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

[2021] SGHC 286

Suit No 84 of 2020

Between

(1) Nishiki Holdings Pte Ltd
(2) Nishiki Real Estate Pte Ltd
(3) Nishiki International Investments Pte Ltd

… *Plaintiffs*

And

(1) Sankaty European Investments S.A.R.L
(2) Sajjad Ahmad Akhtar
(3) Chin Sek Peng Michael

… *Defendants*

JUDGMENT

[Agency] — [Principal] — [Holding out]
[Companies] — [Directors] — [Duties]
[Companies] — [Receiver and manager] — [Appointment]
[Professions] — [Valuer] — [Judicial review of valuation]

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Nishiki Holdings Pte Ltd and others
v
Sankaty European Investments Sarl and others

[2021] SGHC 286

General Division of the High Court — Suit No 84 of 2020
Kwek Mean Luck JC
2–4, 10–13, 16–20, 24–26, 31 August, 1, 2, 7–9, 14 September 2021, 29 November 2021

20 December 2021 Judgment reserved.

Kwek Mean Luck JC:

The parties

1 The 1st plaintiff, Nishiki Holdings Pte Ltd ("NH"), is a company incorporated in Singapore. NH is a holding company. Dr Masami Yabumoto ("Dr Yabumoto") is the 100% beneficial owner of NH. At the time of the "Sale Leaseback Transaction" mentioned below, NH was 50% owned by Dr Yabumoto and 50% owned by a Medical Charitable Trust.[1] Presently, Dr Yabumoto and Ms Zhang Ran ("Ms Zhang") are equal shareholders of NH, with Ms Zhang holding on behalf of Dr Yabumoto.[2] The 2nd plaintiff, Nishiki Real Estate Pte Ltd ("NRE"), is also a company incorporated in Singapore and

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1 Eve Lee's AEIC dated 21 June 2021 ("Eve Lee's AEIC") at pp 54 and 57 and 1st Defendant's Closing Submissions ("1DCS") at para 7(b)(i).

2 Zhang Ran's AEIC dated 21 June 2021 ("Zhang Ran's AEIC") at para 10.

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is a holding company. NH is the ordinary shareholder of NRE. The 3rd plaintiff, Nishiki International Investments Pte Ltd ("NII"), is also a company incorporated in Singapore and a holding company. NII is a wholly owned subsidiary of NH.

2 The 1st defendant, Sankaty European Investments S.A.R.L ("Sankaty") is a private limited company incorporated in Luxembourg. Sankaty is part of the debt division of Bain Capital LP. Sankaty was later renamed Bain Capital Credit.

3 The 1st defendant demanded from the plaintiffs, payment of "Additional Interest" arising from a loan agreement entered into between the parties ("Loan Agreement"). Flowing from the alleged debt for "Additional Interest", the 1st defendant also appointed the 2nd and 3rd defendants, Mr Sajjad Ahmad Akhtar ("Mr Akhtar") and Mr Chin Sek Peng Michael (from PKF-CAP Advisory Partners Pte Ltd), as private receivers over certain assets of the plaintiffs.

4 In this suit, the plaintiffs sought in the main, to set aside the Loan Agreement and in particular, the "Additional Interest" provisions of the Loan Agreement, on the ground that the 1st defendant was put on notice regarding a certain conflict of interest. In the alternative, they sought to set aside the appointment of the appraiser, Houlihan Lokey (China) Limited ("HL China"), whom the 1st defendant had appointed to value certain assets. HL China's valuation formed the basis for the computation of the "Additional Interest". I find that the Loan Agreement was valid, but the appointment of HL China as the appraiser was not valid. I set out my reasons below.

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Background facts

5 The Kinshukai Medical Corporation ("KMC") is a large healthcare provider in Japan, with substantial holdings of hospitals in Osaka. The controlling shareholder of KMC is Dr Yabumoto. Sometime in or about the middle of 2016, KMC restructured its corporate structure. In particular, ownership of KMC's nine Osaka medical properties (the "Properties") were transferred to a Japanese special purpose company called Nishiki Tokutei Mokuteki Kaisha ("Nishiki TMK"). Nishiki TMK is wholly owned by NRE.

6 KMC and Nishiki TMK entered into a transaction, whereby KMC would sell the Properties to Nishiki TMK, who would lease the properties back to KMC ("Sale Leaseback Transaction"). Nishiki TMK had to raise senior, mezzanine, and equity financing to finance the purchase of properties from KMC. The senior financing to Nishiki TMK was provided by Deutsche Bank Tokyo ("DB Tokyo") and United Overseas Bank Tokyo ("UOB Tokyo"). This was to serve as bridge financing until Nikishi TMK sold the Properties to third party investors. The 1st defendant was involved in funding DB Tokyo for DB Tokyo's mezzanine financing to Nishiki TMK at JPY6.9bn and providing a principal loan of JPY100m to NRE pursuant to the Loan Agreement.

7 The Loan Agreement was entered into by the plaintiffs and the 1st defendant. It was concluded on the plaintiffs' behalf by Mr Theodore Meegan ("Mr Meegan"). Mr Meegan was the sole director of NH and NRE from June 2016 to on or about 23 October 2018. He was the sole director of NII from 12 October 2015 to on or about 23 October 2018.

8 Under cl 2 of the Loan Agreement, the 1st defendant would advance JPY100m to NRE (the "Loan"). Clause 6.1 provided that the Loan was repayable in full by the "Maturity Date". Clause 8.1 of the Loan Agreement

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provided that "Fixed Interest" would accrue on the outstanding principal amount of the Loan at the rate of 10% per annum. In or about July 2016, the 1st defendant advanced the Loan to NRE. About one year later, on or about 29 June 2017, NRE repaid the Loan and the accrued Fixed Interest in full.

9 Around 18 December 2017, Mr Meegan, with the assistance of Ms Zhang, who was then the plaintiffs' office manager and secretary to Mr Meegan, emailed Dr Yabumoto to inform him that there were covenants with the 1st defendant that remained until equity exit, including a component for "Additional Interest". Dr Yabumoto replied by email on 18 December 2017 that he did not know of such a covenant and asked to be informed of the conditions to be released from the covenant effectively.

10 This covenant relating to "Additional Interest" is set out in cl 8.2 of the Loan Agreement, which provides that upon the occurrence of certain events specified in cl 8.2(a), the Plaintiffs would be obliged to pay the 1st defendant a component termed "Additional Interest" (the "Additional Interest"). It is the 1st defendant's contention that the Additional Interest is compensation for the 1st defendant's provision of the funding for the mezzanine financing that was fronted by DB Tokyo. Schedule 1 of the Loan Agreement sets out the mechanism to calculate the quantum of Additional Interest. The relevant clauses from the Loan Agreement and Schedule 1 of the Loan Agreement states:

> [The Loan Agreement:]
>
> **8.2 Additional Interest Payment**
>
> (a) In addition to the interest payments contemplated under Clause 8.1, the Borrowers shall pay to the Lender, as additional

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interest on the Loan, the Additional Interest Amount at the following time:

…

> (ii) on the acceleration of the Loan pursuant to Clause 19.16 (*Acceleration*) or the Maturity Date, or, at the election of the Lender (in its sole discretion), at such later date as may be specified by the Lender to the Borrower Agent (subject to clause (iii) below) …

[Schedule 1:]

1. Exit.

(a) Upon the occurrence of an Exit, the Borrowers shall cause the Exit Proceed to be used to pay the following amounts in the following order of priority:

> (i) *first*, by Nishiki TMK to pay all outstanding Nishiki TMK Financing Obligations;
>
> (ii) *second,* to the extent that Exit Proceeds are received by Nishiki TMK, by Nishiki TMK to pay all Preferred Equity and TK Distributions;
>
> (iii) *third*, to pay the aggregate amount of Approved Operating Expenses then due and payable by NRE and NII;
>
> (iv) *fourth*, to pay the Lender all accrued and unpaid Fixed Interest and any fees, costs and expenses the due to the Lender;
>
> (v) *fifth,* to pay the Lender the aggregate amount sufficient to repay in full all then-outstanding principal (including capitalized interest) of the Loan on and as of the date of such payment;
>
> (vi) *sixth,* to make a distribution to the Preferred Shareholder in the amount of the Preferred Shareholder Investment Amount plus any accrued and unpaid fixed distributions (not to exceed 10% of the Preferred Shareholder Investment Amount);
>
> (vii) *seventh*, to pay to KMC the deferred payment amount incurred by Nishiki TMK in connection with the

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> Sale Leaseback Transaction in the amount of JPY 1.256 billion, plus accrued interest at 1% per annum;
>
> (viii) *eighth,* to make a distribution to Holdings in an amount equal to JPY 1.425 billion; and
>
> (ix) *ninth*, to pay the Lender and the Preferred Shareholder an aggregate amount equal to 20% of the amount equal to the (A) the Exit Proceeds minus (B) the sum of the amounts under items (i) through (vii) above, such that the ratio of such payment to the Lender and the Preferred Shareholder is 93.103:6.897 (such amount determined to be payable to the Lender under this item, the "**Additional Interest Amount**").

Thereafter, any remaining amounts can be used to make distributions to Holdings or as the Borrowers otherwise see fit.

…

3. Definitions

…

(c) "**Exit Proceeds**" means:

…

> [(v)] in the event that payment of the Additional Interest Amount is due to the Lender pursuant to Clause 8.2 of the main body of this Agreement prior to the occurrence of an Exit, the fair market value of all of Nishiki TMK's assets, including the Properties (as determined, in the case of non-cash assets, by an Appraiser).

[emphasis in original]

11 Under Schedule 1 of the Loan Agreement, read with cl 20 of the Loan Agreement (which defines "Borrower Agent" as NRE):[3]

> (a) The first step was to ascertain the quantum of "**Exit Proceeds**", which is defined in paragraph 3(c)(iv) [*sic*] of Schedule 1 as: "*the fair market value of all of Nishiki TMK's assets, including the Properties (as determined, in the case of non-cash assets, by an Appraiser).*"

[3] Takeyuki Matsuda's AEIC dated 23 June 2021 ("Matsuda's AEIC") at para 87.

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> (b) "**Appraiser**" was defined by Paragraph 3(a) of Schedule 1 as "*a reputable appraisal firm with operations in Japan appointed by* [the 1st defendant] *in consultation with* [*the Borrower Agent, ie*, NRE, pursuant to Cl 20 of the Loan Agreement]."
>
> (c) The next step was to take the Exit Proceeds and use it to pay the amounts to various parties in the order of priority stated at paragraph 1(a)(i) to (viii) of Schedule 1.
>
> (d) Thereafter, [under paragraph 1(a)(ix) of Schedule 1,] the remainder was to be used to pay [the 1st defendant] and Brocade Investment "*an aggregate amount equal to 20% of the amount equal to the (A) the Exit Proceeds minus (B) the sum of the amounts under items (i) through (vii) above,* ***such that the ratio of such payment to*** [***the 1st defendant***] ***and Brocade Investment is 93.103 : 6.897***" ...
>
> [emphasis in original]

12 Clause 8.2(a)(ii) of the Loan Agreement stated that the Additional Interest would be payable, *inter alia*, on the "Maturity Date". The original Maturity Date was 30 June 2018. The Maturity Date was amended six times. At the final amendment, the Maturity Date was 30 November 2018.

13 On 23 October 2018, Mr Meegan was dismissed as sole director of the plaintiffs.

14 On or about 4 December 2018, the 1st defendant emailed to the plaintiffs, a "Demand for Payment of Additional Interest Amount". The email was sent to Mr Meegan, Mr Shinsuke Kataoka ("Mr Kataoka") and Ms Zhang, but only Mr Kataoka received the email. Mr Kataoka was a consultant hired by Mr Meegan to assist in the financing for the Sale Leaseback transaction. Ms Zhang testified that her email was deactivated at that time.

15 On 5 December 2018, Ms Eve Lee ("Ms Lee") of the 1st defendant wrote to Mr Kataoka suggesting the appointment of one of the following three firms as the Appraiser for the purposes of the valuation under Schedule 1 of the Loan Agreement: "Houlihan Lokey", "PWC", and "Deloitte". Mr Kataoka

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replied by email on the same day to say that he had no objection to either "Houlihan" or "PWC", "assuming they do a fair valuation".

16 The 1st defendant appointed HL China on 6 February 2019 as the Appraiser. HL China subsequently subcontracted the entirety of the work of determining the fair market value of the Properties to Enrix Co Ltd ("Enrix"). For its report, HL China relied on Enrix's valuation of the Properties, which was JPY28.601bn.

17 On or about 12 July 2019, the 1st defendant wrote a letter of demand to the plaintiffs. The 1st defendant quantified the Additional Interest at JPY1.111bn, based on a valuation report issued by HL China in March 2019 (the "HL China Valuation Report").

18 On or about 27 September 2019, the plaintiffs' representative, Mr Takeyuki Matsuda ("Matsuda"), met with the 1st defendant's representative, Mr Tetsuji Okamoto ("Mr Okamoto"). The plaintiffs' case is that Mr Okamoto agreed that all parties refrain from taking any legal or enforcement action pending the plaintiffs' appointment of a third-party appraisal firm to review the HL China Valuation Report. The 1st defendant's case is that Mr Okamoto had consistently maintained that while the plaintiffs could be given more time to conduct their own internal checks, the Additional Interest of JPY1.111bn would not be compromised.

19 On or about 18 October 2019, the 1st defendant appointed the 2nd and 3rd defendants as joint receivers (the "Receivers"). On or about 23 October 2019, the 2nd and 3rd defendants wrote to each of the plaintiffs informing that they have been appointed Receivers over the plaintiffs' charged assets.

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20 The plaintiffs raise three main issues in their action against the 1st defendant:

(a) whether the 1st defendant was put on notice that Mr Meegan had neither actual nor apparent authority to negotiate and conclude the Loan Agreement, in particular the clauses in relation to the payment of the Additional Interest (the "Notice Issue");

(b) whether HL China is an "Appraiser" as defined in the Loan Agreement (the "HL China Issue"); and

(c) further and/or alternatively, whether there are manifest errors in HL China Valuation Report that justify the valuation being set aside (the "Valuation Issue").

21 The plaintiffs submit that if it is found that there is no Additional Interest Amount owed to the 1st defendant, then it follows that the 2nd and 3rd defendants' appointment as Receivers is invalid and void.

The Notice Issue

Plaintiffs' case

22 The Notice Issue determines whether the Loan Agreement, in particular the clauses on the Additional Interest, are void.

23 On or about 28 June 2016, Mr Meegan presented the 1st defendant with a "Certificate of Director of Nishiki Real Estate Pte Ltd" (the "NRE Director's Certificate"). The NRE Director's Certificate stated that Mr Meegan had authority to enter into the Loan Agreement on behalf of the 2nd plaintiff. It was signed by only Mr Meegan. The NRE Director's Certificate also annexed a

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director's resolution dated 27 June 2016 (the "NRE Director's Resolution"). This was again signed only by Mr Meegan. The NRE Director's Resolution identified the conflict of interest between Mr Meegan (as sole director) and the plaintiffs:

> After having carefully considered the foregoing, the sole director confirms that he has disclosed all his interests in the subject of these resolutions … In particular, it is noted that the sole director is also a director of each of Nishiki, NII, Brocade Investment and Brocade Management and a holder of 51% of the issued and paid-up shares in the capital of each of Brocade Investment and Brocade Management.

24 The plaintiffs submit that the evidence indicated to the 1st defendant that:

(a) Mr Meegan stood to personally gain from any payment that the plaintiffs made to the 1st defendant as Additional Interest. The Loan Agreement provided for payment of 6.897% of the Additional Interest to Brocade Investment, and Mr Meegan was a 51% shareholder of Brocade Investment.

(b) Nobody from the plaintiffs, apart from Mr Meegan, had approved this conflict of interest between Mr Meegan as sole director and the plaintiffs. A fiduciary cannot self-authorise his own breach of fiduciary duty: *Skandinaviska Enskilada Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another and another appeal* ("*Skandinaviska*") [2011] 3 SLR 540 at [38].

(c) In the premises, the 1st defendant was placed on notice that Mr Meegan did not have authority to enter into the Loan Agreement in relation to the Additional Interest, on the plaintiffs' behalf. The 1st defendant was therefore obliged to make further inquiries to satisfy

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itself that the requisite shareholder consent, namely that of Dr Yabumoto, had been obtained. The 1st defendant did not do so.

25 The plaintiffs submit that the conflict of interest taints the provisions relating to Additional Interest. As a result, the clauses in the Loan Agreement on the payment of Additional Interest are a nullity and the 1st defendant cannot enforce the said clauses in the Loan Agreement.[4]

1st defendant's case

26 The 1st defendant submits that Mr Meegan's entitlements under the Loan Agreement were entered into by the plaintiffs with the full knowledge and consent of the companies and Dr Yabumoto as the owner. In *Regal (Hastings) Ltd v Gulliver and Others* [1942] 1 All ER 378 ("*Regal (Hastings) Ltd*"), the House of Lords found that Regal (Hastings) Ltd's former solicitor was not liable in respect of alleged unauthorised profit as he had acted with the full knowledge and consent of the company, when he purchased the shares that led him to make the disputed profit. In respect of the directors of Regal (Hastings) Ltd, who were found liable for profits made in the execution of their office, the House of Lords noted that they could have protected themselves by a resolution of Regal (Hastings) Ltd's shareholders.

27 In this case, the 1st defendant submits that the following documents, which were furnished by the plaintiffs to the 1st defendant, shows that the Loan Agreement was entered into with the full knowledge and consent of the company, including Dr Yabumoto as owner of the plaintiffs:

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[4] Plaintiffs' Closing Submissions against the 1st Defendant ("PCS1D") at para 99.

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(a) NRE Director's Resolution and NH Director's Resolution dated 27 June 2016;[5]

(b) NRE Director's Certificate dated 28 June 2016;

(c) Opinion from the plaintiffs' solicitors (at the material time), Latham & Watkins LLP ("L&W") dated 30 June 2016 (the "L&W Opinion"),[6] where:

(i) at para 1.3(w), L&W had reviewed a "certified true copy of the written resolutions signed by the relevant shareholders of each Singapore Company dated 27 June 2016, authorising the execution by each Singapore Company of the Principal Agreements to which it is a party …" NH is one of such "Singapore Company". Dr Yabumoto is the 100% beneficial owner of NH; and

(ii) at para 2.4, L&W stated that the "entry into and performance of its obligations under the Principal Agreements to which it is a party by each Company does not violate" its constitution or existing laws of Singapore applicable to the companies generally.

(d) Articles of Association of NRE and NH;

(e) The specific comments provided by the lawyers of Nishiki TMK around 21 June 2016 to the 1st defendant on the Loan Agreement from

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5 20 Agreed Bundle ("AB") at pp 10806–10815 and 1st Defendant's Bundle of Documents ("1DB") at pp 84–89.

6 4AB at p 2192.

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"NH/L&W/N&A", relating to the personal interests of Dr Yabumoto;[7] and

(f) The Sponsor Indemnity Agreement signed by Dr Yabumoto in support of the Loan Agreement ("Sponsor Indemnity Agreement").[8]

My decision

28 The NRE Director's Certificate and the Articles of Association of NRE and NH do not deal specifically with the conflict of interest. The NRE and NH Director's Resolution highlight the conflict of interest but were signed by Mr Meegan. It is trite law that a director cannot clear his own conflict of interest.

29 Among the documents referred to by the 1st defendant, the most relevant to their case are the L&W Opinion, the Sponsor Indemnity Agreement and the specific comments made by Nishiki TMK's lawyers from "NH/L&W/N&A" to the 1st defendant on the Loan Agreement at around 21 June 2016, in relation to Dr Yabumoto's personal interests.

30 First, para 1.3(w) of the L&W Opinion stated that L&W had reviewed a "certified true copy of the written resolutions signed by the relevant shareholders of each Singapore Company dated 27 June 2016, authorising the execution by each Singapore Company of the Principal Agreements to which it is a party …" Pursuant to para 1.2(h), NH is one such "Singapore Company". The "Principal Agreements" include the Loan Agreement (see para 1.3(j) of the L&W Opinion). Paragraph 2.2 of the L&W Opinion also states that it is the opinion of L&W that "the execution of, and the performance by [each Singapore

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7 1st Defendant's Core Bundle ("1DCB") at p 342.

8 4AB at pp 2157–2179 (English translation at 4AB at pp 2173–2179).

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Company] of its obligations under, the Principal Agreements to which it is a party has been duly authorised by all necessary corporate action on the part of each Singapore Company".

31 The plaintiffs submit that the L&W Opinion is hearsay. However, the key issue is not whether the L&W Opinion is hearsay now before the court, but whether the 1st defendant was entitled at the material time of the Sale Leaseback Transaction, to rely on paragraph 1.3(w) of the L&W Opinion, which stated that L&W had reviewed a NH shareholders' resolution that authorised the execution of the Loan Agreement. The plaintiffs did not dispute that the document was authentic, marking it as such in the Agreed Bundle. As the L&W Opinion was provided by the plaintiffs to the 1st defendant pursuant to Schedule 2-2 of the Loan Agreement,[9] and shows the reviews that had been conducted by the plaintiffs' own solicitors, I find that the 1st defendant was entitled to rely on it. Ms Lee also testified that L&W's opinion stating that they had sighted the NH shareholders' resolution authorising the transaction, was a key document that the 1st defendant relied on in proceeding on the basis that the plaintiffs had the requisite authority to enter into the transaction.[10]

32 The plaintiffs submit that the NH shareholders' resolution is not before the court. However, as the NH shareholders' resolution would belong to the plaintiffs, I find that it is for them to disclose.

33 The plaintiffs note that the L&W opinion only addresses "customary matters for a transaction of this nature" and submit that this equated to regulatory formalities but did not cover issues such as breach of fiduciary duty.

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9 2AB at p 761.

10 Notes of Evidence ("NE") 25 August 2021 at pp 45–46 and 48–49.

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In particular, the plaintiffs submit that the effect of the assumptions at paras 1(e), 1(h) and 3 of the L&W Opinion, relating to directors acting in good faith, limits on the powers of directors not being exceeded, and the absence of fraud, is to place issues on conflict of interest and breach of fiduciary duties outside the scope of the L&W Opinion. This is because the opinion effectively assumed that the requisite full and informed consent of the shareholders had been obtained. However, I note that that the L&W Opinion also states at para 1.3 that for the purposes of issuing the opinion, L&W had reviewed a list of documents. This includes the NH shareholders' resolution. Hence, their opinion at para 2.2 that the execution of the obligations under the Loan Agreement had been "duly authorised by all necessary corporate action on the part of each Singapore company", is not based only on assumptions, but on specific documents L&W had reviewed.

34 The plaintiffs further submit that Schedule 2 of the L&W opinion states that the opinion expresses no opinion as to matters of fact, and whether Dr Yabumoto gave informed consent or not is a "matter of fact". I do not find this submission helpful to the plaintiffs' case, as L&W also specifically stated at para 1.3(w) that they had reviewed the NH shareholders' resolution, which is what the 1st defendant relied on.

35 The plaintiffs also submit that even if the NH shareholders' resolution exists, it does not show that the NH shareholders knew of Mr Meegan's potential personal gain under the Loan Agreement and that the NH shareholders proceeded to approve the Loan Agreement with that knowledge.[11] However, the Loan Agreement is one of the agreements that is authorised by the NH shareholders' resolution. The form of the Members' Resolution in Writing

[11] PCS1D at para 84.

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("MRIW") is set out in the NH Director's Resolution at para 4(a), and para 1 of the MRIW states that the transaction documents, including the Loan Agreement, be hereby approved, notwithstanding that Mr Meegan "is also a director of NRE, NII, Brocade Investment and Brocade Management and a holder of 51% of the issued and paid-up shares in the capital of each of Brocade Investment and Brocade Management".[12] In other words, Mr Meegan's potential conflict of interest is expressly set out for the NH shareholders, in particular Dr Yabumoto, to see when they signed the NH shareholders' resolution.

36 The plaintiffs submit that the MRIW is silent on the fact that under the Loan Agreement, payment of the Additional Interest to the 1st defendant would result in a corresponding payment to Brocade Investment. In other words, even though there were documents indicating Mr Meegan's potential conflict of interest through Brocade Investment and Brocade Management, even though the Loan Agreement was available to Dr Yabumoto in full and even if Dr Yabumoto signed off a shareholders' resolution authorising the execution of the Loan Agreement, Dr Yabumoto did not know about the conflict of interest because he did not know of a particular provision in the Loan Agreement relating to the Additional Interest. This is a recurring theme in the plaintiffs' response to other documentary evidence, and I will address this below after reviewing the other relevant documentary evidence.

37 Second, the Sponsor Indemnity Agreement signed by Dr Yabumoto binds him to certain obligations relating to the Loan Agreement. I find that this is highly indicative that Dr Yabumoto knew of the obligations arising under the Loan Agreement, as he would under the Sponsor Indemnity Agreement be liable for breaches under the Loan Agreement. The obligations include:

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12 1DB at pp 84–89.

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(a) Article 1.7 – Dr Yabumoto agreed that he cannot file any winding up (or similar) proceedings against the plaintiffs and Nishiki TMK within five years after the entire amount of debt arising from the Loan Agreement has been fully repaid;

(b) Article 1.8 – Dr Yabumoto warranted that he had access to all facts and information regarding the Plaintiffs, Nishiki TMK and related contracts, and the 1st defendant may rely on Dr Yabumoto who has such access; and

(c) Article 2.10 – Dr Yabumoto agreed that if a breach of a related contractual obligation committed by a Nishiki-related party other than Nishiki TMK (including a breach of representations, warranties and compliance) is the result of the actions of KMC, Nishiki Corporation, or Dr Yabumoto, Dr Yabumoto would be liable for damages, losses, fees and expenses suffered by the 1st defendant that are considerably related. This would include breaches of the Loan Agreement by the plaintiffs.

38 The plaintiffs again, submit that while the Sponsor Indemnity Agreement sets out certain of Dr Yabumoto's obligations relating to the Loan Agreement, the Sponsor Indemnity Agreement did not deal specifically with the Additional Interest payment to Brocade Investment or Mr Meegan's potential conflict of interest. The plaintiffs thereby submit that the Sponsor Indemnity Agreement does not show that Dr Yabumoto knew of the conflict of interest and authorised the execution of the Loan Agreement with such knowledge. I will address this below after reviewing the other relevant documentary evidence.

39 Third, Nishimura and Asahi ("N&A"), who were Nishiki TMK's lawyers, had on 21 June 2016, sent across an amended version of the Loan Agreement with marked up comments from "NH/L&W/N&A". These

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comments included the following comments from NH and N&A that specifically protected Dr Yabumoto's personal interests:[13]

(a) In relation to the definition of "Group", NH and N&A deleted the reference to Dr Yabumoto in his capacity as "Indemnitor" and stated, *"[NH/N&A: We would like Dr. Yabumoto to be involved in this financing only to the extent of the indemnity letter.]"*;

(b) NH and N&A amended the definition of "Indemnitor" (*ie*, Dr Yabumoto) and commented on his involvement: *"NH/N&A: There shall not be any preferred shares in Holdings to be subscribed to by Dr. Yabumoto"* and deleted the definition of "Yabumoto Investment";

(c) At cl 16.10(a), NH and N&A deleted "the Indemnitor" from this clause due to this clause's lack of relevance to Dr Yabumoto: *"NH/N&A: Dr. Yabumoto himself has not provided any financial information"*;

(d) At Schedule 2 para 1(d), there was a comment from NH that *"NH/N&A: NH want to limit the involvement of Dr. Yabumoto in this loan transaction by NH, NRE and NII"*; and

(e) "NH/L&W/N&A" also made amendments and comments relating directly to the Additional Interest Amount and payments to the Brocade entities under the Loan Agreement.

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[13] 4AB at pp 2073, 2095, 2121 and 2124.

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40 The main documentary evidence that the plaintiffs rely on to show Dr Yabumoto's lack of knowledge, is his reply to Mr Meegan's email update to him dated 18 December 2017 where Mr Meegan said:[14]

> [a]lthough Bain's mezzanine and term-loan were repaid in June of 2017, there are still a couple of covenants which remain until equity exit. The first covenant is "Additional Interest" at exit which allows them some upside when we execute equity investment with a potential candidate.

41 Dr Yabumoto replied Mr Meegan on the same day, stating:[15]

> I did not know about (such) covenant with Bain. Please let me know the conditions to be released (from the covenant) effectively.

42 Weighed against the L&W Opinion, the Sponsor Indemnity Agreement and the Nishiki TMK lawyers' provision of specific inputs on the Loan Agreement jointly with NH to protect Dr Yabumoto's personal interests and their amendments and comments on the Additional Interest provision of the Loan Agreement, I find that Dr Yabumoto's reply of 18 December 2017, in and of itself, does not indicate his lack of knowledge of the Additional Interest provision of the Loan Agreement. It could simply reflect that Dr Yabumoto had forgotten, or that the internal explanations given to him were not adequate or that he failed to fully appreciate what was explained to him.

43 That Dr Yabumoto could forget, was attested to by Mr Matsuda himself when he was cross-examined about Mr Meegan's email of 18 December 2017. The difficulties that Dr Yabumoto may have had with the internal explanations given to him were also identified by Mr Matsuda when he was cross-examined

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14 4AB at p 2310.

15 4AB at p 2314.

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on Dr Yabumoto's awareness of the obligations in the Sponsor Indemnity Agreement:[16]

> [Cross-examination of Mr Matsuda on Mr Meegan's email of 18 December 2017]
>
> Q. So Dr Yabumoto would have told you that he became aware, according to him, of this additional interest when Mr Ted Meegan sent him this email, yes?
>
> A. No. *When I showed him, he said that, "Did you think that I would still remember everything like this?"* And then after that Kataoka made a phone call and he said that my -- that "The things changed in my brain."
>
> Q. "Things changed in my brain." Sorry, Mr Matsuda, I'm really struggling to understand your answer. When you showed him, when you showed Dr Yabumoto this email and this line, "The first covenant is 'Additional Interest' at exit which allows them some upside when we execute equity investment with a potential candidate", Dr Yabumoto said or asked you, "Do you think that I would remember everything like this?" Was that Dr Yabumoto's response?
>
> A. *What he said is he doesn't remember every single thing mentioned out of so many emails.*
>
> [Cross-Examination of Mr Matsuda on the Sponsor Indemnity Agreement]
>
> Q. … All I'm asking is it would be important -- wouldn't it be important for Dr Yabumoto to know what are the related contractual obligations of a Nishiki-related party before he gives this indemnity to Sankaty, that's all.
>
> A. *He didn't receive explanation, that's all.*
>
> A. (In English) From anyone.
>
> Q. He didn't receive any explanation in relation to --
>
> A. From anyone.
>
> …
>
> Q. So Dr Yabumoto told you he didn't know the contents of the sponsor indemnity but he executed it and he gave it and he signed it?

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16 NE 11 August 2021 at pp 23–25, 27–28 and 72–74.

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> A. It should be that way. *I guess there was some sort of explanation but I'm not sure how much he knew*, so my answer is yes.
>
> [emphasis added]

44 It is not the plaintiffs' position that Dr Yabumoto was unaware of the set-up of Brocade Investment and Brocade Management, including the fact that Mr Meegan and Mr Kataoka would be their shareholders. Mr Hiroyuki Horikawa ("Mr Horikawa"), a director of the plaintiffs, testified in his AEIC at paras 37–41 that Mr Meegan had explained this to Dr Yabumoto. Nor is it the plaintiffs' position that Dr Yabumoto was unaware of the Sale Leaseback Transaction, the Loan Agreement or the Sponsor Indemnity Agreement. Instead, the plaintiffs' position is that although Dr Yabumoto knew of them, he did not know specific details, in particular that the Loan Agreement also contained provisions for the Additional Interest and allocation of part of the Additional Interest to Brocade Investment. He may have forgotten, it was not explained to him or there was some explanation but it was unclear how much he knew from the explanation.

45 That there may have been such lack of internal clarity on the details for Dr Yabumoto, would not have been apparent to the 1st defendant. In preparing for the financing of the Sale Leaseback Transaction, they would have seen documents such as the L&W Opinion, the Sponsor Indemnity Agreement and the N&A edits, which showed Dr Yabumoto's close involvement in the process.

46 Taken together, I find that the weight of the documentary evidence is such that the 1st defendant was entitled to think that Dr Yabumoto knew about the Loan Agreement, including the Additional Interest provision, and Mr Meegan's potential conflict of interest, and that Dr Yabumoto approved the execution of the Loan Agreement with such knowledge. Mr Matsuda sought to

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explain that Dr Yabumoto may have forgotten or may not have known because of the lack of proper explanation to him by his staff. However, Mr Matsuda had not even joined the plaintiffs when the Loan Agreement and Sponsor Indemnity Agreement were signed. Hence his evidence on this holds little weight. Moreover, even if Mr Matsuda's explanation is accepted, the lack of adequate explanation to Dr Yabumoto by his staff or Dr Yabumoto forgetting what he was briefed on, do not change the fact that there was objective documentary evidence that the 1st defendant was entitled to rely on at the time of executing the Loan Agreement, indicating that Dr Yabumoto knew of the potential conflict of interest involving Mr Meegan and nevertheless approved of the Loan Agreement in totality. It is not for the 1st defendant to go behind such documents, to enquire if Dr Yabumoto had properly understood the documents that he had seen or signed or if the plaintiffs had properly briefed their ultimate shareholder on the material documents.

47 It is notable that the only person who can explain away the weight of the documentary evidence is Dr Yabumoto, but the plaintiffs have chosen not to call him.

48 Taking the evidence on the whole, I find that while there was a potential conflict of interest in Mr Meegan personally profiting from the Additional Interest, this was overcome by the documents indicating knowledge of Dr Yabumoto and his consent for the plaintiffs to nevertheless proceed with the Loan Agreement, as reflected in the L&W Opinion, the Sponsor Indemnity Agreement and N&A's edits to the Loan Agreement jointly with NH protecting Dr Yabumoto's personal interests, which the 1st defendant was entitled to rely on. Consequently, I find the Loan Agreement to be valid and enforceable.

49 I will next consider the second issue, the HL China issue.

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The HL China issue

50 In the event the Loan Agreement is found valid and enforceable against the plaintiffs, the plaintiffs submit that the HL China Issue arises.

Plaintiffs' case

51 In particular, the plaintiffs submit that the appointment of HL China failed to comply with the conditions in para 3(a) of Schedule 1 of the Loan Agreement for the appointment of an Appraiser, which provides that the valuation of the Exit Proceeds had to be determined by an "Appraiser", which is defined as "a reputable appraisal firm with operations in Japan appointed by [the 1st defendant] in consultation with the Borrower Agent". Clause 20 of the Loan Agreement defines "Borrower Agent" as NRE. The plaintiffs make three submissions on this issue.

52 First, HL China lacks "operations in Japan". At most, HL China has an affiliate company with operations in Japan, which is presumably Houlihan Lokey K K ("HL Japan"). This appears to be a distinct corporate entity with a different Managing Director and different employees. Hence, it is HL Japan that has "operations in Japan", not HL China. If the 1st defendant's interpretation of "Appraiser" is correct, it would mean that the valuation could have been carried out by any entity within the Houlihan Lokey group (since they would all be "affiliated" to HL Japan). But it would be baffling if the parties had intended for the valuation of the properties in Osaka to have been carried out by for example the Houlihan Lokey entity in Dubai.

53 Second, a reasonable reading of the definition of "Appraiser" indicates that not only was the Appraiser to have "operations in Japan", but that the valuation was to be carried out by those "operations in Japan". This is sensible,

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since the reference to "operations in Japan" necessarily indicates the parties' objective intention for the valuation to be carried out by the Japanese operations of that "reputable appraisal firm". The parties could not have intended HL Japan to be appointed as the Appraiser, but for the actual valuation to be subcontracted to a valuation firm in Egypt. Hence even if HL China is treated as having "operations in Japan", the valuation process was still not carried out by HL China's "operations in Japan" (*ie*, HL Japan). Instead, the valuation was carried out by Enrix.

54 Third, HL China was not appointed "in consultation with NRE". Only Mr Kataoka was consulted, but he is not a staff of NRE. The relevant timeline shows the following. Mr Meegan was dismissed as sole director of the plaintiffs on 23 October 2018. On or about 23 October 2018, Mr Horikawa and Ms Zhang were appointed as directors of the plaintiffs and the ACRA records were accordingly updated. Ms Lee from the 1st defendant knew by 4 December 2018 that Mr Meegan had "retired", *ie*, that he was no longer the sole director of the plaintiffs. On 5 December 2018, Ms Lee sent to Mr Kataoka a list of potential valuation firms, including a "Houlihan Lokey". On the same day, Mr Kataoka replied that he had "[n]o objection, assuming they do fair valuation".

55 The plaintiffs submit that it is undisputed that Mr Kataoka held no position in and was not employed by the plaintiffs. The documentary evidence indicates that Mr Kataoka acted as part of Mr Meegan's team. Hence, even if Mr Kataoka had any authority (actual or implied) to speak on behalf of the plaintiffs, such authority would necessarily have been derived from Mr Meegan, and not the plaintiffs. Therefore, upon the removal of Mr Meegan as sole director, any actual authority that Mr Kataoka had to represent the plaintiffs disappeared with Mr Meegan. The 1st defendant found out on 4 December 2018 from Mr Kataoka that Mr Meegan was no longer the sole director of the

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plaintiffs. The 1st defendant would at that point, have been put on notice of the termination of Mr Kataoka's actual authority. From 4 December 2018 onwards, Mr Kataoka lacked actual and apparent authority to represent the plaintiffs. So, the appointment of HL China and any participation by Mr Kataoka in the valuation process could not have been on the account of the plaintiffs.

1st defendant's case

56 The 1st defendant's response is that HL China is an appraiser with operations in Japan. HL China confirmed in its letter of engagement dated 6 February 2019 that it had a Japanese affiliate with offices in Roppongi, Tokyo.

57 In addition, nothing in Schedule 1 precluded HL China from subcontracting the real estate appraisal to a valuer based in Japan. The plaintiffs knew that HL China would subcontract such work to a local Japanese real estate appraiser, *ie*, Enrix and did not raise any objections. Mr Kataoka had dealt with Enrix and even facilitated their real estate appraisal during the valuation process, without objection. In an email from Ms Lee to Mr Kataoka dated 5 December 2018, she explained that the 1st defendant "need a third party independent valuation firm (rather than just purely a real estate valuer) as this exercise will include the value of all of TMK's assets". This was why HL China was appointed even though Enrix conducted the valuation of the properties in Osaka.

58 The plaintiffs' expectation that the Japan operation of the appraisal firm has to perform the valuation, is not expressed in Schedule 1, para 3(a) of the Loan Agreement. If this was the parties' intention, para 3(a) could have simply stated: "Appraiser" means "a reputable Japanese appraisal firm appointed by the Lender in consultation with the Borrower Agent". However, it does not.

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59 The 1st defendant submits that the plaintiffs had by their conduct, represented that Mr Kataoka was authorised to deal on their behalf. Mr Kataoka engaged the 1st defendant and DB Tokyo in relation to Financing for the Sale Leaseback Transaction with the knowledge of Mr Meegan and Dr Yabumoto. Mr Kataoka continued to be involved in and acted as the plaintiffs' representative post-investment (*ie*, after the closing of the Financing for the Sale Leaseback Transaction). Mr Kataoka was involved in the prepayment of the principal loan and fixed interest. Mr Kataoka was involved in the valuation process and was in direct communication with HL China and Enrix. Mr Kataoka had also arranged the 7 August 2019 meeting between the 1st defendant's representatives, Dr Yabumoto, Nishiki Corporation representatives and senior lenders per the Mizuho refinancing that took place in June 2017.

60 The 1st defendant also relies on the terms of the Investment Management Deed[17] dated 28 June 2016 ("IM Deed") for Mr Kataoka's actual authority. Per the IM Deed, Brocade Management Pte Ltd, as manager, had extensive powers in relation to the plaintiffs which included procuring their compliance with their obligations under the Loan Agreement.

61 The 1st defendant highlights that at no point prior to NRE's letter dated 29 August 2019, was the 1st defendant informed that Mr Kataoka was not the plaintiffs' authorised representative. There was an email from Ms Zhang to Dr Yabumoto dated 19 August 2016 conveying a message from Mr Meegan that with the first financing arrangement over, there should be separation of NH employees (Mr Meegan) from third party consultants (Mr Kataoka).[18] But this was internal to the Nishiki group and never conveyed to the 1st defendant.

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17 2AB at pp 942–973.

18 4AB at p 2214.

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My decision

62 It is undisputed that pursuant to Schedule 1, para 3(a) of the Loan Agreement, the Appraiser is to be appointed by the 1st defendant in consultation with NRE, that the 1st defendant consulted only Mr Kataoka on the appointment, and that Mr Kataoka is not an employee of NRE.

63 The 1st defendant relies on the following clauses of the IM Deed as the basis for Mr Kataoka's actual authority (with added emphasis):[19]

> **2. APPOINTMENT**
>
> 2.1 Subject to Clause 2.1.1 (Appointment) and Clause 12 (Term and Termination), **each of the Shareholder and Companies hereby appoint the Manager, and the Manager agrees, to carry out all activities as the Manager may deem necessary for the management of the Companies and its business (including any and all management functions that would ordinarily be undertaken by NH in its capacity as Shareholder of the Companies), in accordance with and subject to this Deed**. Without limiting the generality of the foregoing, the Manager shall have responsibility in:
>
> 2.1.1 managing the Companies and the Deposited Property in accordance with this Deed and in accordance with customary industry wide best practices;
>
> 2.1.2 fulfilling the duties imposed on it under general law as the manager of each Company;
>
> 2.1.3 ensuring that in managing each Company, it has sufficient oversight of the daily operations and financial conditions of such Company and the Deposited Property, **and shall remain as the key decision-maker in respect of all material matters relating to the management of such Company**;
>
> …
>
> **2.2 Companies' Power of Attorney**
>
> To enable the Manger to perform its responsibilities set out in Clause 2.1 above, each of the Companies irrevocably and severally **appoints the Manager** and any person nominated for

[19] 1DCS at para 313.

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the purpose by the Manager as **its attorney** (with full power of substitution and delegation) **in its name and on its behalf** and as its act and deed to execute, seal and deliver (using the company seal where appropriate) and otherwise **to do any deed, assurance, agreement, instrument, act or thing which each Company has the power and authority to execute and do** (other than such matters which such Company has the power and authority to execute and do under or pursuant to this Deed, and any Third Party Asset Manager Services with respect to which a Third Party Asset Manager has been appointed), whether under applicable laws, the Constitutive Documents of each Company or **otherwise** ("Companies Matters"), and each Company agrees that it shall hereby waive and relinquish any and all residual power and authority to execute and do any Companies' Matters which have been granted to the Manager under this Clause 2.2 (except to the extent limited by any applicable laws).

2.3 Shareholder's Power of Attorney

To enable the Manger to perform its responsibilities set out in Clause 2.1 above, the Shareholder irrevocably and severally **appoints the Manager** and any person nominated for the purpose by the Manager as **its attorney** (with full power of substitution and delegation) **in its name and on its behalf** and as its act and deed to execute, seal and deliver (using the company seal where appropriate) and otherwise **to do any deed, assurance, agreement, instrument, act or thing which the Shareholder has the power and authority to execute and do as shareholder of each Company** (other than such matters which the Shareholder has the power and authority to execute and do under or pursuant to this Deed) ("Shareholder's Matters") (whether under applicable laws, the Constitutive Documents of each Company or otherwise), and the Shareholder agrees that it shall hereby waive and relinquish any and all residual power and authority to execute and do any Shareholder's Matters which have been granted to the Manager under this Clause 2.3 (except to the extent limited by any applicable laws).

…

3. POWERS OF THE MANAGER

…

3.4 Compliance with Restrictions in Financing Documents

Notwithstanding any to the contrary in this Deed, **the Manager** (a) acknowledges **the entry by TMK and NRE into the Financing Documents,** (b) shall ensure that any exercise by it of its powers, authorities and discretions under this Deed shall

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> not result in a breach under any of the Financing Documents, **and** (c) **shall procure that each of the Companies** and the Special Purpose Vehicles **complies in all respects with its obligations,** and observes any restrictions, **imposed on it by the Financing Documents**.
>
> [emphasis by the 1st defendant]

64 The 1st defendant submits that pursuant to cl 3.4 of the IM Deed, Mr Kataoka could and did procure NRE's compliance with the requirements of Schedule 1 of the Loan Agreement. Pursuant to cl 2.1.3 read with cl 2.2 of the IM Deed, Mr Kataoka had the power of attorney from NRE to do any act on its behalf as its key decision-maker in relation to all material matters relating to the management of NRE, which would include its compliance with the Schedule 1 requirements. Consequently, Mr Kataoka had actual authority on NRE's behalf, for the 1st defendant to "consult" with him on the appointment of the Appraiser.

65 Examining the IM Deed, I note that:

(a) Clause 2.1 states that the Manager is to carry out activities "in accordance with and subject" to the IM Deed, and then lists out various responsibilities under its sub-clauses.

(b) The "responsibility" of the Manager under cl 2.1.3 for which he remains "the key decision-maker in respect of all material matters" would consequently also be "in accordance with and subject" to the IM Deed.

(c) The power of attorney given to the Manager in cl 2.2 is to enable the Manager to carry out the responsibilities in cl 2.1 and would hence similarly be "in accordance with and subject" to the IM Deed.

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66 Hence in assessing the applicability of the IM Deed, it is important to understand the intended scope of the IM Deed. In this respect, it is useful to also examine the other provisions of the IM Deed that deal with the scope. Paragraph (c) of the Preamble states that Brocade Management as the Manager "is willing to provide to the Companies discretionary investment management services in relation to the assets of the Companies [*ie*, NRE and NII]". The focus is thus on the provision of investment management services. This is borne out by the nature of the powers that the Manager has under cl 3 of the IM Deed.

(a) Clause 3.1 vests the Manager with the power of discretionary investment management of the "Deposited Property" and the absolute discretion to determine the manner in which any Cash or other assets forming part of the Deposited Property should be invested.

(b) Clause 3.2 vests the Manager with specific powers in relation to the Deposited Property. While the valuation involves the Properties and other non-cash assets of Nishiki TMK, the requirement to consult is not in relation to the Properties, but in relation to the appointment of the Appraiser, whose role is to determine the valuation of Nishiki TMK's assets for the purposes of the Additional Interest calculations under the Loan Agreement. It is a matter relating to the Loan Agreement and not the Deposited Property. Thus, cl 3.2 is not relevant here.

(c) Clause 3.3 vests the Manager with the power to direct the company to borrow or raise moneys in order to, *inter alia*, meet its liabilities.

(d) Clause 3.4 is titled "Compliance with Restrictions in Financing Documents" and gives the Manager the power to "procure that each of the Companies … complies in all respects with its *obligations* …

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imposed on it by the Financing Documents." [emphasis added]. This is the clause which the 1st defendant relies on.

67 In this context, is the requirement under Schedule 1 of the Loan Agreement for the Appraiser to be appointed by the 1st defendant in consultation with NRE, a *right* of NRE to be consulted on the appointment of the Appraiser, or an *obligation* imposed on NRE by the Loan Agreement?

68 The obligation that is imposed by the Loan Agreement, is for the plaintiffs to pay the Additional Interest, the amount of which is based on the fair market value of Niskhi TMK's assets as determined by an Appraiser, after making the deductions set out in Schedule 1 of the Loan Agreement. But it cannot be said that the requirement for NRE to be consulted on the appointment of the Appraiser, is an *obligation* imposed on NRE by the Loan Agreement, as opposed to a *right* vested in NRE.

69 In addition, what cl 3.4 provides is for the Manager to "procure that … the Companies" comply with the obligations, that is, to cause the Companies to comply, and not that the Manager steps into the shoes of the Companies to effect such compliance. This is similar to the ambit of the power in cl 3.3 which allows the Manager to "direct [the] Company to borrow". This is in contrast to cl 3.1 where the power is not limited to the Manager procuring or directing the Company to move in a certain direction, but instead gives the Manager the "absolute discretion" to determine the manner of investment.

70 Thus, on a close examination of the IM Deed, I find that it does not confer actual authority on Mr Kataoka to act on NRE's behalf in relation to the consultation of NRE on the appointment of the Appraiser under Schedule 1 of the Loan Agreement.

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71 I next examine whether the plaintiffs had by their conduct, represented that Mr Kataoka had the authority to act for NRE in respect of the appointment of HL China as the Appraiser.

72 The 1st defendant would have been aware early on, certainly before the signing of the Loan Agreement, that Mr Kataoka was acting for Brocade Management, as the Nishiki Group's investment agent for the Sale Leaseback Transaction, and not for NRE. This is clear from the IM Deed that the 1st defendant points to. Clause 9.3 of the IM Deed states that "neither the Manager nor its personnel or representative shall at any time be deemed to be employees of either Company during the term of this Deed."[20] Mr Kataoka's appointment through the IM Deed would have informed the 1st defendant that he was not a staff of NRE. Ms Lee also testified that it would usually be professional firms specialising in such services, that are appointed as investment agents.[21] It would have been clear to the 1st defendant that Mr Kataoka was not an NRE staff.

73 In addition, at the time of the material correspondence between Ms Lee and Mr Kataoka, around 4–5 December 2018, the 1st defendant was aware that Mr Meegan had left the plaintiffs. In her AEIC, Ms Lee said that after 30 November 18, she received a notification that the email to Mr Meegan had not been delivered. She then sent an email to Mr Kataoka to check with him on an alternative email address to reach Mr Meegan or if the current list of email addresses sufficed. In this regard, the list of email addresses then were: (a) s.zhang@nishikiholdings.com (Ms Zhang); and (b) skataoka@brocade.am

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20 2AB at p 957.

21 NE 26 August 2021 at p 122.

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(Mr Kataoka). Mr Kataoka notified her that Mr Meegan had retired and that the current list sufficed for the purposes of communication with the Plaintiffs.[22]

74 Pertinently, the email address that Eve Lee corresponded with around 4–5 December 2018 was an email address of Mr Kataoka at Brocade, not NRE. Yet, despite having started the inquiry of who would be Mr Meegan's replacement, Ms Lee accepted Mr Kataoka's response and did not press for who would replace Mr Meegan as director of NRE or who would be representing NRE. Ms Lee explained that the 1st defendant did not do so, as they believed that Mr Kataoka sufficed and they were "just being polite" when she first asked.[23] However, this is not consistent with her later email on 13 July 2019, when Ms Lee asked Mr Kataoka to let the 1st defendant know "if there is another NRE contact that [the 1st defendant] need[ed] to copy on this email, [as she] tried to reach [Ms Zhang] but seems that her email is bouncing [*sic*]".[24] If indeed Mr Kataoka sufficed as an NRE contact, there is seemingly no reason for Ms Lee to later request for an NRE contact. Ms Lee again testified on the stand that she only did this out of politeness. However, she also acknowledged that there is nothing in her AEIC that she sought out another NRE contact because of politeness.[25]

75 I am not inclined to believe that this was done simply out of politeness, as it was also the evidence of her colleague, Mr Tetsuji Okamoto ("Mr Okamoto"), who was from Bain Capital and assisted the 1st defendant in discussions with the Nishiki Group, that Mr Kataoka was from Brocade. He

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22 Eve Lee's AEIC at paras 53–54.

23 NE 25 August 2021 at pp 103–104.

24 5AB at p 2987.

25 NE 25 August 2021 at p 117.

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referred to Mr Kataoka in his AEIC as "Brocade (Advisor)"[26] and affirmed on the stand that he knew that Mr Kataoka was not from the Nishiki Group.[27] Taking into account Mr Okamoto's evidence and Ms Lee's requests for an NRE contact from Mr Kataoka, I find it more likely that she had doubts and wanted a NRE contact for certainty, but continued with Mr Kataoka because he was who she had dealt with for the financing of the Sale Leaseback Transaction.

76 Nevertheless, did the plaintiffs, by allowing Mr Kataoka to engage with the 1st defendant on the financing for the Sale Leaseback Transaction, and to continue to be involved in post-investment financial matters such as the prepayment of the principal loan and fixed interest, represent to the 1st defendant that Mr Kataoka would have the authority to act on NRE's behalf in relation to the consultation of NRE on the appointment of the Appraiser?

77 I find not. The conduct that the 1st defendant relied on, are related to the financing matters for the Sale Leaseback Transaction. The IM Deed that the 1st defendant points to provides for Mr Kataoka's role in relation to this. But such involvement does not extend to the plaintiffs representing Mr Kataoka as an NRE staff, and certainly not as someone who can bind NRE on their behalf in respect of the appointment of the Appraiser, who would in effect determine the amount of Additional Interest payable by the plaintiffs to the 1st defendant.

78 Following from this, I do not accept the 1st defendant's submission that there was estoppel by acquiescence by the plaintiffs because there was no challenge to the appointment of HL China or HL China's subcontracting to Enrix, or that the plaintiffs facilitated site visits or reviewed the HL China

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26 Tetsuji Okamoto's AEIC dated 18 June 2021 at para 6(b).

27 NE 14 September 2021 at p 10.

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Valuation Report. There is no evidence that anyone else from the plaintiffs were involved in such actions other than Mr Kataoka. Given that Mr Kataoka did not have authority to act on the plaintiffs' behalf, his actions similarly would not bind the plaintiffs via estoppel.

79 In the absence of any direct evidence that the plaintiffs were aware of Mr Kataoka's involvement in the appraisal process, the 1st defendant submits in its closing submissions that the plaintiffs' claims should be struck out under O 24 r 16 of the Rules of Court (2014 Rev Ed) ("ROC"), because there is a real or substantial risk that a fair trial will no longer be possible as a result of the plaintiffs' failure to provide discovery of the emails between the plaintiffs and Mr Kataoka on the appraisal process.

80 The 1st defendant relies on the principles set out in *Grande Corp Pte Ltd v Cubix International Pte Ltd and others* [2018] SGHC 13 ("*Grande Corp*"). However, the application to strike out under O 24 r 16 of the ROC in *Grande Corp* came after the applicant there had sought for and obtained from the court a specific discovery order on 13 July 2015, obtained from the court an unless order on 21 November 2016, and filed a second application for an unless order on 8 February 2017 which was withdrawn after the respondents filed a List of Documents. In other words, there were prior applications for specific discovery for which specific discovery orders and unless orders were considered and made. The issue of whether discovery should have been ordered had already been determined, when the issue of O 24 r 16 of the ROC was considered by the court in *Grande Corp*. In this case, the 1st defendant has not pointed to any specific discovery order that the plaintiffs are in breach of. Nor has the 1st defendant shown that there were emails between the plaintiffs and Mr Kataoka regarding the appraisal process, that the plaintiffs deliberated suppressed. There

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is hence no basis for the plaintiffs' claim to be struck out pursuant to O 24 r 16 of the ROC.

81 In view of the above considerations, I find that the 1st defendant did not consult NRE as required under Schedule 1 of the Loan Agreement on the appointment of the Appraiser. Consequently, the appointment of HL China and the HL China Valuation Report is invalid.

82 There is another sub-issue under the HL China Issue, on whether HL China falls within the definition of "Appraiser" under para 3(a) of Schedule 1 of the Loan Agreement. On a preliminary note, I agree with the 1st defendant that the language of Schedule 1, para 3(a) does not preclude an appointed "Appraiser" from subcontracting appraisal work. Neither does the language require that the Appraiser be a Japanese firm. In my view, the question which arises, is whether by the phrase "a reputable appraisal firm with operations in Japan", the appraisal firm must have (a) operations in Japan, and that (b) such operations in Japan must be appraisal operations.

83 The applicable principles on contractual interpretation are set out in the Court of Appeal's decision in *Leiman, Ricardo and another v Noble Resources Ltd and another* [2020] 2 SLR 386 where the court stated at [59]:

> (a) The starting point is that the court looks to the text that the parties have used;
>
> (b) The court may have regard to the relevant context as long as the relevant contextual points are clear, obvious and known to both parties;
>
> (c) The court has regard to the relevant context because it then places itself in "the best possible position to ascertain the parties'

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objective intentions by interpreting the expressions used by the parties in the [contract] in their proper context"; and

(d) In general, the meaning ascribed to the terms of the contract must be one which the expressions used by the parties can reasonably bear.

84 The Court of Appeal also stated at [60] that due consideration should be given to the "commercial purpose of the transaction or provision, and … why a particular obligation was undertaken".

85 Schedule 1, para 3(a) of the Loan Agreement defines "Appraiser" as "a reputable appraisal firm with operations in Japan appointed by the [1st defendant] in consultation with [NRE]." It is clear from Schedule 1 that:

(a) The role of the Appraiser is to determine the "fair market value of all of Nishiki TMK's assets, including the Properties" (para 3(c)(iv) [*sic*]).

(b) The largest component of Nishiki TMK's assets is real estate in the form of the Properties, which are in Osaka, Japan. Of the eventual Fair Market Value ("FMV") of JPY29,188.432m that was assessed by HL China, Properties constituted JPY28,601.400m, Cash and Deposits formed JPY1,350.097m and Non-Cash Assets (other than the Properties) were only JPY0.002m.[28]

(c) The FMV of the Properties determined by the Appraiser would form the "Exit Proceeds", which would then be applied in the manner set out in para 1(a) of Schedule 1.

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[28] 7AB at p 4063.

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(d) Part of the amount determined by the Appraiser forming the Exit Proceeds, the Additional Interest, would be paid to the 1st defendant.

86 The appraisal of the Properties by the Appraiser would thus directly and overwhelmingly impact the quantum paid out under the Additional Interest by the plaintiffs to the 1st defendant. Having regard to the relevant context and commercial purpose of the appraisal and the role of the appraiser, which would have been clear, obvious and known to both parties from the provisions of the Loan Agreement, the phrase "reputable appraisal firm with operations in Japan" in Schedule 1, para 3(a) of the Loan Agreement must mean a reputable appraisal firm (a) with operations in Japan, and (b) such operations in Japan must refer to appraisal operations.

87 Given that the fundamental role of the Appraiser is appraisal, and the bulk of such appraisal is the valuation of the Properties located in Osaka, Japan, it is inconceivable that the parties would have envisioned a reputable appraisal firm with for example, only food and beverage "operations" in Japan, when they contemplated an Appraiser determining the valuation. It might be argued that the commercial purpose can still be achieved by the Appraiser subcontracting to an appraisal firm in Japan, even if the Appraiser did not have appraisal operations in Japan. However, this would render the requirement in Schedule 1, para 3(a) for "operations in Japan" meaningless and otiose. As a matter of contractual interpretation, phrases should be given effect where possible rather than rendered inoperative: see *Newall v Lewis* [2008] 4 Costs LR 626 at [33], *Dwr Cymru Cyfyngedig (Welsh Water) v Corus UK Ltd* [2007] EWCA Civ 285 at [13] and *Jani-Kang (GB) Ltd v Pula Enterprises Ltd* [2008] 1 All ER (Comm) 451 at [26]. Indeed, if it was the intention that the Appraiser need not have appraisal operations in Japan, Schedule 1, para 3(a) of the Loan Agreement

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could simply have defined an appraiser as a "reputable appraisal firm" without the mention of "operations in Japan".

88 The 1st defendant contends that the appointed appraiser, HL China, has operations in Japan. However, I am unable to accept the 1st defendant's argument. HL China has at the most, an affiliate in Japan. Mr Terence Tchen ("Mr Tchen"), a Managing Director of Houlihan Lokey Financial Advisors, Inc ("HLF") in its Los Angeles office, and Co-Head of HLF's Technical Standards Committee, said that this affiliate was a subsidiary of Houlihan Lokey, Inc (just as HLF and HL China were also subsidiaries of Houlilan Lokey, Inc). But he was not familiar with it. While the 1st defendant in their Reply Submissions refer to HL China's letter to the 1st defendant dated 6 February 2019, where it was stated under para 6 that Houlihan Lokey "has a Japanese affiliate" in Tokyo engaged in the provision of certain banking and financial advisory services including, "without limitation, valuation advisory services", this was not the evidence of Mr Tchen. At para 42 of his affidavit, he simply stated that the Japanese affiliate in Tokyo is "engaged in the provision of certain investment banking and financial advisory services" without mention of "valuation advisory services". When he was asked if the affiliate was involved in the provision of real estate appraisal, he testified that he did not know all the capabilities of that office, but he was not specifically familiar with them doing real estate appraisals. He did not even know the legal name of the affiliate in Tokyo or what it was called generally or externally.[29] He thinks that HL China would not exercise any form of control over the Japan affiliate's business, although he does not know for certain.[30] In other words, on the evidence, HL

[29] NE 1 September 2021 at pp 148–149.

[30] NE 1 September 2021 at p 22.

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China does not have operations in Japan, and neither HL China nor its affiliate have appraisal operations in Japan.

89 Thus, I find that HL China is not an "appraisal firm with operations in Japan" and hence is not an "Appraiser" as defined in Schedule 1, para 3(a) of the Loan Agreement.

90 In summary, on the HL China Issue, I find that the appointment of HL China is invalid, as it does not comply with the requirements of an "Appraiser", and the 1st defendant did not consult NRE on the appointment of the Appraiser, as required by Schedule 1, para 3(a) of the Loan Agreement. The appointment of HL China and the HL China Valuation Report is consequently set aside.

91 The plaintiffs have also submitted that as Mr Yoshinori Nagai ("Mr Nagai") from Enrix did not file an AEIC or appear at trial, the Enrix reports are hearsay. If the Enrix reports are found to be hearsay, then the portions of the HL China Report that relies on the Enrix reports should be disregarded. Following from my findings above that the appointment of HL China and the HL China Valuation Report should be set aside, this issue does not arise.

92 I observe that on the facts, the lack of consultation with NRE and the improper appointment of HL China as the Appraiser were not just technical breaches. While I have found that the 1st defendant was entitled to proceed on the basis that Dr Yabumoto was aware of the conflict of interest and consented to the Loan Agreement, that only means that the conflict of interest does not void the Loan Agreement. It does not change the undisputed fact that Mr Kataoka stood to gain personally from computation of the Additional Interest, which the valuation of the Appraiser would determine. The more that the plaintiffs had to pay to the 1st defendant in terms of the Additional Interest,

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the more that Mr Kataoka stood to gain personally through his 49% share in Brocade Investment. Under the structure of the Loan Agreement, such conflict would have been safeguarded by the requirement that the 1st defendant consult NRE on the appointment of the Appraiser. The 1st defendant did not do so, but instead, consulted Mr Kataoka himself, without legal basis.

93 I would also add that even when the 1st defendant consulted Mr Kataoka around 5 December 2018 on the choice of appraisal firms, they did not inform him that:

(a) the 1st defendant had recently appointed Enrix to conduct a valuation of the exact properties that would be assessed by the appointed appraisal firm;

(b) Enrix had just submitted its valuation report dated 28 September 2018 to the 1st defendant, just two months before the actual valuation date under the Loan Agreement, which was 30 November 2018 (Maturity Date); or

(c) that they would be recommending Enrix to the appointed appraisal firm to conduct the valuation of the Properties.[31]

94 In *HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Investment Trust) v Toshin Development Singapore Pte Ltd* ("*Toshin*") [2012] 4 SLR 738, the Court of Appeal had observed at [71]:

> … as a matter of legal principle, if an expert or an adjudicator has, prior to the relevant appointment, been recently approached by one of the directly-interested parties to give a professional opinion or adjudicate on a matter, the expert or adjudicator concerned *ought* to make this known as soon as

[31] Terence Tchen's AEIC dated 17 June 2021 at para 16.

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> practicable to the others involved in the appointment process. Additionally, if the expert or adjudicator concerned either has or has previously had a significant relationship with any interested party, particulars of this too ought to be disclosed without any prompting. A failure to make proper disclosure in a timely manner may raise serious concerns about apparent or actual bias on the part of the expert or adjudicator.

95 The 1st defendant submits that there was no duty to disclose this prior engagement because Enrix was engaged by HL China and not the 1st defendant, HL China also added a level of scrutiny to Enrix's valuation to ensure that its valuation would not be tainted by bias, and unlike *Toshin*, there is no contractual duty of good faith here.

96 Following from my finding above that sets aside the appointment of HL China, the issue of whether the 1st defendant failed to make proper disclosure to the plaintiffs of its earlier appointment of Enrix does not arise.

97 That said, I would observe, that while there was no explicit contractual clause requiring good faith, the 1st defendant did write to the plaintiffs that they would be "prepared to have good faith discussions with the Borrower Agent regarding which entity to select as the Appraiser" and that "the Lender is prepared to consult with the Borrower Agent in good faith in conducting such calculation".[32] The involvement of HL China as the engaging party of Enrix also does not alter Enrix's pivotal role in the valuation. HL China subcontracted the valuation of the Properties to Enrix. In the "Engagement Overview" section of the HL China Valuation Report dated 13 November 2019, HL China stated that it "relied upon and assumed, without independent verification, that the values for the Properties … as estimated by ENRIX are the fair market values of the

[32] 4AB at p 2340.

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assets as of November 30, 2018."[33] Enrix's valuation of the Properties, at JPY28,601.400m, formed the overwhelming bulk of HL China's assessment of Nishiki TMK's assets, at JPY29,188.432m. In such circumstances, I find the observations in *Toshin* at [68] to be a particularly apt reminder:

> There is often no clear line between seeking an advantageous but legitimate position in business dealings and negotiations on the one hand, and offending the basic standards of commercial fair play on the other. However, as a matter of prudence, parties in similar circumstances ought to err on the side of caution and reveal their cards openly. In such circumstances, voluntary and timely disclosure of all material information would often go a long way towards ameliorating or rectifying any information deficits.

The Valuation Issue

98 The third issue is the "Valuation Issue". As I have determined the HL China Issue in favour of the plaintiffs and set aside the appointment of HL China and the HL China Valuation Report, the Valuation Issue does not arise. Nevertheless, for completeness, I will deal briefly with the Valuation Issue here.

99 The plaintiffs' preliminary submission is that HL China could not have determined the Additional Interest amount because Enrix's reports were at all material times a draft. However, the Loan Agreement does not impose a requirement for a final report from the Appraiser nor a requirement that the demand for Additional Interest be based on a final report from the Appraiser. Mr Matsuda acknowledged on the stand that Schedule 1 of the Loan Agreement did not require a report from HL China for the computation of the Additional Interest.[34] What the Loan Agreement requires, is that the Appraiser makes a determination of the fair market value of the assets of Nishiki TMK. In addition,

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33 7AB at p 4058.

34 NE 13 August 2021 at p 5.

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HL China's valuation did not change between the draft HL Report (25 March 2019) and the final HL Report (13 November 2019).

100 The parties agree that the key question in the Valuation Issue is whether there are manifest errors in the HL China Valuation Report. In *Viking Engineering Pte Ltd v Feen, Bjornar and others and another matter* [2020] SGHC 78 ("*Viking Engineering*"), the court summarised at [69]–[70] that a "manifest error" is one that: (a) is obvious or patent; (b) obviously capable of affecting the determination; and (c) admits of no difference of opinion. Arithmetic miscalculations, mistakes as to the identity of parties, or reference to a building that does not exist are examples of manifest errors. In contrast, the following are *not* manifest errors: (a) a failure to take into account relevant considerations or taking into account irrelevant considerations; (b) errors in judgment, *eg*, treating as good debts that turn out to be bad, or omitting losses that were not known at the time; and (c) mistakes in the reasoning process; and (d) negligent valuations.

101 The plaintiffs' expert, Mr Takashi Nakazawa ("Mr Nakazawa"), and the 1st defendant's expert, Mr Junya Igarashi ("Mr Igarashi"), both produced written reports. They also provided their views on the nine issues raised by Mr Nakazawa in a Scott Schedule. Both experts gave testimony and answered questions jointly in court.

The parties' case

102 The plaintiffs submit that the nine issues raised by Mr Nakazawa in his report constitute four manifest errors by Enrix:

(a) Wrongly allocating rent for each property (Issues 1 to 3).

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(b) Wrongly assessing rental affordability (rent burdened ratio) for each property (Issues 4 to 7).

(c) Inconsistent application of capitalisation rates (Issue 8).

(d) Error in including the rental renewal fee and failure to deduct Nishiki TMK's property management fee as an expense item (part of Issue 9).

103 The 1st defendant relies on the report and testimony of Mr Igarashi to show that there is no manifest error.

My decision

Wrongly allocating rent for each property (Issues 1 to 3)

104 The plaintiffs' preliminary submission on the first manifest error, is that Enrix deviated from HL China's instructions for valuation on an "as is" basis. The HL China Valuation Report should hence be set aside because of Enrix's material departure from instructions.

105 I note that the Loan Agreement does not require the Appraiser to conduct appraisal on an "as is" basis. Neither did the instructions between the 1st defendant and HL China so require. Whether there is a deviation from HL China's instructions to value on an "as is" basis is hence not material.

106 The more critical issue is whether there is deviation from the requirement under Japan's Real Estate Appraisal Standards ("JREAS") Chapter 3, that the valuation should be conducted on an "as is" basis. JREAS Chapter 3, explains "as is" and states that in "the valuation of property where the influence of the operation is large, such as a hotel … [or] hospital, … it is

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difficult to value without assumption of specific business operation [*sic*]. Accordingly, essentially, such property is valued based on the current operator, employees, competitiveness and other conditions."[35] Both experts affirmed that in valuing "as is" under JREAS Chapter 3 footnote 17, the valuer should not be assuming a different hospital operator.[36]

107 Where they differed was that Mr Nakazawa took the view that footnote 17 means that the valuer should not be assuming that there is no operator, which he considered to be the case in a scenario of demolition for residential use, which Enrix used.[37] Mr Igarashi on the other hand, testified that he did not think that Enrix was assuming no operator when it considered demolition for residential use. It was instead assuming that the current operator "cannot afford to pay the rent".[38] I accept Mr Igarashi's evidence that Enrix did not deviate from assessing the property "as is", as Enrix did start by considering the operator "as is", including its cashflows and rental payments.

108 However, in the process of considering the operator "as is", Enrix concluded that the Highest and Best Use of properties 2 and 5 would be to demolish them for residential use as they were less profitable and were in a location highly desirable for residential use. Thus, the more fundamental question, is whether Enrix committed a manifest error in valuing Properties 2 and 5 on the basis of demolishing for residential use, instead of valuing it on their existing use as a hospital.

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35 1st Defendant's Core Bundle ("DCB") vol 3 at p 668, footnote 17.

36 NE 8 September 2021 at pp 76–77.

37 NE 8 September 2021 at p 78.

38 NE 8 September 2021 at p 78.

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109 Mr Nakazawa's strongest argument on this point is that Enrix erred in concluding that as the hospitals in Properties 2 and 5 were running a deficit, they would not be able to afford the rent, hence Nishiki TMK's income for these two properties would be zero, and the two properties would thus be better off demolished for residential use. In Enrix's report, it is stated in respect of Property 2 that "the subject property is deemed not to afford rent, as it seems to be challenging to continue to pay rent for a long period of time unless the cash flow of the subject property will improve dramatically".[39] Mr Nakazawa's view is that this is wrong as it ignores the fact that rent for the nine Properties, including Properties 2 and 5, have consistently been paid by KMC, the operator of these hospitals, as one lump sum rather than individually. Therefore, the assessment of rent affordability should be examined based on the KMC's entire business revenue and expenses, rather than on an individual hospital basis. Moreover, there is no history of rent not being paid for Properties 2 and 5. JREAS Chapter 3 also states that in the appraisal of securitised properties, "area-specific or property specific assumptions that do not conform to the current conditions should basically not be made." Yet, Enrix assumed that rental could not be paid when it had consistently been. This assumption did not conform to the "current conditions".

110 Mr Igarashi's response was that as the cashflow for Properties 2 and 5 were negative, it was reasonable for Enrix to assume that beyond the short term, KMC would cease the operations of these two hospitals, negotiate with Nishiki TMK to terminate the lease of these two properties and vacate the buildings voluntarily to minimise loss.[40]

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39 8AB at p 4215.

40 NE 8 September 2021 at p 72.

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111 However, Mr Igarashi was not able to provide a satisfactory explanation as to why it would have been reasonable for Enrix to make such an assumption. The surrounding facts point to the contrary.

(a) The intent of the Sale Leaseback Transaction, as explained by Ms Lee, was to allow Dr Yabumoto and KMC to derive certain financial benefits from the ongoing medical operations carried out by KMC.[41]

(b) It was not contemplated or said that KMC would be closing down any of its nine hospitals to enter into the residential property market.

(c) Neither could it be assumed that KMC intended to do so. It is undisputed that there was one lease agreement for eight of the nine properties, including Properties 2 and 5. Despite the history of deficits and poor cashflows from Properties 2 and 5, rent has been paid for them by KMC through lump sum rental payments from the time the lease was issued around 30 June 2016 to when HL China concluded its valuation around 30 November 2018. On this point, Mr Igarashi testified that Enrix might need to consider that rent had been paid by KMC throughout the lease period despite the existing poor cashflows for Properties 2 and 5.[42]

(d) Moreover, the 2016 lease agreement was subsequently amended by a 2017 lease agreement, which did not contain any rental breakdowns. Mr Igarashi affirmed that on the basis of the 2017 amended lease agreement, Enrix could not have concluded that KMC would not

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41 Eve Lee's AEIC at para 14.

42 NE 8 September 2021 at pp 85–88.

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be able to pay the rents for Properties 2 and 5 since there was no rental breakdown for them.[43]

112 It is therefore clear from the surrounding facts and from Mr Igarashi's testimony, that Enrix did not properly consider the lease agreements, and the assumption that KMC would not be able to pay the rents for Properties 2 and 5 was not a reasonable one for Enrix to make. This was not just a question of taking into account irrelevant considerations. On the evidence, there was no basis at all for Enrix to assume that KMC would not pay for the rents, or to assume that because of the poor cashflows from Properties 2 and 5, that KMC would decide to exit from the hospital business in Properties 2 and 5, demolish the hospitals there and rebuild for residential use.

113 The 1st defendant submits that this was not a manifest error as Mr Nakazawa also recognised that the rent in the Properties was not sustainable and had hence testified that the global rent would have to be reduced in the third year by 12.5%. It is just that the manner in which Mr Nakazawa and Enrix sought to address this need for rent reduction differed. However, I do not find that this reference to Mr Nakazawa's advocacy for rent reduction changes the analysis at the fundamental level.

114 The key issue is whether having identified the negative cashflow issue for Properties 2 and 5, Enrix was justified in making the assumption that KMC would demolish the hospitals on those properties and rebuild for residential use. As set out above, the surrounding facts do not support such an assumption. Mr Nakazawa's view that rent should be reduced, does not render this assumption of KMC's behaviour any more viable.

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[43] NE 8 September 2021 at p 161.

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115 Moreover, at a conceptual level, valuation analysis proceeding on the basis of demolishing a hospital and converting that land to residential use, is different from a valuation analysis assuming existing use as a hospital but with rental reduction for that hospital. In the former scenario, there is a possibility of upside to the valuation for Nishiki TMK. In the later scenario, the reduced rental cashflows to Nishiki TMK would likely reduce the valuation. However, as the 1st defendant had not put such a question to both experts, there is no evidence from either expert on whether both valuation paths would indeed lead to the same valuation quantum.

116 I therefore find that Enrix's valuation of Properties 2 and 5 on the basis of demolishing for residential use, is an obvious error which is obviously capable of affecting the determination and which admits of no difference of opinion. It constitutes a manifest error.

117 For completeness, in respect of the alleged first manifest error of "[w]rongly allocating rent for each property", Mr Nakazawa also submitted that a reasonable appraiser would not have referred to the lease agreement between Nishiki TMK and KMC dated 30 June 2016 when this was subsequently replaced by the amended lease agreement dated 30 June 2017, which did not have the rental breakdown contained in the 2016 lease agreement. Mr Nakazawa testified that while the total amount of annual rent in the 2017 amended lease agreement remained the same as the 2016 lease agreement, at JPY1,610,000,000, differing rental breakdown for each property could result in changes in valuation as a different capitalisation rate was applied for each property. Mr Nakazawa testified that in his view, Enrix referring to the original rental breakdown as contained in the 2016 lease agreement was not completely wrong. But he would then have checked further, since the 2017 amended lease agreement no longer had such rental breakdown, by either assessing the rental

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apportionment based on the relative Gross Floor Area ("GFA") of each property or by using the cost approach of assessing the value of the land and building for each property to ascertain the rental ratio. However, Mr Nakazawa also testified that he has not done such alternative analysis.[44]

118 I agree with the 1st defendant that Enrix did not commit a manifest error here in referring to the rental breakdown in the 2016 lease agreement. Notably, the total rental quantum remained the same in the 2017 amended lease agreement. It was reasonable for Enrix to refer to the 2016 lease agreement, for an indication of the rental breakdown. As the rental allocation was agreed to by KMC itself, I place little weight on the plaintiffs' submission that this may have been done on an illogical basis. In any event, Enrix used the rental breakdown in the 2016 lease agreement only as a starting point and did further analysis on the reasonableness of those rental breakdown. Mr Nakazawa himself also accepted that Enrix was not completely wrong in referring to the rental breakdown. While Mr Nakazawa testified that he would have done additional alternative calculations, he did not do so and hence was not able to testify if such alternative approaches would have changed the valuation significantly or be negligible.

Wrongly assessing rental affordability (Issues 4 to 7)

119 The plaintiffs submit that the second manifest error, involving Issues 4 to 7, is that Enrix wrongly assessed rental affordability.

120 In assessing rental affordability, Enrix had taken the JPY50m in the 2016 lease agreement for Property 1 as a starting point and conducted an assessment of the comparable rent. It also analysed the applicability of such

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44 NE 8 September 2021 at p 167.

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comparable rent. Mr Nakazawa's view under Issue 4, was that Enrix should have gone further to look at the cashflow analysis of the hospital in Property 1.[45] Mr Igarashi's view was that Enrix was justified in not looking at the cashflow analysis of the hospital in Property 1. Since Nishiki TMK only owned the land but not the hospital building in Property 1, it was effectively assessing only the reasonableness of the rental stream and need not assess the affordability from the business perspective.[46]

121 Mr Nakazawa acknowledged that JREAS Chapter 3 did not explicitly mention the requirement for cashflow analysis to be conducted in such scenarios, but in his view, the concept of securitisation of assets would lead to that.[47] Mr Igarashi stated that whether cashflow analysis is needed, depends on the client, background and purpose.[48] In light of Mr Nakazawa's acknowledgement, I find that what Mr Nakazawa advocates under Issue 4 is more a matter of difference in practice, than what JREAS requires, and does not constitute a manifest error.

122 In respect of Issues 5–7, Mr Nakazawa states in his report that when the relevant expense items are considered, four out of five of the properties assessed would be negative after deducting the expenses from the Gross Operating Profit ("GOP"). This is found in the table at para 81 of his report.[49] His view is that his analysis showed that the rental in the 2016 lease agreement was not mutually fair. The tenant would hence seek a reduction of the rental amounts set out in

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45 NE 9 September 2021 at pp 23–26.

46 NE 9 September 2021 at pp 34–41.

47 NE 9 September 2021 at pp 42–43.

48 NE 9 September 2021 at p 44.

49 Takashi Nakazawa's AEIC dated 18 June 2021, Expert Report at para 81.

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the 2016 lease agreement. Enrix was thus wrong to rely on the 2016 lease agreement for the rental burden allocation.

123 Mr Igarashi had different views on the expense items that should be deducted from the GOP. His analysis showed a deficit for two Properties (4 and 7), rather than the four properties in Mr Nakazawa's table.[50] Even then, his view was that since both KMC and Nishiki TMK had agreed to the rental indicated in the lease agreement, he would regard it as mutually fair.[51]

124 I note that while Mr Nakazawa has through his analysis, pointed out questions about the rental allocation between the properties, there is no evidence about why the parties to the lease agreement arrived at such allocation. But what is in evidence, is that both the tenant and owner did agree to the rental allocation set out in the lease agreement. Notably, the total rental amount in the 2017 amended lease agreement stayed the same as that in the 2016 lease agreement. It was just that the rental breakdown for each property was removed in the 2016 lease agreement. From the testimony of Mr Nakazawa, it is also unclear that he has a fairer method of rental allocation if the numbers in the 2016 lease agreement were not used. For example, in respect of Properties 2 and 5, while Mr Nakazawa initially testified that the rental allocation in the 2016 lease agreement could be used for an income approach valuation, he subsequently testified that the rental allocation there was not fair. In its place, he recommended allocating rent by each property's share of total GFA. However, this could result in properties which have larger GFAs, having much larger rents even if their GOP was negative or lower than those with smaller GFAs. This would not be an inherently fairer method. Hence, I find that the questions raised

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50 NE 9 September 2021 at p 108.

51 NE 9 September 2021 at p 124.

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by Mr Nakazawa, in themselves, do not render the rental allocation in the 2016 lease agreement as mutually unfair, such that Enrix manifestly erred in relying on it as a starting point in their appraisal.

Inconsistent application of capitalisation rates (Issue 8)

125 The plaintiffs submit that the third manifest error arises from Mr Nakazawa's Issue 8, where he asserts that Enrix incorrectly applied the capitalisation rate and discount rate in its assessment. During his testimony, Mr Nakazawa testified that this is "just a difference of the way where we observed the capitalisation rate" and that he is "raising the issue but it is not really a big matter". He would have checked the rent affordability together with capitalisation rate assessment, but it does not mean that Enrix made a manifest error.[52] As Mr Nakazawa is not a legal expert, I do not place weight on his concession that he did not regard this error as a manifest error. However, what is material is his evidence that the differences arise from a matter of opinion. He subsequently emphasised again in his testimony that there is an opinion of the capitalisation rate and discount rate and there should be several ways of analysis, and that he did not find that the Enrix analysis was sufficient.[53]

126 Mr Igarashi testified that as can be seen from the Enrix report, the capitalisation rate and discount rate have a number of inputs. After his comparison of the capitalisation rates, he found that it looks quite reasonable.[54] Taking into account the evidence of both experts, I find that that Issue 8 arises from a difference of practice and opinion and does not constitute a manifest error.

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52 NE 9 September 2021 at p 200.

53 NE 9 September 2021 at pp 202 and 210.

54 NE 9 September 2021 at p 211.

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Failure to deduct Nishiki TMK's property management fee as expense item (part of Issue 9)

127 The fourth manifest error that the plaintiffs submit Enrix committed, arises from one of the three errors identified in Issue 9 by Mr Nakazawa.

128 The plaintiffs first highlight an alleged error relating to Enrix's assumption that Nishiki TMK would expect income in the form of a rent renewal fee for Property 1 in year six of its cash flow analysis.

129 Mr Nakazawa's view was that Enrix was wrong to assume income from such rent renewal fee.[55] Mr Igarashi's view was that it was common practice in Japan for renewal fees to be paid by the tenant to the landlord for the lease of the land upon the expiry of the lease, and that a commission of 10% of the renewal fees was typically paid by the landlord to the real estate agent.[56] Nevertheless, Mr Igarashi disagreed with Enrix's assumption that the renewal fee would be generated in year six under its discounted cash flow ("DCF") calculations. His view was that it ought to be generated in year eight under the DCF calculations. This would result in an estimated market value of JPY952m compared to Enrix's JPY954m.[57]

130 The 1st defendant submits that even on Mr Igarashi's calculation, there is only an error of less than 0.2% for Property 1, which is *de minimis*. The plaintiffs rely on Mr Igarashi's concession on this point to submit that this is such a basic error and shows the haphazard manner in which Enrix appears to have prepared the report. However, in so far as whether particular errors are

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55 NE 9 September 2021 at p 214.

56 NE 9 September 2021 at pp 233–234.

57 Junya Igarashi's AEIC dated 17 June 2021 at pp 40–41.

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manifest errors, they would have to be assessed on their own. I hence consider the plaintiffs' submission on the error relating to the property management fee, which Mr Nakazawa emphasised as the manifest or more serious error in Issue 9, within the confines of both experts' testimony on this particular alleged error.

131 The plaintiffs submit that Enrix failed to deduct Nishiki TMK's property management fee as an expense item from each property's cashflow analysis. Mr Nakazawa points out that a property management agreement dated 22 March 2016 was executed between Nishiki TMK and CBRE, the asset manager of Nishiki TMK ("Property Management Agreement"). The Property Management Agreement specifies that the property management work shall be outsourced by CBRE to a third-party property manager. Thereafter, Brocade Asset Management ("BAM") was assigned as the property manager and a fixed property management fee of JPY416,667 per month is payable to BAM. Yet, in Enrix's Valuation Report, under the cash flow modelling in the "income approach" (both direct capitalisation and the DCF), the property management fee is nil. This results in a difference of about JPY100m in valuation.[58]

132 Mr Igarashi's view is that while Enrix has not included property management fees as an expense item, there will not be, in any event, any impact to the estimated market values. This is because the lease agreements are "triple-net" lease agreements, whereby the tenant takes on the payment of all expenses including taxes and maintenance. This is pursuant to Article 8 of the 2016 lease agreement.[59] The said amount from property management fees will hence be included as income items and expense items. They are offsetting and the same.[60]

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58 NE 9 September 2021 at pp 213–214.

59 3AB at p 1396.

60 NE 9 September 2021 at p 241.

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133 I accept Mr Igarashi's explanation, and find that it has not been shown that Enrix had made a manifest error here.

134 In summary, on the Valuation Issue, I find that Enrix has made a manifest error, in making an unjustified assumption that the hospitals in Properties 2 and 5 would be demolished and the land converted for residential use. The 1st defendant submits that the usual consequence of a successful challenge to an expert's determination is that it is a nullity and does not bind any of the parties. In which case, the court will direct the expert to come to a new decision in accordance with the instructions as clarified by the court; see *Poh Cheng Chew v K P Poh & Partners Pte Ltd and another* [2014] 2 SLR 573 at [80].[61]

135 Thus, if the HL China Issue was not found against the 1st defendant, the HL China Valuation Report would be a nullity on this basis and HL China would be directed to come to a new valuation that corrects the manifest error identified.

Oral Agreement between Mr Matsuda and Mr Okamoto

136 For completeness, I will also deal with the plaintiffs' submission that there was an oral agreement between Mr Matsuda and Mr Okamoto on or about 27 September 2019, whereby the 1st defendant agreed that the plaintiffs could appoint a third-party appraisal firm to review the draft HL China Valuation Report and that all parties refrain from taking any legal or enforcement action pending the plaintiffs' appointment of a third-party appraisal firm for the review.

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[61] 1DCS at para 512.

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137 Both Mr Matsuda and Mr Okamoto differed in their oral testimony on whether there was such an oral agreement at their meeting on 27 September 2019. The main document the plaintiffs rely on is the email sent by Mr Okamoto to Mr Matsuda on 1 October 2019 where Mr Okamoto said: "Regarding the valuation process, I hope that it will be completed in two weeks so that we can reach the final agreement." This in itself does not support the plaintiffs' position. Mr Okamoto's explanation of this email is that the 1st defendant was prepared to give the plaintiffs two weeks as courtesy, but not more. This explanation is supported by the internal correspondence of the 1st defendant. Mr Okamoto's email to his colleagues on 29 September 2019 shows that he had not made any commitment at the 27 September 2019 meeting and that he was seeking in the email, his colleagues' views of the next steps. In his email reply to Mr Okamoto on 29 September 2019, the 1st defendant's Mr Scott Garfield ("Mr Garfield") says he would tell the plaintiffs "two weeks" as courtesy. On 30 September 2019, Mr Okamoto informed his colleagues that he had told Mr Matsuda that they would "not have any valuation discussions going forward and that the appraisal process on their end will just be for them to confirm the calculations" and proposed that the 1st defendant give a two-week timeframe for the plaintiffs to confirm. This was followed by the 1 October 2019 email sent out by Mr Okamoto to Mr Matsuda.

138 I therefore find that the evidence supports the 1st defendant's position that there was no oral agreement between Mr Matsuda and Mr Okamoto. The 1st defendant has also submitted that the plaintiffs have failed to plead or show what consideration there was for the alleged oral agreement.[62] The plaintiffs indeed did not plead or show consideration. Per *Singapore Civil Procedure 2021* vol 1 (Cavinder Bull gen ed)(Sweet & Maxwell, 2021) ("*Singapore Civil*

62 1st Defendant's Reply Submissions at para 304.

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Procedure") at para 18/2/5 and 18/12/10, consideration must be stated in the pleadings if an agreement is alleged. In the absence of consideration, even if there was an oral agreement, it would have been unenforceable.

Plaintiffs' claims against the Receivers

Plaintiffs' pleaded case

139 In addition to its claims against the 1st defendant, the plaintiffs claim against the 2nd and 3rd defendants (the "Receivers") the following:

(a) a declaration that Sankaty's appointment of the 2nd and 3rd defendants as receivers was invalid and void ("Prayer 1");

(b) in the alternative to Prayer 1, a declaration that the 2nd and 3rd defendants have failed to discharge their duties in good faith and/or are biased, and are to be removed as receivers ("Alternative Prayer");

(c) an order that the 2nd and 3rd defendants provide an account of all transactions conducted by the 2nd and 3rd defendants in relation to the plaintiffs' assets and/or interests;

(d) an order that the 2nd and 3rd defendants jointly and severally forthwith deliver up and/or transfer possession and/or title and/or ownership of the plaintiffs' assets and/or interests and/or the traceable proceeds of the same;

(e) damages and/or equitable compensation to be jointly and severally paid by the 2nd and 3rd defendants for injury, loss and/or damage sustained by the plaintiffs by reason of the 2nd and 3rd defendants' trespass and/or wrongful interference.

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140 The plaintiffs acknowledge that their prayer for a declaration that the Receivers' appointment is invalid and void (*ie*, Prayer 1) has to proceed against the 1st defendant rather than the Receivers. Following from my ruling above on the HL China Issue that the appointment of HL China and the HL China Valuation Report is to be set aside, the Receivers' appointment would consequently be invalid and void.

141 Nevertheless, as the plaintiffs also strenuously maintained their claim for the Alternative Prayer, I will deal with it here for completeness.

142 The plaintiffs maintained their claim for the Alternative Prayer, despite their acknowledgement of the weakness of their claim for it. The plaintiffs' main witness for their claims, Mr Matsuda, stated in his AEIC at para 125 that:

> (a) the Plaintiffs will accordingly on the present state of the evidence **not** be pressing the Plaintiffs' allegations in paragraphs 48 and 49 of the Statement of Claim (Amendment No. 1) filed on 9 June 2021 against the Receivers at the trial, pending of course any new evidence that may arise through cross-examination or otherwise; and
>
> (b) but the Plaintiffs maintain that on the state of evidence available to the Plaintiffs *at the time the present claim was filed* the Plaintiffs were entitled to take the position that the Receivers were acting in bad faith, etc, and that in fact the Plaintiffs still believe that to be so.
>
> [emphasis in original]

143 In the Plaintiffs' Opening Statement at para 65, the plaintiffs state:

> … on the state of the current evidence, the Plaintiffs forthrightly accept that they would find it hard to meet the required standard of proof. However, if new evidence should surface to support the contentions set out in [48] and [49] of the Statement of Claim, the Plaintiffs will pursue these contentions and reserve the right to cross-examine the Receivers on the same.

144 Paragraphs 48 and 49 of the Statement of Claim ("SOC") states:

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48. Further or alternatively, if the 2nd and 3rd Defendants were validly appointed as receivers, the 2nd and 3rd Defendants would owe the Plaintiffs the duty to exercise due care and diligence. This duty would include a duty to act in good faith and to act impartially.

49. In this regard, the 2nd and 3rd Defendants are biased and / or have failed to act in good faith and / or are wrongfully colluding with Sankaty. These are the best particulars that the Plaintiffs can provide pending discovery.

Particulars

(a) By way of letter dated 24 October 2019, the Plaintiffs informed the 2nd and 3rd Defendants that the Plaintiffs denied Sankaty's demand for Additional Interest, and that the 2nd and 3rd Defendants' purported appointment as receivers was accordingly invalid.

(b) On 4 November 2019, the 2nd and 3rd Defendants replied to say *inter alia* that they took the position that the Additional Interest as quantified by Sankaty was due and owing. The 2nd and 3rd Defendants had therefore taken a positive position on the substantive merits in favour of Sankaty.

(c) It is highly unlikely that the 2nd and 3rd Defendants had, in 11 days, managed to start and complete their investigations into the disputed issues and take independent legal advice on the same.

(d) The obvious inference is that the 2nd and 3rd Defendants were colluding with Sankaty.

(e) Hence, on 5 November 2019, the Plaintiffs wrote to ask that the 2nd and 3rd Defendants disclose all correspondence the 2nd and 3rd Defendants had exchanged with Sankaty on the substantive merits.

(f) The 2nd and 3rd Defendants have to date refused to provide any disclosure whatsoever.

(g) Despite being put on notice by 24 October 2019 of the disputed debt, the 2nd and 3rd Defendants consented to their registration by Sankaty as receivers of the Plaintiffs. …

(h) On 23 December 2019, the 2nd and 3rd Defendants wrote to the Plaintiffs' *directors* threatening legal action. In particular, the 2nd and 3rd Defendants threatened that they would not hesitate to hold the directors liable for any losses caused to *Sankaty*.

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> (i) Yet the 2nd and 3rd Defendants' have no standing in law to hold the Plaintiffs' directors liable for losses caused to *Sankaty*.
>
> (j) On 2 January 2020, the Plaintiffs' directors wrote to the 2nd and 3rd Defendants and alleged that they were Sankaty's "*cat's paw*". The letter also stated that the 2nd and 3rd Defendants, even if validly appointed, would be unable to discharge their duty to act in good faith. The basis of the allegations were the particulars set out at (a) to (i) above.
>
> (k) To date, the 2nd and 3rd Defendants have not denied the charges nor provided any explanation.
>
> (l) Further, on 14 January 2020, the 2nd and 3rd Defendants sent a letter to Nishiki TMK (a Japan company) notifying Nishiki TMK of their purported appointment as joint receivers of NRE and NII. In their letter, the 2nd and 3rd Defendants gave the false and misleading impression that:
>
> > (i) the ACRA records presently listed NII as being under receivership. This was patently false; and
> >
> > (ii) because ACRA had accepted the registration of their appointment as receivers, ACRA had accepted that a debt was owed by the Plaintiffs to Sankaty, and that ACRA had accepted the validity of their appointment as receivers. This was patently misleading, and omitted the obvious fact, which might not be readily apparent to a foreign entity, that ACRA is a filing registry that cannot and does not assess or rule on the validity of a receiver's appointment, much less on whether a disputed debt is owed.
>
> (m) On 14 January 2020, the 2nd and 3rd Defendants also sent letters to Nishiki TMK's bankers in Japan, namely, Mizuho Bank Ltd, Orix Corporation, United Overseas Bank Limited, Fuyo General Lease Co Ltd, The Kagoshima Bank Ltd, and The Hyakugo Bank Ltd. These letters contained the same false and misleading statements. …

145 During the trial, after Mr Matsuda's affirmation of para 125 of his AEIC on the stand, counsel for the Receivers invited him to formally withdraw the plaintiffs' claim for the Alternative Prayer. He declined. When asked why, his reply was that "because our position is that we don't accept the receivership".[63] The trial was stood down for plaintiffs' counsel to speak with Mr Matsuda and

63 NE 13 August 2021 at p 39.

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explain that the plaintiffs' claim for the invalidity of the receivership would have to proceed against the 1st defendant and was distinct from their alternative claim against the Receivers. When trial resumed, counsel for the plaintiffs reiterated that the plaintiffs would maintain their alternative claim against the Receivers.

146 The plaintiffs then submitted that the plaintiffs' case for the Alternative Prayer stood on four pillars.[64] First, for the Receivers to take a position by their reply of 4 November 2019, that the Additional Interest as quantified by the 1st defendant was due and owing within 11 days, showed evidence of collusion: SOC at paras 49(a)–(c). Second, when the plaintiffs asked the Receivers for correspondence that they had with the 1st defendant, they refused: SOC at paras 49(e)–(f). Third, the Receivers threatened legal action against the plaintiffs' directors for losses caused to the 1st defendant: SOC at paras 49(h)–(i). Fourth, the Receivers sent letters on 14 January 2020 to Nishiki TMK's four foreign banks stating that the Receivers were validly appointed when they were not: SOC at paras 49(l)–(m).

Plaintiffs' case in the closing submissions

147 At the conclusion of trial, as it was still unclear what the plaintiffs' position was in relation to their Alternative Prayer against the Receivers, they were directed to provide an outline of their case, which would provide the issues for the parties' respective closing submissions.

148 In their closing submissions, the plaintiffs pivoted from their pleaded case and what their counsel had stated in the middle of trial as the four pillars of their pleaded case. They now submit that the Receivers owed the plaintiffs

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64 NE 13 August 2021 at pp 44–46.

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the duty to exercise due care and diligence and breached their duties in three ways.

The Receivers failed to take basic steps for due diligence/independent assessment

149 The plaintiffs' first submission is that the Receivers failed to take the most basic steps for due diligence/independent assessment. They point to the following:

(a) there is no documentary evidence that the Receivers had received the Security Documents before accepting their appointment on 18 October 2019;[65]

(b) the Receivers had no basis to believe that the persons who signed the Notices of Appointment did in fact have the requisite authority;[66]

(c) the Receivers knew that they were unjustifiably appointed on the basis of a draft valuation report.[67] The Receivers could only speculate (as was the case in *Batrouney v Forster (No 2)* [2015] VSC 541 ("*Batrouney*")) that the final valuation report would be identical to the draft;[68]

(d) the Receivers wanted to conceal that they had a letter as of 31 October 2019 ("31 October 2019 Letter"), which was a duplicate of what they sent out on 4 November 2019 ("4 November 2019 Letter"),

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65 Plaintiffs' Closing Submissions against the 2nd and 3rd Defendants ("PCS2D3D") at para 27.

66 PCS2D3D at paras 32–33.

67 PCS2D3D at para 35.

68 Plaintiffs' Reply Submissions against the 2nd and 3rd Defendants ("PRS2D3D") at paras 17 and 23.

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which means that as of 31 October 2019, the Receivers already knew what the 1st defendant's solicitor's (Harry Elias Partnership LLP ("HEP")) letter of 31 October 2019 ("HEP 31 October 2019 Letter") would state;[69] and

(e) Mr Akhtar accepted that certain paragraphs in the 4 November 2019 Letter amounted to the Receivers taking a positive position on the merits of the HEP 31 October 2019 Letter.[70]

The Receivers created misimpressions, inaccuracies and false exaggerations to advance the 1st defendant's interests

150 The plaintiffs' second submission is that the Receivers created misimpressions, inaccuracies and false exaggerations to advance the 1st defendant's interests:

(a) the Receivers misrepresented to the plaintiffs' directors in their letter dated 23 October 2019 ("23 October 2019 Letter") that the 14-day period for submission under s 223 of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act") runs from the date of the letter, which was wrong because the notices were only served on the company a day after the date of the letter;[71]

(b) the Receivers misrepresented to Nishiki TMK and six Japanese banks (who were lenders with first priority over the charged assets ("Japanese Lenders")), when they informed them that records under the Accounting and Corporate Regulatory Authority ("ACRA")

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69 PCS2D3D at para 40.

70 PCS2D3D at para 42.

71 PCS2D3D at para 43.

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"confirmed" their appointment as receivers and that the "record of ACRA makes clear that [the Receivers] have been validly appointed". The Receivers gave the impression that ACRA had accepted that the plaintiffs owed a debt to the 1st defendant and ACRA accepted the validity of the Receivers' appointment. This was done to impact the credit lines of the plaintiffs' related companies in Japan;[72] and

(c) the Receivers misrepresented in their letter to UOB dated 3 January 2020,[73] that the plaintiffs' directors had no more powers upon the Receivers' appointment. The letter stated: "Accordingly, all the powers vested with the Directors of NII including in respect of the management of the Company's business are suspended and transferred to the Receivers, since the date of our appointment." This was repeated in the letter to Japanese Lenders.[74]

The Receivers made demands and threats that had no basis in law

151 The plaintiffs' third submission is that the Receivers made demands and threats that had no basis in law:

(a) the Receivers requested for information and full access to inspect documents against Nishiki TMK and KMC that had no basis under Japanese law;[75]

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72 PCS2D3D at paras 45–53.

73 6AB at p 3472.

74 6AB at p 3492.

75 PCS2D3D at para 61.

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(b) the Receivers communicated threats of regulatory and criminal liability to compel the directors to comply with the Receivers' demands, without evidence that the requirements for liability had been met;[76] and

(c) the Receivers made indiscriminate requests for NH's share certificates and share transfer forms when they had most of the documents.[77]

Adverse Inference

152 Finally, the plaintiffs submit that adverse inferences should be drawn against the Receivers pursuant to s 116 of the Evidence Act (Cap 97, 1997 Rev Ed),[78] as there was incomplete disclosure of documents. This was due to the defendants' insistence of issue estoppel arising from the decision in HC/ORC 6221/2020, their assertion of litigation privilege on communications between the 1st defendant and the Receivers, and Mr Akhtar's failure to inform the Court that he refused to sign an access letter sent by HL China to the 1st defendant ("Access Letter").[79] Mr Tchen testified that prior to HL China inserting into their 13 November 2019 Report that the Receivers may not rely on the report "without our prior written consent",[80] HL China had sent the Access Letter to the 1st defendant, which stated that the Receivers could not place reliance on the HL China Valuation Report. The 1st defendant replied to the valuers, saying that the Receivers were not going to sign it.[81]

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76 PCS2D3D at para 64.

77 PCS2D3D at para 67.

78 PCS2D3D at para 84.

79 PCS2D3D at paras 72–85.

80 NE 1 September 2021 at p 129.

81 PRS2D3D at para 24.

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153 The plaintiffs submit that adverse inferences should be drawn against the Receivers that the Receivers knew that nothing in the debentures allowed them to be appointed as receivers on the basis of draft valuation reports, but agreed to be appointed anyway, that the Receivers and the 1st defendant were coordinating the Receivers' efforts to secure payment as soon as possible and that they took steps to conceal such coordination.[82]

The Receivers' case

Adverse Inference

154 The Receivers note that in HC/SUM 3278/2020 for discovery ("SUM 3278"), the plaintiffs sought the following:[83] (a) Amended Category 1: All documents and correspondence between the 1st defendant and the Receivers leading up to the appointment of the Receivers; and (b) Amended Category 2: All internal documents and correspondence between the Receivers and PKF-Cap Advisory Partners Pte Ltd in relation to their appointment and matters related to the suit (collectively, the "SUM 3278 Communications"). The assistant registrar ("AR") did not allow the discovery request and found the request to be a fishing expedition. The AR held that the correspondence between the Receivers and the 1st defendant were covered by litigation privilege, while the internal documents sought against the Receivers were covered by litigation privilege and, where applicable, legal advice privilege. The plaintiffs' appeal against the AR's decision was heard by Justice Chua Lee Ming on 4 November 2020 and was dismissed.

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82 PRS2D3D at para 86.

83 2nd and 3rd Defendant's Closing Submissions ("2D3DCS") at paras 26–27.

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155 The Receivers submit that there is hence no basis to draw any adverse inference. The documents were not disclosed because of the plaintiffs' (failed) discovery application. In *Sudha Natrajan v The Bank of East Asia Ltd* [2017] 1 SLR 141, the court held at [20]–[21] that an adverse inference should not be drawn where the failure to produce evidence is reasonably attributable to reasons other than the merits of the case or the issue in question.[84]

156 In any event, the plaintiffs are estopped from challenging the disclosure of such documents. Parties cannot seek to re-litigate the same issues that were "*fundamental and not merely collateral*" to the earlier decision: *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 ("*Goh Nellie*") at [34]–[35]. Decisions made in interlocutory applications are likewise regarded as final and conclusive judgments on the relevant issues: *TMT Asia Ltd v BHP Billiton Marketing AG (Singapore Branch) and another* [2019] 2 SLR 710 ("*TMT Asia Ltd*") at [25]–[26]. In accordance with the principle of *res judicata*, the plaintiffs are bound by the court's findings that the SUM 3278 Communications are privileged and not relevant, and are not entitled to re-litigate the issue. A party has to show that the cross-examination relates to "relevant facts". If such communications have already been found to be irrelevant or are privileged in the context of the specific discovery applications, such communications should not be issues for cross-examination. The plaintiffs have not pointed to any change of circumstances from the time of the specific discovery applications.[85]

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84 2D3DCS at para 50.

85 2D3DCS at paras 51–53.

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157 The Receivers note that Mr Tchen confirmed on the stand that he has never met or communicated with the Receivers, and he did not know whether the Access Letter was provided by the 1st defendant to the Receivers.[86]

The Receivers failed to take basic steps for due diligence/independent assessment

158 In respect of the plaintiffs' submission that the Receivers failed to take basic steps for due diligence, the Receivers contend that:

(a) the plaintiffs' suggestion that the Receivers did not review the Security Documents before accepting appointment, was only raised for the first time at trial. In any event, Mr Akhtar confirmed that he had received the Security Documents from the 1st defendant before he was appointed as a receiver;[87]

(b) the plaintiffs' pleaded case never took issue with the formalities of the Notices of Appointment. This was only raised in the midst of trial. Had this been pleaded, the 1st defendant could have produced the relevant documents to respond to any such allegations.[88] In any event, Mr Akhtar confirmed that the Receivers were informed by the 1st defendant that the Notices of Appointment would be signed by authorised signatories. The 1st defendant also confirmed that the signatories on the Notices of Appointment were all authorised signatories. The plaintiffs had the chance to cross-examine Mr Garfield

86 2D3DCS at para 73.

87 2D3DCS at para 60.

88 2D3DCS at paras 63–64.

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on the authority of the persons who signed the Notices of Appointment but chose not to do so;[89] and

(c) the 4 November 2019 Letter does not make a judgment of the merits. It simply said that based on the Notices of Appointment, receivers are duly appointed, and they have to discharge their duties. Neither does the 31 October 2019 duplicate of the 4 November 2019 Letter demonstrate collusion. The Receivers' response was prepared on 31 October 2019 but it was not sent out until Mr Akhtar signed and issued it on 4 November 2019.[90]

159 The Receivers submit that the plaintiffs have not pleaded that the Receivers owe any specific duties to make any inquiries of the 1st defendant as regards the underlying debt. At trial, the plaintiffs confirmed that this is not their case.[91] The Receivers were entitled to rely on the 1st defendant's position that the debt fell due in accordance with the Loan Agreement. It was not for them to question the 1st defendant on matters which fall outside the Receivers' scope of duties. The Receivers submit that as long as a receiver is acting in good faith when exercising the powers vested in him, a receiver is "entitled and indeed obliged to give priority to the interests of the mortgagee" (*ie*, the debenture holder) in securing repayment. Further, the receiver (while acting in good faith) "must" in fact look to the interests of the mortgagee (*ie*, the 1st defendant), even if that causes damage to the mortgagor (*ie*, the plaintiffs).[92]

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89 2D3DCS at paras 65–66.

90 2D3DCS at paras 134–139.

91 2D3DCS at para 56.

92 2D3DCS at paras 101–102.

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The Receivers created misimpressions, inaccuracies and false exaggerations to advance the 1st defendant's interests

160 In respect of the plaintiffs' submission that the Receivers created misimpressions, inaccuracies and false exaggerations to advance the 1st defendant's interests, the Receivers submit the following:

(a) the 23 October 2019 Letter was delivered to the two directors of the plaintiffs and both of them admitted receipt. The directors only submitted the Statement of Affairs after the court's orders in HC/OS 611/2021 were made, and after the trial, on 29 September 2021. Whether the directors received the notices of appointment on 23 October 2019, or a few days later, is beside the point;

(b) both directors did not say that they were misinformed as to the statutory requirements. Their evidence is that they were instructed by Mr Matsuda not to submit the Statement of Affairs and they did not pursuant to those instructions;[93]

(c) there was no conscious intention or attempt to mislead through the Receivers' letters to Nishiki TMK and the Japanese Lenders. Mr Akhtar explained that it was important for the Receivers to understand whether the Japanese banks had any concerns. In any event, Nishiki TMK and the Japanese Lenders were well apprised of the plaintiffs' position. The plaintiffs have not pleaded any prejudice to their credit lines or loss arising from the Receivers' letters to the Japanese Lenders; and

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93 2D3DCS at para 115.

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(d) the Receivers did not misrepresent the extent of their powers. If a receiver is given powers to manage the company's business, that "must be to the exclusion of the directors".[94]

The Receivers made demands and threats that had no basis in law

161 In respect of the plaintiffs' submission that the Receivers made demands and threats that had no basis in law, the Receivers submit the following:

(a) neither Ms Zhang or Mr Horikawa suggested that they were threatened or felt compelled to comply with the Receivers' demands. The onus is on the directors to submit the Statement of Affairs;[95]

(b) the plaintiffs have not pleaded any matters of Japanese law regarding the Receivers' requests to Nishiki TMK and KMC for information nor adduced evidence of such;[96] and

(c) the Receivers had explained that they demanded for the share certificates because they only had sight of the share certificates for the one Singapore dollar share held by NH in each of NRE and NII, but not the shares in Japanese yen.

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94 2D3DCS at paras 121–127.

95 2D3DCS at paras 141–147.

96 2D3DCS at para 150.

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My decision

The Receivers did not fail to take basic steps for due diligence/independent assessment

162 I find that the plaintiffs have not established that the Receivers failed to take basic steps for due diligence or independent assessment.

163 The plaintiffs' case is not that there is no evidence that the Receivers reviewed the Security Documents before accepting appointment, but that there is no *documentary* evidence of such. However, this was never part of their pleaded case. Neither the 1st defendant nor the Receivers had the opportunity to produce the necessary documents to respond to this allegation. The first time the plaintiffs raised it was during the cross-examination of Mr Akhtar, who testified that he did receive the Security Documents from the 1st defendant before being appointed as receiver.[97] I find Mr Akhtar to be a credible witness and accept his evidence on this.

164 Similarly, the plaintiffs' case that there were issues with the formalities of the Notices of Appointment was never pleaded. Neither the 1st defendant nor the Receivers had the opportunity to produce the necessary documents to respond to this allegation. Moreover, it was the evidence of the 1st defendant's Mr Garfield that the Receivers were properly appointed. This was in his AEIC at paras 21–22. It was also his testimony on the stand that all the formalities for appointment of the Receivers were complied with.[98] If the plaintiffs had issues with the specific authority of the persons who signed the Notices of Appointment, they could have asked Mr Garfield when he was on the stand, but they chose not to do so.

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97 NE 20 August 2021 at p 46; NE 24 August 21 at p 107.

98 NE 19 August 2021 at p 79.

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165 The plaintiffs' allegation that the Receivers failed to make sufficient inquiries as to the underlying debt is again, not part of their pleaded case. It is also contrary to a position that they took at trial through their counsel, who stated that the plaintiffs "are not saying that there was a duty on the part of the receivers to go and investigate more".[99] The plaintiffs also accepted that the dispute over the Additional Interest and whether the Loan Agreement should be set aside, were issues between the plaintiffs and the 1st defendant, and the subject matter of the trial.

166 That the Additional Interest was calculated by the 1st defendant on the basis of a draft valuation report does not change this for the Receivers. This is unlike *Batrouney*, which the plaintiffs cited. There, the court held that it was inappropriate for the receivers of a law firm to bring proceedings against Mr Forster, the law firm's former principal, without ascertaining to whom the moneys were due and despite being advised by Deloitte that nothing was owing by Mr Forster to the clients. In this case, the 1st defendant's position as lender, was that the debt was due and quantified on the basis of the draft valuation report, which was done in accordance with the Loan Agreement. The Loan Agreement only requires the Appraiser to make a determination. It does not require a written report or a final report. The 1st defendant had also informed the Receivers that the numbers in the final valuation report would not change,[100] and they did not change. The Receivers were entitled to rely on the instructions by the lender, the 1st defendant. I note that it was open to the plaintiffs to take out any interim relief or injunction to restrain the receivership, but they did not do so for close to two years since the receivership commenced on 18 October 2019.

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99 NE 2 September 2021 at p 6.

100 NE 20 August 2021 pp 52 and 61.

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167 Neither do the correspondence relied on by the plaintiffs show recklessness or collusion on the part of the Receivers. The 4 November 2019 Letter[101] simply states that based on the Notices of Appointment,[102] the Receivers were duly appointed. The Notices of Appointment from the 1st defendant to the Receivers stated, *inter alia*, that the plaintiffs' failure to make payment of the Additional Interest constitutes a breach of obligations entitling the 1st defendant to appoint a Receiver pursuant to Section 5 of the Security. Thus, the 4 November 2019 Letter does not indicate that the Receivers took a position on the Additional Interest or took sides.

168 The 31 October 2019 duplicate of the Receivers' 4 November 2019 Letter also does not demonstrate collusion between them and the 1st defendant. HEP are the solicitors for the 1st defendant. The Receivers were entitled to see HEP's reply to the plaintiffs, which sets out the 1st defendant's position, before issuing their letter to the plaintiffs.

169 Moreover, as set out in Gabriel Moss and Gavin Lightman, *Lightman & Moss on the Law of Administrators and Receivers of Companies* (Sweet & Maxwell, 6th Ed, 2017) ("*Lightman & Moss*") at para 13-008, "provided [the receiver] acts in good faith, when deciding whether and, if so, how to exercise powers vested in him, a receiver is likewise entitled and indeed obliged to give priority to the interests of the mortgagee in securing repayment." The touchstone is thus whether the Receivers acted in good faith. *Lightman & Moss* at para 13-009 to 13-010 also sets out that:

> Breach of the duty of good faith involves something more than negligence or even gross negligence: it requires some

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101 6AB at p 3330.

102 6AB at pp 3068–3070.

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> dishonesty, or improper motive, some element of bad faith, to be established. …
>
> Reckless indifference to the rights or interests of others or shutting one's eyes deliberately to the consequences of one's actions may suffice to establish dishonesty or bad faith. … [I]f the decision lay outside the range which the court thought might be arrived at by a reasonable commercial man, this might provide some evidence that the decision was not taken in good faith.

170 After assessing the plaintiffs' submissions and the evidence, I find that the plaintiffs have not shown that the Receivers did not act in good faith.

The Receivers did not create misimpressions, inaccuracies and false exaggerations, to advance the 1st defendant's interests

171 I find that the plaintiffs have not established that the Receivers created misimpressions, inaccuracies and false exaggerations to advance the 1st defendant's interests.

172 The plaintiffs' case is that the 23 October 2019 Letter wrongly stated that the 14-day period under s 223 of the Companies Act runs from the date of the letter, when the statutory period actually runs 14 days after the company receives the notice of appointment. The 23 October 2019 Letter was only received by Ms Zhang on 24 October 2019. However, it is undisputed that:

(a) The only two directors of the plaintiffs received the notices and one of them, Mr Horikawa, received it by email on the same day of the 23 October 2019 Letter.

(b) The Receivers' staff visited the plaintiffs' premises on the day the notices were issued. No one was in the office. They visited again the next day on 24 October 2019 and Ms Zhang acknowledged receipt.

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(c) Neither Ms Zhang nor Mr Horikawa said that they were at all misled as to the statutory period of filing. Their evidence was that they were instructed by Mr Matsuda not to comply with the requirements to submit the Statement of Affairs. They therefore did not. The Statement of Affairs was only submitted on 29 September 2021 after orders were made in HC/OS 611/2021.

173 I accept Mr Akhtar's evidence that the intent was for delivery of the letter on 23 October 2019 and hence the letter was worded as it was.[103] Taking into consideration all the circumstances, I find no intent on the part of the Receivers to wrongly gain a marginal advantage of an earlier filing by one day, nor was there misimpression created on the part of the plaintiffs.

174 Neither do I find the plaintiffs' emphasis on the Receivers' use of "confirmed" when communicating with Nishiki TMK and the Japanese Lenders, to be persuasive. I do not find that by stating that ACRA had "confirmed" the Receivers' appointment as receivers and that the "record of ACRA makes clear that [the Receivers] have been validly appointed", the Receivers were intending to give the misimpression that ACRA had accepted that a debt was owed by the plaintiffs to the 1st defendant. In any event, the plaintiffs had discussed with Nishiki TMK and the Japanese Lenders after the Receivers sent their letter. The plaintiffs have not pleaded any risk of prejudice to their credit lines, nor have they surfaced evidence of any loss arising from the Receivers' letters to the Japanese Lenders.

175 The plaintiffs also submitted that there was misrepresentation by the Receivers in their letters to UOB and the Japanese Lenders by stating that all

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103 NE 20 August 2021 at p 85.

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the directors' powers over the charged assets now vested in the Receivers rather than in the directors. However, beyond a suggestion that this may have been to prevent the banks from withholding information from the Receivers,[104] the plaintiffs were unable to show how the banks were in any way misinformed arising from this, or what they did as a result of such alleged misrepresentation.

The Receivers did not make demands and threats that had no basis in law

176 I find that the plaintiffs have not established that the Receivers made demands and threats that had no basis in law.

177 The plaintiffs claim that the Receivers should have sought Japanese law advice prior to making requests from Nishiki TMK and KMC. However, they have not pleaded any matters of Japanese law nor adduced any evidence of such.

178 The plaintiffs also claim that there was no evidence that the requirements for liability had been met as the requisite notice had not been served on the plaintiffs.[105] However, as set out above, both directors of the plaintiffs acknowledged receipt of the notice – Mr Horikawa, on the day the letter was dated and Ms Zhang, on the next day (see [172] above). Mr Akhtar's evidence was that the letter was drafted as such because the intent was to serve it on the same day. I do not find this to be a threat to gain a marginal advantage of one day in the filing of the Statement of Affairs.

179 Neither do I find the Receivers' demand for NH's share certificates and share transfer forms to be a threat. I accept the Receivers' explanation that they demanded for the share certificates because they only had sight of the share

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104 PCS2D3D at para 60.

105 PCS2D3D at paras 64 and 43.

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certificates for the one Singapore dollar share held by NH in each of NRE and NII, but not the shares in Japanese yen.

No basis for Adverse Inference

180 I find no basis to draw an adverse inference against the Receivers. The plaintiffs' requests for the SUM 3278 Communications were considered by the AR in SUM 3278. The AR held that the correspondence between the Receivers and the 1st defendant were covered by litigation privilege, while the internal documents sought against the Receivers were covered by litigation privilege and, where applicable, legal advice privilege. I also note that the AR found the plaintiffs' request to be a "fishing expedition". The plaintiffs' appeal was heard by Justice Chua Lee Ming on 4 November 2020 and dismissed. In other words, the documents were not disclosed because the plaintiffs failed in their application for disclosure, including their appeal. Cross-examination on what the court had already found to be privileged in SUM 3278, would not be appropriate.

181 I find that the plaintiffs are in any event, estopped from challenging the disclosure of such documents. I agree with the authorities cited by the Receivers: see *Goh Nellie* and *TMT Asia Ltd*.

182 The plaintiffs rely on *Singapore Civil Procedure* at para 24/5/5, which cites *Banque Cantonale Vaudoise v Fujitrans (Singapore) Pte Lt*d [2007] 1 SLR(R) 570 for the proposition that "[t]here is no question of issue estoppel even where the categories of documents sought in a discovery application mirror or are wider than those unsuccessfully sought in a prior discovery application. An applicant is entitled to a second application for discovery as long as he can show the court *changed circumstances* which warrant the discovery of documents previously denied to him" [emphasis added]. However, the plaintiffs

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have not shown any changed circumstances to warrant a second application. In *Transpac Capital Pte Ltd v Lam Soon (Thailand) Co Ltd* [1999] 3 SLR (R) 454 ("*Transpac Capital*"), the court noted at [26] that while an interlocutory judgment can contain a determination which is final for estoppel purposes, the ultimate question is not so much whether the earlier decision was final or interlocutory, but whether in the circumstances it is reasonable to regard the earlier decision as a final determination of the issue which one of the parties now wishes to raise. The plaintiffs here have not shown that in the circumstances, it is reasonable to regard the earlier decision (including the dismissal of the plaintiffs' appeal by the High Court) as anything other than a final determination.

183 The plaintiffs refer to Mr Tchen's testimony as an example of changed circumstances and how the plaintiffs may have been prejudiced. But Mr Tchen himself confirmed during cross-examination that he has never met or communicated with the Receivers, and that he did not know as a matter of fact whether or not the Access Letter was provided to the Receivers. There is hence no evidence that Mr Akhtar did receive the Access Letter. The plaintiffs did not apply to re-examine any of the 1st defendant's witnesses or Mr Akhtar on this point but chose to leave it as that. In any event, the draft HL China Valuation Report in March 2019 had already contained a disclaimer that it "may not be relied upon by any other person or entity", while the disclaimer against use of the valuation report by the "receivers" is found in the final HL China Valuation Report dated 13 November 2019. These reports were available to the plaintiffs before the trial. If the plaintiffs regarded such a disclaimer as a basis to attack the Receivers' appointment or exercise of their duty, they could have done so on that basis, even without the Access Letter, but they did not.

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Conclusion on alternative claim against Receivers

184 In conclusion, I find no basis to the plaintiffs' alternative claim against the Receivers for failure to discharge their duties in good faith and/or being biased, and hence dismiss their alternative claim against the Receivers.

185 The plaintiffs claim that if the receivership is invalid, the Receivers are liable for trespass and/or wrongful interference. In this case, as found above, the Receivers were entitled to regard the receivership as valid at the point of appointment, and the plaintiffs have not shown that the Receivers failed to discharge their duties in good faith or were biased. Consequently, the plaintiffs have not established that the Receivers did trespass or engaged in wrongful interference. The Receivers also submit that the plaintiffs have not pleaded any alleged loss. Owing to the plaintiffs' obstructive behaviour, the Receivers have not even been able to take any meaningful possession over the charged assets and could not have caused loss. To the extent that the Receivers exercised any powers pursuant to the directions granted in HC/OS 611/2021, such powers would be exercised to preserve the charged assets and would not cause any loss to the Plaintiffs. I agree with the Receivers that the plaintiffs have not pleaded what loss they would suffer arising from the Receivership nor shown evidence of any such loss. I dismiss the plaintiffs' claim for damages against the Receivers.

186 The plaintiffs also sought an order for the Receivers to provide an account of all transactions conducted by the Receivers in relation to the plaintiffs' assets and/or interests, as well as an Order that the Receivers jointly and severally forthwith deliver up and/or transfer possession and/or title and/or ownership of the plaintiffs' assets and/or interests and/or the traceable proceeds

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of the same. As neither party has submitted on this, I will hear further submissions on the consequential orders sought.

Conclusion

187 In conclusion, the appointment of HL China as Appraiser and the HL China Valuation Report is set aside. The appointment of the Receivers is consequently invalid and void.

188 I will hear parties on costs and any consequential orders.

Kwek Mean Luck
Judicial Commissioner

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