robin was the only witness for the defendants' case. Robin began his testimony by refuting Domenico's evidence that KK Asia did not have the capacity to manufacture 55 m/t of processed goods a day. He claimed it was due to the supply of "rubbish" raw materials by Forest Fibers which necessitated KK Asia using 20-30 persons to handpick out the actual raw materials required for production and discarding the soil, glass, etc., that was included in Forest Fibers' shipments. He contended that was the reason KK Asia was unable to reach its maximum daily production capacity of 55 m/t.[114]

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110 DB, 4-5, 7-8; NE, 13 April 2018, 8:2-4.

111 DB, 6; NE, 13 April 2018, 7:30-8:14.

112 NE, 13 April 2018, 7:11-12.

113 NE, 12 April 2018, 42:14-43:17.

114 NE, 12 April 2018, 45:22-46:17.

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99 However, during cross-examination by counsel for the plaintiffs ("Mr Murali"), Robin acknowledged that he had no evidence to substantiate KK Asia's maximum daily production capacity of 55 m/t.[115] In fact, at a later stage, Robin was referred to KK Asia's daily production reports in May and June 2015 that he had exhibited in his AEIC. They showed that the average daily production of finished products approximated 3 to 6 m/t not 55 m/t.[116]

100 Although it was his/the defendants' contention that the revised PFA was only a draft, Robin acknowledged that even before its signing on 8 May 2015, the defendants had treated shipments from Forest Fibers in February/March 2015 as being made under the revised PFA.[117] Robin agreed that KK Asia's counterclaim in the first suit (at [56]), premised on KK Asia being paid US$320 per m/t for monthly supplies of raw materials at 1,500 m/t, meant that KK Asia treated the revised PFA as a subsisting agreement.[118]

101 Robin also agreed with Mr Murali that Domenico's guarantee under clause 16 thereof (for the obligations of Forest Fibers) was valid.[119] He blew hot and cold at one and the same time, agreeing to clauses that were to the defendants' benefit and disputing those that were detrimental to the defendants.

102 As for Robin's contention that KK Asia's inability to take delivery of the raw materials was due to the bills of lading being issued in Teguh Jaya's name by Forest Fibers, Mr Murali pointed to emails exchanged (in January

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115 NE, 12 April 2018, 47:26-48:1.

116 Plaintiff's Consolidated Bundle of AEICs, Vol. 3, pp 1441-1447; NE, 13 April 2018, 12:10-31.

117 NE, 12 April 2018, 56:12-31.

118 NE, 12 April 2018, 57:1-58:16.

119 NE, 12 April 2018, 65:4-14.

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2015) between the staff of KK Asia and Forest Fibers wherein the former requested the latter to put Teguh Jaya as the consignee/notify party in bills of lading.[120] Robin agreed that was due to the fact Teguh Jaya had the requisite import licence that KK Asia needed for the raw materials supplied by Forest Fibers.[121]

103 Robin was also referred to his affidavit filed on 14 February 2017 to resist Forest Fibers' application for O 14 judgment in the first suit. There, Robin had deposed in para 16(c) that Forest Fibers did not consign the raw materials to KK Asia because it wanted to retain full control of the same. Robin maintained that Forest Fibers wanted to, and did retain control of what it shipped to Teguh Jaya and that it was Forest Fibers that instructed Teguh Jaya to process the raw materials. [122] This was part of the defendant's overall case that Teguh Jaya was in fact Forest Fibers' agent.[123]

104 There was a letter dated 28 March 2016 (at 3AB1463) from KK Asia to Teguh Jaya wherein Robin as the writer stated *inter alia*:

> Understand that there are 481.56 ton (*sic*) of finished goods in your factory which you are holding after sub-contracting job for us.
>
> This finished goods cannot be release (*sic*) to anyone except for K K Asia Environmental Pte Ltd.
>
> We have clear instruction to you for sub-contracting this job for us and only upon our instruction (*sic*) then you can release cargo under our instruction…

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120 2AB962; NE, 12 April 2018, 69: 27-28.

121 NE, 12 April 2018, 70:25-32.

122 Loh Choon Phing Robin's AEIC in defence of summary judgment, dated 14 February 2017 ("Robin's 14 February 2017 AEIC"), at 3AB1657; NE, 12 April 2018, 72:3-28.

123 NE, 12 April 2018, 68:18-21.

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> If you were to release goods to them you will be admitting or take over their owing to us and we will be looking to you for all their owing (*sic*). In other words you will be paying K K Asia Environmental Pte Ltd on their behalf in all Forest Fiber Inc. owing…

Confronted with such clear evidence, Robin changed his testimony yet again and claimed that Teguh Jaya acted as agent for both Forest Fibers and KK Asia.[124]

105 Mr Murali also drew Robin's attention to invoices (an example is 3AB1464) that Teguh Jaya had issued to KK Asia for workmanship and processing at RM1,000 per m/t. Pressed by the court for an answer,[125] Robin finally admitted that Teguh Jaya was indeed KK Asia's subcontractor.

106 There was another letter from KK Asia to Teguh Jaya dated 28 September 2015 (at 3AB1400) showing that Robin had acknowledged receiving 38 containers and requesting Teguh Jaya to process them. Those containers were part of the 39 containers that Teguh Jaya had refused to release to Domenico despite being paid US$43,600 (at [36] above). Confronted with such evidence, Robin claimed he had "no choice" but to ask Teguh Jaya to process the material as Teguh Jaya refused to return the containers to KK Asia.[126] His answer prompted the court to draw Robin's attention to the language he had used in his letter – nowhere was it stated that the containers were being withheld by Teguh Jaya.[127]

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124 NE, 12 April 2018, 82:10-29.

125 NE, 12 April 2018, 76:25.

126 NE, 12 April 2018, 78:10-21.

127 NE, 12 April 2018, 79:8-80:3.

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107 Not only did KK Asia take possession of 38 of the 39 containers that Domenico attempted (unsuccessfully) to retrieve from Teguh Jaya, Robin went further and billed Forest Fibers for processing of the raw materials in the 38 containers even though the work was done by Teguh Jaya on behalf of KK Asia.[128] KK Asia's billing of Forest Fibers flatly contradicted Robin's claim that Teguh Jaya was Forest Fibers' agent.[129] After considerable prevarication, Robin eventually agreed with the court that it was also wrong of him to bill Forest Fibers for Teguh Jaya's charges of producing 481 m/t of finished products as Teguh Jaya was in fact KK Asia's and not Forest Fibers' agent.[130]

108 Mr Murali then drew Robin's attention to an affidavit (at 3AB1421-1425) that Teguh Jaya's managing-director Nik Mahiro had filed in the Malaysian proceedings (at [40]) (commenced by Forest Fibers against Teguh Jaya and Ever Classic) in which the deponent had deposed that Ever Classic was Teguh Jaya's subcontractor. The deponent added (in para 7 of the affidavit) that at all material times, Teguh Jaya dealt with KK Asia in respect of the importation of the plastic waste for the purpose of manufacturing.[131]

109 In his own affidavit filed on 21 March 2016 in the first suit to set aside the default judgment obtained by Forest Fibers against KK Asia, Robin had deposed that Teguh Jaya was "not only the [s]ub-contractor for converting "[r]aw [m]aterial" to "[f]inished [p]roduct", they are also [KK Asia's] legal importer and exporter."[132]. Despite being shown the extracts from both

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128 NE, 12 April 2018, 80:16-19,

129 NE, 12 April 2018, 80:20-26.

130 NE, 12 April 2018, 80:27-81:2.

131 Nik Shahrul Nizam bin Nik Mahiro's Affidavit in Reply in the High Court at Shah Alam, Selangor Darul Ehsan, Malaysia dated 31 December 2015, ("Nik Mahiro's affidavit"), at 3AB1423.

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affidavits, Robin still disagreed with Mr Murali that Teguh Jaya was KK Asia's agent.[133] Ultimately, his feeble explanation was that Teguh Jaya was "everybody's agent".[134]

110 There were other instances during Robin's cross-examination that showed that his testimony was entirely unreliable if not untrue. One such instance concerned the defence pleaded by the Lohs at [52] that as the bills of lading had been consigned to Teguh Jaya by Forest Fibers, they were not in a position to know whether the latter's raw materials were received. Mr Murali showed Robin a list that confirmed KK Asia had received 154 containers that were shipped to Teguh Jaya.[135] Robin changed tack and claimed that the list was prepared by Teguh Jaya which he just signed as he was being held to ransom – thereafter, he did not receive the containers save for 26.[136]

111 In further cross-examination by Mr Murali as well as in answer to the court's questions, Robin disclosed that KK Asia/he owed Teguh Jaya not only for the processing work done on the raw materials supplied by Forest Fibers but also for rent of and electricity supplied to, the premises rented by KK Asia.[137] None of this new testimony was to be found in any of Robin's affidavits or in his AEICs. Indeed, there was a letter dated 22 April 2016 (at 3AB1464) from Teguh Jaya to KK Asia that stated KK Asia owed Teguh Jaya RM1,098,701.90 for (i) processing 481.56 m/t of raw materials @ RM1,000 per m/t (totalling

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132 Loh Choon Phing Robin's AEIC in defence of summary judgment, dated 21 March 2016 ("Robin's 21 March 2016 AEIC"), at 3AB1536.

133 NE, 12 April 2018, 83:8-84:1.

134 NE, 12 April 2018, 81:5-6.

135 3AB1398-1399; NE, 12 April 2018, 92:25-93:13.

136 NE, 12 April 2018, 93:31-95:7.

137 NE, 12 April 2018, 95:27-96:16.

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RM481,560), (ii) RM270,000 for arrears of rent for 6 months @ RM45,000 per month, (iii) factory expenses of RM111,304.70 as well as (iv) RM235,837.20 for detention, demurrage, storage and handling charges.

112 Despite his denial when it was put to Robin,[138] it was clear from the evidence that the Lohs had subcontracted KK Asia's obligations under the revised PFA to Teguh Jaya in all aspects namely (i) collection of and clearing of the raw materials when they arrived at port, and (ii) processing the same thereafter.

113 What was equally clear was that the Lohs naively thought they could make easy money from the entire exercise. Under the revised PFA, KK Asia charged Forest Fibers US$320 per m/t to process the raw materials. The processing work was then subcontracted to Teguh Jaya at RM1,000 per m/t which equated to about US$250 per m/t. The Lohs/KK Asia could have made a profit on the difference of US$70 per m/t for doing no work.[139]

114 Unfortunately, the anticipated profits for the Lohs did not materialise because KK Asia failed and/or was unable to pay Teguh Jaya for the subcontracting work and other charges set out at [111]. It did not help that the Lohs effectively abandoned KK Asia's factory/operations by around 26 August and 1 September 2015[140] leaving Forest Fibers in the lurch as Domenico had testified.[141]

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138 NE, 12 April 2018, 103:24-31.

139 NE, 12 April 2018, 104:19-28.

140 NE, 12 April 2018, 110:29-111:1.

141 2AB1224, 1233, 3AB1390; NE, 12 April 2018, 109:20-110:9.

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115 It was clear from the documentary evidence presented in court that Robin's claim that he was "kicked out" of KK Asia's factory was not only a lame but wholly untrue excuse.[142] However, he admitted that Forest Fibers did ship 2,611.038 m/t of raw materials to Teguh Jaya.[143]

The issues

116 The main issues arising from the two suits are:

(a) Was Teguh Jaya the agent/subcontractor of KK Asia?

(b) Was the revised PFA a valid and binding agreement? If it was, did the defendants breach the agreement?

(c) Was RGA a party to the SSA and did the Lohs breach the provisions?

(d) Are the plaintiffs entitled to their monetary claims against the defendants?

The findings

117 Unlike Robin whose credibility suffered from his constant shifts in position and whose testimony contradicted the documentary evidence before the court, Domenico's testimony was able to withstand scrutiny in cross-examination. The plaintiffs' claims were well documented and satisfactorily explained by Domenico. The court finds that on a balance of probabilities Forest Fibers and RGA have proven their case against KK Asia and the Lohs.

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142 NE, 12 April 2018, 103:11-13; 13 April 2018, 17:10.

143 NE, 12 April 2018, 100:26-101:3.

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The first suit

(a) Was Teguh Jaya the agent/subcontractor of KK Asia?

118 On the evidence, there is no doubt that Teguh Jaya was KK Asia's agent/subcontractor in regard to the latter's obligations under the revised PFA. Teguh Jaya acted as the clearing agent for the raw materials shipped by Forest Fibers and then processed those raw materials into finished products.

119 The Lohs had passed onto Teguh Jaya all the obligations of KK Asia under the revised FPA without regard to the consequences of breach and ignoring Robin's guarantee contained in clause 16 therein. The subcontracting arrangement with Teguh Jaya would only have succeeded and enabled KK Asia and in turn the Lohs to collect their middleman "cut" of US$70 per m/t (at [113]) had the Lohs paid Teguh Jaya for clearing the raw materials shipped to Malaysia by Forest Fibers, for the subcontracting works and for rent and other overheads in making use of Teguh Jaya's premises; they did not. As the plaintiffs stated in their closing submissions (at para 50), the revised PFA envisaged a steady cycle of raw materials supplied by Forest Fibers, processing by KK Asia and sale of finished products. It was this steady cycle that would create a consistent flow of revenue that would enable Forest Fibers and KK Asia to get paid, Unfortunately, Forest Fibers' expectation of how the revised PFA would have operated did not come to fruition because of the misconduct of the Lohs.

120 Once the agency of Teguh Jaya for KK Asia was established (as the court finds), it was no longer tenable for the Lohs to maintain their defence that KK Asia did not receive the raw materials shipped by Forest Fibers and consigned to Teguh Jaya on the instructions of Robin. That also meant that KK Asia and not the plaintiffs is liable for the claims of Teguh Jaya that the

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defendants attempted to pass on to the plaintiff(s). Robin's testimony that Teguh Jaya was "everybody's agent" is pure nonsense. Apart from the one incident (in [36]) where Domenico negotiated with Teguh Jaya to try to recover the raw materials of Forest Fibers that had been shipped/consigned to Teguh Jaya at KK Asia's behest, neither plaintiff had any dealings whatsoever with Teguh Jaya. This was confirmed by Teguh Jaya in the affidavit it filed in Forest Fibers' Malaysian proceedings at [108].

121 The oral as well as documentary evidence adduced in court showed clearly that the Lohs paid scant regard to their obligations whether under the revised PFA or the SSA. They were prepared to go to any lengths to take advantage of and/or make money from their fellow shareholder cum supplier RGA/Forest Fibers. This can be seen from the following incidents:

(a) Apparently overcharging Forest Fibers or allowing Teguh Jaya to overcharge by US$45 per m/t (see [76]) for import duties;

(b) Attempting to make a profit of US$70 per m/t between what KK Asia charged Forest Fibers for processing raw materials and what Teguh Jaya charged for doing the work;

(c) Undermining the efforts made by Domenico to recover the containers of raw materials and/or processed goods from Teguh Jaya and/or other companies belonging to Chai (see [37], [104] and [106]).

(d) Selling No. 246 despite their undertaking not to sell either of the Properties under clause 3.7 of the SSA (at [14]); and

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(e) Selling the processed goods that belonged to Forest Fibers and not paying the sale proceeds to Forest Fibers as seen in the transaction with Hongxin at [96].

(b) Was the revised PFA a valid and binding agreement? If it was, did the defendants breach the agreement?

122 As pointed out earlier (at [100]), the counterclaim in the first suit was premised on the revised PFA being valid and subsisting. The Lohs cannot approbate and reprobate – where it suited their purpose (as in the counterclaim), they relied on the revised PFA but where it was against their interests, they asserted that the revised PFA was only a draft. They cannot have it both ways. The parties had operated for about six months based on the terms of the revised PFA according to Domenico's AEIC (at para 148) which Robin accepted.[144] Moreover, during his cross-examination, Robin had agreed he did furnish the personal guarantee save that he disputed the scope of what he guaranteed.[145]

123 The evidence presented also showed that KK Asia breached its obligations in the revised PFA as, despite being supplied with raw materials by Forest Fibers in February and March 2015, it failed to deliver the finished products by end May/early June or at all as was envisaged. In addition, the Lohs effectively abandoned KK Asia's operation in Malaysia by end August 2015 leaving Domenico to fend for Forest Fibers the best he could.

(c) Was RGA a party to the SSA and did the Lohs breach the provisions?

124 The defendants' pleaded case (in para 4 of their defence and counterclaim (Amendment No 1) in the second suit) was that they contracted

144 NE, 12 April 2018, 56:15-30.

145 NE, 12 April 2018, 65: 28-32.

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with Domenico and not RGA. They asserted that they only recognised Domenico not RGA, as the rightful owner of 50% of the shares in KK Asia. They relied on Article 7 of the memorandum and articles of association of KK Asia to support their contention. The article (at 3AB1295) states:

> Except as required by law, no person shall be recognised by the company as holding any share upon any trust, and the company shall not be bound by or be compelled in any way to recognise (even when having notice thereof) any equitable, contingent, future or partial interest in any share or unit of a share or (except only as by these Regulations or by law otherwise provided) any other rights in respect of any share except an absolute right to the entirety thereof in the registered holder.

125 The plaintiffs' closing submissions (at paras 99 to 105) pointed out that Article 7 itself does not prohibit a trust or make it invalid. It merely states that KK Asia shall not be bound to recognise a trust. The plaintiff added that a valid trust may be formed so long as the intention of the settlor to create the trust is certain, the identity of the trust property is certain and the identity of the beneficiaries is defined with some precision (citing the appellate court's decision in *Guy Neale v Nine Squares Pty Ltd* [2015] 1 SLR 1097 at [51]). Here, Domenico had expressly declared he held the shares in KK Asia on trust for RGA.

126 The court notes that Article 7 contains an exception "[e]xcept as required by law" and "except…by law otherwise provided". I would construe those words to mean that the law can declare there is a valid trust if the situation warrants it. I also accept the plaintiffs' argument that independent of the trust arrangement between Domenico and RGA and regardless of whether it is recognised, the basis of RGA's claim is contractual -- namely the SSA and it does not hinge on RGA being a shareholder of KK Asia.

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127 It is therefore the court's finding that RGA is the purchaser of the shares in the SSA. This is reinforced by the fact that RGA not Domenico is a party to the executed SSA and that the former's related company paid KK Asia (at the Lohs' behest) the purchase price. The inclusion of Domenico's name as shareholder in the company's records and in the company resolution was an error on the part of KK Asia's company secretary. Unfortunately, as Domenico candidly admitted,[146] he was so engrossed with the problems he was then facing with KK Asia, the Lohs and/or Teguh Jaya in September 2015, that he overlooked the error that his name and not RGA's was stated in the share transfer form prepared by KK Asia's company secretary. RGA should not be held accountable for the mistake made by KK Asia.

128 In the light of the above findings, the Lohs' action at [68] in selling No. 246 and their failure to pay half the outstanding sums owed to RGA by KK Asia as set out in [41] and [42], meant that they had breached clauses 3.5, 3.6 and 3.7 of the SSA.

(d) Are the plaintiffs entitled to their monetary claims against the defendants?

129 I shall now deal with the claim of Forest Fibers for damages under the first suit (see [49]). There was also a claim for a declaration of the validity of the guarantee from Robin under clause 16 of the SSA.

130 Forest Fibers claimed the market price of the raw materials it had supplied to KK Asia as set out in [46] above. Added thereon was the claim for finance and administrative charge at US$25 per m/t pursuant to clause 4 of the revised PFA which states:

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146 NE, 11 April 2018, 96:16-22.

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> Regarding the financing of the plastic waste raw material, decision supplied to [KK Asia], all transactions bought rather from [Forest Fibers], or [Forest Fibers] through [KK Asia] supplies, or [KK Asia] buying direct, shall go through the [Forest Fibers] finance process a $US25.00 per ton charge will be added to every metric ton bought in order to cover the service.

The claim in [46] was for 2,611.038 m/t of raw materials supplied to KK Asia. The total claim of Forest Fibers inclusive of the US$25 per m/t finance/administrative charge amounted to US$719,799.13 less US$13,087.55 and US$5,629.05 in [46], which breakdown was given in Domenico's AEIC at para 116. Copies of invoices, shipping and other documents pertaining to the supply of raw materials were annexed to Domenico's AEIC (at pp 899 to 961) to support the figure.

131 Forest Fibers' claim against Robin was premised on clause 16 of the revised PFA which states:

> This agreement shall be bonded by personal guarantees by both parties:
>
> - [Forest Fibers] shall make sure any extra proceeds from the transactions or payments due to [KK Asia] will be personal guaranteed by [Forest Fibers HK], shareholder [Domenico] living in the province of Quebec, Canada whose number of passport is….
> - That [KK Asia] will make sure that, all financing provided by [Forest Fibers] or [Forest Fibers HK], will be return (*sic*) 100% within the due times of payments for invoices or inventory, or aswell whenever this agreement shall terminate that Forest Fibers will get back all their cash investment and not incur any losses. This will be personal guaranteed, by Loh Choon Phing Robin living in Singapore, whose number of passport is…

132 Notwithstanding the poor drafting of the clause (and the revised PFA in general), there is no ambiguity in the wording as to the parties' intentions. Despite Robin's valiant attempts, there can be little doubt that the words "KK

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Asia" on page 1 of the revised PFA with the word "Singapore" added thereafter by Robin in his handwriting (see [16] and [79]) must refer to KK Asia as there was/is no such legal entity as KK Asia Malaysia and no other Singapore entity other than KK Asia.

The second suit

133 I turn next to the second suit. First, there was the claim for advances made by Forest Fibers (at [35]) totalling US$59,488.38. Earlier (at [88]), the court had noted from Domenico's testimony that Forest Fibers mistakenly overpaid Teguh Jaya in that its payment of US$9,700 should have been RM9,700. There is no reason for KK Asia (or Robin as its guarantor) to bear the loss sustained by Forest Fibers from its own mistake. Consequently, Forest Fibers is only entitled to recover back 50% of US$49,799.38 (US$59,488.38-US$9,700) namely US$24,894.19 and 50% of RM9,700 namely RM4,850.

134 I should mention that the Lohs had disputed the advances totalling US$59,488.38 in para 6 of the defence and counterclaim (Amendment No 1) in the second suit as seen in [55]. The plaintiff's answer to their objection was to rely on the deeming provision in Order 27, rule 4 of the Rules of Court (Cap 322, Section 80, 2014 Rev Ed). It states:

> **4.**—(1) Subject to paragraph (2) and without prejudice to the right of a party to object to the admission in evidence of any document, a party on whom a list of documents is served in pursuance of any provision of Order 24 or any order made thereunder shall, unless the Court otherwise orders, be deemed to admit —
>
> > (*a*) that any document described in the list as an original document is such a document and was printed, written, signed or executed as it purports respectively to

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> have been; and
>
> (*b*) that any document described therein as a copy is a true copy.
>
> This paragraph does not apply to a document the authenticity of which the party has denied in his pleading.
>
> (2) If before the expiration of 14 days after inspection of the documents specified in a list of documents or after the time limited for inspection of those documents expires, whichever is the later, the party to whom the list is served serves on the party whose list it is a notice stating, in relation to any documents specified therein, that he does not admit the authenticity of that document and requires it to be proved at the trial, he shall not be deemed to make any admission in relation to that document under paragraph (1).

135 The plaintiffs pointed out that the defendants only raised objections to the authenticity of the documents supporting the figures in [35] at a very late stage just before trial, when the agreed bundles of documents were prepared. Consequently, it was too late for the defendants to dispute the documents as O 27, r 4(1)(*a*) deemed them to have been admitted.

136 The loans extended by RGA to KK Asia totalling US$149,578.05 have been set out at [28]. Documentary evidence to support the four loans comprised in the figure was produced in court and satisfied the requisite burden of proof on a balance of probabilities.

137 In this regard, the court notes that the documents in the three volumes of the agreed bundles produced in court were only agreed by the Lohs as dispensing with formal proof. However, the contents in such banking documents as the wire transfer of the purchase price of the shares (at 2AB874) (see [82]) can hardly be challenged. They merely state the particulars of the sender and the recipient or beneficiary. The Lohs disputed the wire transfer from

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Gestions RGA of US$200,000. Yet they accepted the evidence contained in the following wire transfers to KK Asia which were all similar to that from Gestions RGA:

Date	Remitter	Amount in US$
7 May 2015	Forest Fibers	21,367,00
8 May 2015	Forest Fibers	37,487.00
22 May 2015	Forest Fibers	60,724.05
8 June 2015	Forest Fibers	39,033.20
18 June 2015	Gestions RGA	22,977.50
25 June 2015	Forest Fibers	45,227.00
30 June 2015	Forest Fibers	29,859.48
1 July 2015	Forest Fibers	29,836.98
Total		286,512.21

If the Lohs accepted the above remittances as having been made, there is no reason for them to dispute the remittance of the purchase price of the shares from Gestions RGA.

138 The same observation would apply to the other documents in the agreed bundles – the Lohs were equally selective in their agreement to the truth of contents of documents, depending on whether it suited their purpose. As an example, the Lohs disputed the contents of email correspondence even when they emanated from Robin and/or staff of KK Asia and sent to Forest Fibers' staff, between 20 October 2014 and 1 March 2018. Some of those documents

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were listed in the defendants' own list of documents. Their stand only serves to reinforce the court's unflattering view of the Lohs' conduct.

139 Robin's testimony that Forest Fibers did not extend a loan of US$120,000.00 to KK Asia is untenable in the light of the Lohs' clear acknowledgement of receipt of that sum in clause 3.5 of the SSA coupled with their joint and several undertaking to refund 50% of that sum (with interest) to RGA by 31 December 2016 should KK Asia fail to repay the loan by 30 December 2016. If indeed the loan of US$120,000 was not extended, it was very much out of Robin's character not to have chased Forest Fibers/Domenico for the sum.

140 At this juncture, it would be appropriate to refer to the parol evidence rule encapsulated in section 94 of the Evidence Act (Cap 97, 1997 Rev Ed)) which precludes the admission of testimony that contradicts a written agreement. The section states:

> **94.** When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 93, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms…

The exceptions in ss 94 (*a*) to (*f*) would not apply here so as to displace the application of s 94 itself. The plaintiffs had also cited the guidelines set out by the Court of Appeal in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [131] to reinforce their point on when extrinsic evidence should be admitted to affect written contracts.

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141 As for the other loan of US$30,000 extended on or about 15 July 2015, Robin's testimony was not that the loan was not extended but that it came from Gestions RGA, a related company of RGA. It is irrelevant from which source RGA procured the sum from. There was no evidence that Robin objected to the fact that the remittance did not come from RGA and he certainly made no attempts to return the money.

142 Finally, there are the claims for advances made on behalf of KK Asia to Teguh Jaya for import and other related expenses to obtain the raw materials shipped by Forest Fibers amounting to US$128,058.60 (see [45]).

143 There is the further sum of US$43,600 that Domenico paid to Teguh Jaya in his attempts to recover Forest Fibers' raw materials in order to mitigate its loss. The case of *The "Asia Star"* [2010] 2 SLR 1154 at [24] cited by the plaintiffs is authority for the principle that an aggrieved party who takes reasonable steps to mitigate its loss is entitled to recover expenses reasonably incurred in the course of taking such mitigating measures.

144 I therefore find that the other items in [35] were all incurred on behalf of KK Asia. The first sum of US$11,461.56 was advanced to Wawasan Aspirasi Packaging at the request of Peter while the second sum of US$14,462 was another advance made at the request of KK Asia's employee Hwee Qun (via email dated 11 August 2015 (at 2AB1213)) for the spare part purchases and machinery repairs carried out by Genox for KK Asia. I should add that Hwee Qun's email request was one of the documents which contents the Lohs chose to dispute notwithstanding it emanated from KK Asia.

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145 The next items of US$19,913.83 and US$3,950.99 were expenses incurred for the running of KK Asia's plant in Malaysia after the Lohs effectively abandoned ship and Domenico was forced to despatch Luis from Forest Fibers' office to take charge of operations.

146 Next, I deal with the loans extended to KK Asia. At law, where there are no stipulations as to the time of repayment, a loan is generally repayable at once without any previous demand (see *Chitty on Contracts* vol 2 (H G Beale gen ed)(Sweet & Maxwell, 32nd Ed, 2015) at p 1429 para 39-266). The plaintiffs had cited *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 at [101] to submit that a term must be implied that the plaintiffs' loans were repayable on demand as a matter of business efficacy. The court accepts this proposition of law. Hence, the demands made by Forest Fibers and RGA of KK Asia and the Lohs for repayment of advances made by the plaintiffs were perfectly valid.

147 I reiterate that the signatories to the SSA upon which the plaintiffs based their claims were RGA and the Lohs, not Domenico. Consequently, the records of KK Asia filed with the regulatory authorities should be rectified to reflect that RGA and not Domenico is the owner of the shares in the company.

The counterclaims

148 Not one iota of evidence let alone credible evidence was produced to support the defendants' counterclaim in either suit. Robin had admitted during cross-examination[147] that KK Asia was responsible under clause 2(e) of Annex A to the revised PFA for 300 m/t orders (see [80]). The counterclaim in the first suit is frivolous and absurd. KK Asia was obliged to provide three months'

147 NE, 13 April 2018, 51:8-11.

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forecast of what tonnage was required at the end of every month, while item 2 merely gave examples of what Forest Fibers and KK Asia had to do. Even if the examples in item 2 applied, it behove KK Asia to supply 300 m/t of the total 1,500 tonnage for four territories set out therein.

149 As for the second suit, the counterclaim against Forest Fibers was for US$153,217.60 for workmanship, US$285,871.22 for total loss of banana film and defective goods, US$58,027.77 for detention and demurrage charges and US$25,100 for shipping charges. Again there was no evidence to support any of the claims. On the other hand, the plaintiffs' evidence disproved all the claims.

150 I should add that the submissions and reply submissions tendered by the defendants completely ignored if not was contrary to, the evidence adduced in court, not to mention they were not easily comprehensible.

The decision

(i) The first suit

151 In the light of the evidence presented, the court awards Forest Fibers final judgment against KK Asia:

(a) in the sum of US$701,082.53 (US$719,799.13 less US$13,087.55 and US$5,629.05 in [46]) for the price of raw waste materials supplied;

(b) in the sum of US$128,058.60 for advances relating to payment of import and other duties;

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(c) the sum of US$43,600 for the payment made to KK Asia's agent Teguh Jaya.

with interest at 5.33% per annum from the date of the writ until payment.

152 It is declared pursuant to clause 16 of the revised PFA, that Robin's guarantee is valid and enforceable and in the event of non-payment by KK Asia of all or any of the sums set out in [151], that Robin is liable to pay the sum(s) to Forest Fibers.

153 Forest Fibers is awarded interlocutory judgment against KK Asia and Robin jointly and severally, with damages to be assessed by and costs reserved to the Registrar, for KK Asia's breach of contract in failing to process and deliver finished products to Forest Fibers.

(ii) The second suit

154 RGA as the second plaintiff is awarded final judgment jointly and severally against all three defendants for half the loans totalling US$149,578,05 extended to KK Asia namely US$74,789.02 together with interest (pursuant to clause 3.5 of the SSA) at 5% per annum from the dates the loans were disbursed or acknowledged. In this regard, US$30,000 was disbursed on 15 July 2015 while the Lohs acknowledged in clause 3.5 of the SSA dated 9 July 2015 that there was a loan for US$120,000 (rounded up from US$119,578.05)

155 The plaintiffs are awarded final judgment against the defendants jointly and severally in the sums of US$24,894.19 and RM4,850 with interest at 5% per annum from 30 December 2016 until payment, pursuant to clause 3.5 of the SSA being 50% of the sums advanced to KK Asia (see [35]) less US$9,700 plus RM9,700.

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156 Although clause 9.9 of the SSA provides "*the parties agree that any costs awarded by the Courts shall be on an indemnity basis"*, the plaintiffs' closing and reply submissions made no mention of costs. Consequently, the court awards costs to the plaintiffs on a standard basis for both suits but with disbursements on an indemnity basis.

157 The interim prohibitory injunction granted by the Court of Appeal on 5 July 2017 to restrain the Lohs from selling No. 248 is to remain. In the event Robin sells the property, the injunction will ensure that the plaintiffs as his judgment creditors are aware of the sale and can take the necessary steps to protect/preserve their position.

158 The defendants' counterclaims in both suits are dismissed with costs to the plaintiffs on a standard basis.

Lai Siu Chiu
Senior Judge

K Murali Pany and Ng Lip Kai (Joseph Tan Jude Benny LLP)
for the plaintiffs in both suits;
Loh Choon Phing Robin for the first defendant in both suits;
Second defendant in person for both suits;
Third defendant in person for Suit 226/2016.

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