Tjong Very Sumito and others
v
Chan Sing En and others

[2012] SGHC 125

High Court — Suit No 89 of 2010
Steven Chong J
16–20, 25–27, 30, 31 January; 15–17, 20–24 February; 26 March; 29 May; 21 June 2012

Companies — *Incorporation of companies — Lifting of corporate veil —* Alter ego *principle*

Contract — *Duress — Economic — Whether illegitimate pressure might be exerted by non-contracting party*

Credit and Security — *Guarantees and indemnities — Construction — Principle of co-extensiveness*

Evidence — *Proof of evidence — Standard of proof — Allegation of forgery — Evidence of handwriting expert*

Restitution — *Unjust enrichment — Money had and received — Whether benefit gained at plaintiff's expense*

Tort — *Conspiracy — Unlawful means conspiracy — Proof of loss suffered*

Tort — *Conversion —* Locus standi — *Right to immediate possession — Whether bailment and agency relationships confer standing to sue on bailor and principal*

Tort — *Conversion — Subject matter — Whether scripless shares capable of being converted*

Tort — *Misrepresentation — Fraudulent misrepresentation — Inducement — Proof of loss suffered*

Trusts — *Resulting trusts — Sale-and-purchase context — Whether* Lysaght v Edwards *principle applied in vendor's favour*

Facts

This case involved two separate sets of claims relating to the sale of shares in two Indonesian companies, PT Deefu and PT Batubara. The prime mover of these transactions was the first defendant ("Richard Chan"), who was the director of two related companies, the tenth defendant ("MEGL") and the 11th defendant ("Antig").

The first set of claims concerned the sale of 72% of PT Deefu's shares for US$18m under a set of main and supplemental agreements (collectively, "the 1st SPA"). The three plaintiffs were the vendors under the 1st SPA, and the purchaser was Antig. Clause 4.02(2) of the 1st SPA ("Clause 4.02(2)") required US$12.25m to be paid by way of cash ("Cash Component") and the remaining US$5.75m to be paid by way of allotments of MEGL shares ("Shares Component"). Of the US$12.25m Cash Component, US$6m was to be paid

directly to the 1st plaintiff ("Tjong"), while US$5.7m and US$550,000 were to be paid to the second defendant ("Aventi") and the fourth defendant ("OAFL") respectively. The Shares Component was also to be received by Aventi and OAFL. Under Clause 4.02(2), Aventi and OAFL were "authorised to receive" these payments and share allotments "for and on behalf of" the plaintiffs. On a plain reading, Clause 4.02(2) entitled them to *receive* these payments and share allotments, but did not allow them to *retain* the same for their own benefit.

At the time these proceedings were commenced, the plaintiffs had only received US$5,528,772 out of the US$18m purchase price due to them under the 1st SPA. It also transpired that Aventi and OAFL had, without the plaintiffs' authority, sold the MEGL shares received by them. OAFL also sought to assert beneficial entitlement over the sums paid to it under the Cash Component. Further, the evidence showed that various sums had been paid to the fifth defendant ("Alwie"), who controlled OAFL, and the sixth defendant ("Susiana"), who was Alwie's wife. The plaintiffs sought to recover the value of these various payments and share allotments based on the principles of money had and received, resulting trust, conversion, fraudulent misrepresentation and unlawful means conspiracy. They also brought a separate claim against Richard Chan based upon a document under which he personally guaranteed the full payment of US$18m to Tjong "not through OAFL and Aventi" ("the Guarantee Claim").

The second set of claims related to two further agreements, the 2nd and 3rd SPAs, which, respectively, concerned the sale of 5% of PT Batubara's shares and 28% of the PT Deefu's shares (collectively, "the Remaining Shares"). Tjong was the vendor under the 2nd and 3rd SPAs, and the purchasers were, respectively, the seventh defendant ("Jake") and the eighth defendant ("AAML"), which was controlled by the ninth defendant ("Edwin").

Tjong argued that the Remaining Shares were sold at an undervalue, and brought three claims in this connection. First, he argued that he had executed the 2nd and 3rd SPAs under duress exerted by Richard Chan, who had threatened to otherwise withhold payment of the balance purchase price under the 1st SPA ("the duress claim"). Second, Tjong claimed that he was induced to execute the 2nd and 3rd SPAs by fraudulent misrepresentation made by Richard Chan to the effect that Tjong would be paid the balance purchase price under the 1st SPA if he sold the Remaining Shares. Third, Tjong claimed that Richard Chan, MEGL, Antig, Jake, AAML and Edwin conspired to induce him to sell the Remaining Shares at an undervalue via the alleged duress and/or fraudulent misrepresentation.

Held, allowing the claims against the first, second, fourth, fifth and sixth defendants, and dismissing the claims against the seventh, eighth and ninth defendants:

Lifting of the corporate veil

(1) Courts would pierce the corporate veil where the controller of the company was found to have used the company as an extension of himself and have made no distinction between its business and his own. OAFL's corporate veil was pierced *vis-à-vis* Alwie as the evidence showed that OAFL was the *alter ego* of Alwie.

Money had and received

(2) A claimant bringing a money had and received claim had to show that (a) the defendant had received a benefit (*ie*, the defendant had been enriched); (b) the defendant's enrichment was at the claimant expense; (c) it was unjust to allow the defendant to retain the enrichment, such unjust factor being specifically identifiable on the facts; and (d) there were no defences available to the defendant: at [81] and [94].

(3) While the evidence showed that OAFL, Alwie and Susiana beneficially received the sums of US$550,000, S$334,429.20 and US$157,525 respectively, there was no evidence showing that the sum of US$5.7m was received by Aventi. The plaintiffs' money had and received claim *vis-à-vis* Aventi for the refund of US$5.7m therefore failed: at [78], [79], [84] and [90].

(4) The test for whether the defendant's enrichment had been at the claimant's expense depended on whether the claimant was pursuing a personal or proprietary restitutionary claim. While a claimant seeking a proprietary restitutionary remedy had to establish some proprietary link to the money claimed via rules of following and tracing, a claimant seeking a personal restitutionary remedy had to show that he had suffered a loss sufficiently linked to the defendant's gain. Based on the plaintiffs' pleaded case, they were seeking both such remedies: at [85] and [86].

(5) The plaintiffs' proprietary restitutionary claim wholly failed as the PT Deefu shares could not be traced into the payments made by Antig to OAFL, Alwie and Susiana; there was no evidence that these payments came from the sale of the PT Deefu shares or were in any way obtained by Antig through dealing with the PT Deefu shares: at [87].

(6) The plaintiffs' personal restitutionary claim also failed in relation to the sums of S$334,429.20 and US$157,525 received by Alwie and Susiana as there was no nexus between such gains by Alwie and Susiana, and the plaintiffs' loss. These sums were paid out of the portion of the Cash Component which was directly receivable by the plaintiffs, *ie*, not in accordance with Antig's payment obligations under Clause 4.02(2). As the plaintiffs' recourse against Antig remained alive in relation to these sums, the gains by Alwie and Susiana could not be said to have been at the plaintiffs' expense: at [90] to [92] .

(7) Nevertheless, the plaintiffs succeeded in their personal restitutionary claim in relation to the US$550,000 received by OAFL. Antig's payment of this sum simultaneously conferred a benefit on OAFL and extinguished the plaintiffs' right of recourse against Antig, *ie*, OAFL's gain was at the plaintiffs' expense. OAFL's retention of the US$550,000 without the authority to do so constituted the unjust factor justifying the disgorgement of such sum from OAFL. Further, OAFL and/or Alwie had not pleaded any defence to unjust enrichment: at [93] and [120] to [122].

(8) Based on a plain reading of Clause 4.02(2), which expressly stated that the entire purchase price was "due to" the plaintiffs, and that Aventi and OAFL were only meant to hold the payments and the MEGL shares "for and on behalf of" the plaintiffs, OAFL was authorised to *receive* the sum of US$550,000, but was not entitled to *retain* the same for its personal benefit. This plain reading of

Clause 4.02(2) was supported by the objective evidence before the court: at [95], [96], [98], [103] and [106] to [120].

(9) The contextual approach in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich*") was not a *carte blanche* route to the admission of any and all extrinsic evidence to aid a party's interpretation of a contract. A party wishing for the court to depart from the plain language of a contract had to satisfy the court that the factual context which he sought to rely on was clear and obvious: at [97] and [98].

(10) Alwie failed to invoke the *Zurich* contextual approach to contradict the plain language of Clause 4.02(2). First, there were scant details of the events surrounding the execution of the 4th Supplemental which introduced Clause 4.02(2) in its present form. Second, and more crucially, Alwie sought to rely on three vastly different factual matrices, which he asserted, constituted the factual context of the 1st SPA entitling him to retain the payments received by him, *ie*, the factual context was far from "clear and obvious": at [99] to [102].

Resulting trust

(11) Traditionally, in a vendor-purchaser relationship, beneficial interest in the object of sale vested in the purchaser upon execution of a valid contract of sale. This vesting of beneficial interest operated unilaterally – while beneficial interest of the property was vested in the purchaser, beneficial interest in the purchase money did not simultaneously vest in the vendor. The vendor's entitlement to the purchase money was instead protected by a vendor's lien over the property.

(12) On the facts, the plaintiffs were not in a traditional vendor-purchaser trust situation; the plaintiffs were the vendors of the PT Deefu shares and not the "purchasers" of the payments and MEGL shares. The principle in *Lysaght v Edwards* therefore did not apply in the plaintiffs' favour.

(13) As the plaintiffs never had the beneficial interest in the payments and the MEGL shares at the time when the PT Deefu shares were sold under the 1st SPA, their invocation of the resulting trust doctrine was therefore flawed; since the resulting trust doctrine did not effect, but gave effect to, the beneficiary's equitable interest, allowing the plaintiffs' resulting trust claim would have put the equitable cart before the proprietary horse.

Conversion

(14) To establish *locus standi* to sue for conversion, the plaintiffs had to show that they had, at the material time, either actual possession or a right to immediate possession of the MEGL shares. Having title to the property concerned did not necessarily mean having a right to immediate possession, and hence, a right to sue for conversion. Similarly, a person who merely had an equitable right in the property without possession would not have standing to sue for conversion: at [135] and [137].

(15) On the facts, the plaintiffs never had actual possession of the MEGL shares because the shares were issued by MEGL directly to Aventi and OAFL. Nevertheless, they acquired a right to immediate possession of the MEGL shares when the MEGL shares were sold by Aventi and OAFL, which were holding the same as bailees and agents of the plaintiffs: at [139].

(16) A bailment relation was founded exclusively on a person's voluntary possession of goods which belonged to another. On the facts, Aventi and OAFL voluntarily took possession of the MEGL shares. Although there was no clause in the 1st SPA entitling the plaintiffs to determine the bailment, under the common law, a bailment was terminated and the right of possession to the bailed property re-vested in the bailor if the bailee behaved in a manner that was utterly repugnant to the terms of the bailment. Aventi and OAFL, as bailees of the MEGL shares, acted in a manner utterly repugnant to the terms of the bailment when they sold the MEGL shares. The right to immediate possession of the MEGL shares thereby re-vested in the plaintiffs, conferring on them the legal standing to sue for conversion: at [141] to [143].

(17) The two core elements of an agency relationship were (a) consent of both the principal and agent; and (b) authority conferred or power granted to the agent to legally bind the principal. On the facts, the phrase "for and on behalf of the [plaintiffs]" in Clause 4.02(2) signalled the plaintiffs' consent to appoint Aventi and OAFL as their agents to receive the payments and the MEGL shares. Aventi and OAFL, in receiving the payments and the MEGL shares on behalf of the plaintiffs, had a duty to account to the plaintiffs qua agents and had to hand over such property on demand: at [145] and [149].

(18) Where the agent was still in possession of the property on behalf of the principal, the conversion was consummated when the agent refused to hand over possession on demand by the principal. However, where the agent had sold the property without authority, the sale in itself constituted the act of conversion. In that situation, a prior demand was irrelevant: at [150].

(19) On the facts, the MEGL shares held by Aventi and OAFL as agents of the plaintiffs were expressly stated to be due to the plaintiffs. The plaintiffs thus had a right to immediate possession of the MEGL shares from the moment they were allotted to and received by Aventi and OAFL "for and on behalf of" the plaintiffs, or, at least, when they were sold: at [154].

(20) The facts showed that there had been (a) deliberate conduct on the part of Aventi and OAFL which was inconsistent with the plaintiffs' possessory rights; and (b) such conduct was so extensive an encroachment on the plaintiffs' rights as to exclude them from use and possession of the MEGL shares. Aventi and OAFL, who were to hold the shares for and on behalf of the plaintiffs, had, by withholding and selling the shares, clearly acted inconsistently with the plaintiffs' rights: at [135], [136] and [158].

(21) While it remained an open question in Singapore whether intangible property could form the subject matter of conversion, the law was fairly settled that corporeal objects representing the value of intangible property, such as cheques and share certificates could be subject matters for a claim in conversion: at [156].

(22) The scripless nature of the MEGL shares did not render them any less capable of being converted. Although the MEGL shares were scripless, they were essentially scripless only for the purposes of trading, and were still represented by physical share certificates: at [155] and [157].

Fraudulent misrepresentation

(23) The elements of an action in fraudulent misrepresentation were as follows: (a) there had to be a representation of fact made by the defendant by words or conduct; (b) the representation had to have been made with the intention that it should be acted upon by the plaintiff, or by a class of persons including the plaintiff; (c) the plaintiff had to have acted upon the representation; (d) the plaintiff had to have suffered damage by so doing; and (e) the representation had to have been made with the knowledge that it was false, or at least, in the absence of any genuine belief that it was true.

(24) On the facts, the plaintiffs' fraudulent misrepresentation in relation to the 1st SPA failed for want of reliance since, *inter alia*, (a) they never knew of the existence of some of the relevant representations until the commencement of the present action; and (b) the rest of the representations were made after the 1st SPA was signed by them. Even if inducement had been established, the plaintiffs had not succeeded in proving their loss.

(25) Tjong nevertheless succeeded in his fraudulent misrepresentation claim in relation to the 2nd and 3rd SPAs. The relevant representation was clearly made to be acted upon by Tjong, and had obviously been made fraudulently by Richard Chan who knew of its false nature at the time of its making. It was also a significant factor inducing Tjong to act as he did, and had resulted in Tjong suffering losses when he sold the Remaining Shares at an undervalue.

Unlawful means conspiracy

(26) A conspiracy by unlawful means was constituted when two or more persons combined to commit an unlawful act with the intention of injuring or damaging the plaintiff. The act had to have been carried out and the intention achieved.

(27) The failure of the plaintiffs' fraudulent misrepresentation claim in relation to the 1st SPA was fatal to their unlawful means conspiracy claim against the first to sixth defendants, which was parasitic upon the fraudulent misrepresentation claim.

(28) The failure of the plaintiffs' duress claim in relation to the 2nd and 3rd SPAs was fatal to their unlawful means conspiracy claim against the seventh to ninth defendants.

The guarantee

(29) Due to the gravity of an allegation of fraud and forgery, courts required more compelling evidence than that which was sufficient to "tilt the balance". This high standard of proof was not met on the facts.

(30) The state of evidence was insufficient to ground a finding that the guarantee was forged. The handwriting expert report produced by Richard Chan did not support of his allegation of forgery. First, the expert conceded that it was highly probable that the signature on the guarantee was written in original form by the writer of the specimen signatures attributed to Richard Chan. Second, the expert's alternative suggestion that the text of the document had been superimposed on another document bearing Richard Chan's genuine signature was (a) not pleaded; and (b) made without the benefit of inspecting the original

document despite the veracity of such theory being heavily dependent upon an inspection of the original document.

(31) Apart from Richard Chan's failure to positively prove forgery by relying on the expert's evidence, the objective evidence also supported the plaintiffs' position that the guarantee had indeed been executed by Richard Chan.

(32) It was fairly settled that the performance of, or a promise to perform, an existing contractual obligation to a third party afforded sufficient consideration. As such, the fact that the consideration provided to Richard Chan under the guarantee was a pre-existing obligation owed by Tjong to Antig did not render the guarantee unenforceable.

(33) Whether a surety contract was a guarantee or indemnity was a question of substance to be construed based on its wording and in light of the parties' intentions. The key difference between a guarantee and indemnity was that, while a guarantor's liability was collateral to and dependent upon the liability and default of the principal debtor, an indemnifier's liability was original and independent.

(34) The purported guarantee was, on its true construction, an indemnity. By the phrase "not through OAFL and Aventi", Richard Chan undertook to pay Tjong the full US$18m purchase price under the 1st SPA regardless of the fact that Antig was only obliged to pay US$6m directly to Tjong under the 1st SPA. Richard Chan was therefore liable for the balance purchase price not yet received by the plaintiffs.

Economic duress

(35) There were two elements to constitute duress, *viz*, (a) the exertion of illegitimate pressure; and (b) such pressure amounting to the compulsion of the victim's will. On the facts, the threats were deliberately made by Richard Chan to exploit Tjong's weak financial position with a view to procuring the Remaining Shares at an undervalue – an advantage which was completely unrelated to the 1st SPA; this was not a case where the defendants had simply used their commercial muscle to extract an attractive bargain for themselves: at [245] to [247], [255] and [257].

(36) The duress claim nevertheless failed as there was no compulsion of Tjong's will at the material time since, *inter alia*, Tjong failed to take steps to avoid the transactions under the 2nd and 3rd SPAs for a period of about 30 months, and had an alternative recourse to obtaining the full US$18m by way of the guarantee, which he extracted from Richard Chan: at [248], [262] and [266].

[Observation: While duress claims were generally made where illegitimate pressure was exerted by one contracting party on the other, a contract might sometimes be set aside on the ground of duress exerted by someone who was, strictly-speaking, a third party to the contract, *eg*, where the other contracting party knew of the duress, had constructive notice of it, or had procured the making of the contract through the agency of the party who exercised the duress: at [243] and [269].

In this case, a direct claim of duress could have been brought against Jake, AAML and Edwin had it been shown that Richard Chan was their agent.

However, the plaintiffs' case was that Jake, AAML and Edwin were the nominees of MEGL/Antig/Richard Chan in relation to the purchase of the Remaining Shares. The duress claim against Jake, AAML and Edwin was therefore indirect and dependent upon establishing a conspiracy to procure the Remaining Shares via duress, which was not made out on the facts.]

Case(s) referred to

B & S Contracts and Design Ltd v Victor Green Publications Ltd [1984] ICR 419 (distd)

BBMB Finance (Hong Kong) Ltd v Eda Holdings Ltd [1990] 1 WLR 409 (folld)

Blaustein v Maltz, Mitchell and Co [1937] 2 KB 142 (folld)

Bute (Marquess) v Barclays Bank Ld [1955] 1 QB 202 (folld)

CTN Cash and Carry Ltd v Gallaher Ltd [1994] 4 All ER 714 (distd)

Chartered Electronics Industries Pte Ltd v Comtech IT Pte Ltd [1998] 2 SLR(R) 1010; [1998] 3 SLR 502 (folld)

Cycle & Carriage Motor Dealer Pte Ltd v Hong Leong Finance Ltd [2005] 1 SLR(R) 458; [2005] 1 SLR 458 (refd)

E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd [2011] 2 SLR 232 (distd)

Edgell v Day (1865) LR 1 CP 80 (folld)

EG Tan & Co (Pte) v Lim & Tan (Pte) [1985–1986] SLR(R) 1081; [1986] SLR 489 (refd)

Foskett v McKeown [2001] 1 AC 102 (folld)

Garnac Grain Co Inc v H M F Faure & Fairclough Ltd [1968] AC 1130 (folld)

Halpern v Halpern [2006] EWHC 603 (Comm) (refd)

Kesarmal s/o Letchman Das v N K V Valliappa Chettiar s/o Nagappa Chettiar [1954] 1 WLR 380 (refd)

Kleinwort Benson Ltd v Birmingham City Council [1997] QB 380; [1996] 4 All ER 733 (folld)

Lipkin Gorman (a firm) v Karpnale Ltd [1991] 2 AC 548 (folld)

MCC Proceeds Inc v Lehman Bros International (Europe) [1998] 4 All ER 675 (refd)

Nickolson v Knowles (1820) 5 Madd 47; 56 ER 812 (folld)

North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd [1979] QB 705 (folld)

Pao On v Lau Yiu Long [1980] AC 614 (folld)

Seagate Technology Pte Ltd v Goh Han Kim [1994] 3 SLR(R) 836; [1995] 1 SLR 17 (refd)

Sharon Global Solutions Pte Ltd v LG International (Singapore) Pte Ltd [2001] 2 SLR(R) 233; [2001] 3 SLR 368 (distd)

Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd [2011] 3 SLR 540 (refd)

Star Cruise Services Ltd v Overseas Union Bank Ltd [1999] 2 SLR(R) 183; [1999] 3 SLR 412 (folld)

Tam Tak Chuen v Khairul bin Abdul Rahman [2009] 2 SLR(R) 240; [2009] 2 SLR 240 (folld)

Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd [2009] 4 SLR(R) 1101; [2009] 4 SLR 1101 (folld)

Third World Development Ltd v Atang Latief [1990] 1 SLR(R) 96; [1990] SLR 20 (folld)

Union Transport Finance Ltd v British Car Auctions Ltd [1978] 2 All ER 385 (folld)

Universe Tankships Inc of Monrovia v International Transport Workers Federation [1983] 1 AC 366 (folld)

Uren v First National Home Finance Ltd [2005] EWHC 2529 (Ch) (folld)

Win Line (UK) Ltd v Masterpart (Singapore) Pte Ltd [1999] 2 SLR(R) 24; [2000] 2 SLR 98 (refd)

Woolwich Equitable Building Society v IRC [1993] AC 70 (folld)

Yeow Chern Lean v Neo Kok Eng [2009] 3 SLR(R) 1131; [2009] 3 SLR 1131 (refd)

Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd [2008] 3 SLR(R) 1029; [2008] 3 SLR 1029 (refd)

Legislation referred to

Companies Act (Cap 50, 2006 Rev Ed) ss 130A, 130C

Gabriel Peter, Tan Sia Khoon Kelvin David, Ong Pang Yew Shannon (Gabriel Law Corporation) for the first and second plaintiffs;
Nicholas Jeyaraj s/o Narayanan (Nicholas & Tan Partnership LLP) for the first defendant;
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Ong Su Aun Jeffrey (JLC Advisors LLP) for the seventh to ninth defendants.

[Editorial note: The first defendant's appeal to this decision in Civil Appeal No 83 of 2012 and the fifth defendant's appeal in Civil Appeal No 82 of 2012 are scheduled for hearing by the Court of Appeal in the week beginning 26 November 2012.]

21 June 2012 Judgment reserved.

Steven Chong J:

[Editorial note: Paragraphs 1–303 are summarised in the headnote, while paras 78–122, 135–161, 243–272 and 298–303 (summarised in the headnote at holdings (2)–(10), (14)–(22) and (35)–(36)) are reported below in full.

The "Case(s) referred to" and "Legislation referred to" in the headnote list the cases and legislation which are referred to in the paragraphs reported below.

The complete text of the unreported version of the judgment ([2012] SGHC 125) is available on LawNet.]

…

Money had and received

78 The plaintiffs claim that the following defendants have received from Antig the various sums listed below, and seek to recover them as money had and received:

(a) as against Richard Chan and/or Alwie, the sum of $334,429.20, which was part of the US$6m to be directly received by the plaintiffs under Clause 4.02(2);

(b) as against Aventi, the sum of US$5.7m, which was to be received by Aventi for and on behalf of the plaintiffs under Clause 4.02(2);

(c) as against OAFL and/or Alwie, the sum of US$550,000, which was to be received by OAFL for and on behalf of the plaintiffs under Clause 4.02(2); and

(d) as against Susiana, the sum of US$157,525, which was part of the US$6m to be directly received by the plaintiffs under Clause 4.02(2).

As explained (at [45] above), the plaintiffs have not proved that Aventi received the US$5.7m under head (b). I have also found that the sum of $334,429.20 under head (a) was received by Alwie, and not Richard Chan (see [90] below). Hence, the plaintiffs' claim for money had and received can only proceed against OAFL, Alwie and Susiana under heads (a), (c) and (d). I shall refer to the sums under heads (a), (c) and (d) as "the payments".

79 Alwie claims that OAFL was entitled to retain the payments under the 1st SPA. Although various un-pleaded defences were raised at the injunction hearing and at the trial, Alwie relies solely on the terms of the 1st SPA in his pleadings. In particular, he relies on Clause 4.02(2) to justify OAFL's purported entitlement to retain the payments it received. This solitary basis was confirmed by Alwie in cross-examination, as well as by his counsel, Mr Murugaiyan. The proper construction of Clause 4.02(2), as will be discussed (at [96] to [104]), naturally becomes pivotal to the defence of OAFL and/or Alwie. As for Susiana, Alwie accepts that she did receive the sum of US$157,525 on his behalf as part of his commission as well as the return of his personal loan to Tjong (see [51] above).

80 I shall first discuss the relevant principles of unjust enrichment so that the facts can be examined in their proper perspective. For completeness, I will also consider the various un-pleaded defences separately below as they have a material bearing on the credibility of some of the witnesses.

The law

81 A claim of money had and received is part of the wider body of the law of unjust enrichment (*Star Cruise Services Ltd v Overseas Union Bank Ltd* [1999] 2 SLR(R) 183 at [120]), provided the following conditions are satisfied:

(a) the defendant has received a benefit (*ie*, he has been enriched);

(b) the enrichment is at the plaintiff's expense;

(c) it is unjust to allow the defendant to retain the enrichment; and

(d) there are no defences available to the defendant.

(See also *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2011] 3 SLR 540 at [110].)

82 As a preliminary matter, I will first deal with the argument raised by Mr Murugaiyan, that the claim in unjust enrichment is premised on a "waiver of the tort" and therefore, if the plaintiffs "failed to establish a tort (*ie*, conversion) [their] claim in restitution also fails". In making this submission, Mr Murugaiyan relied on the Court of Appeal case of *Yeow Chern Lean v Neo Kok Eng* [2009] 3 SLR(R) 1131 ("*Yeow Chern Lean*").

83 I am not persuaded by the argument that the claim in unjust enrichment is contingent, or parasitic, upon the claim in conversion. In the first place, the two claims *relate to different subject matter and different defendants*. The claim in unjust enrichment relates only to the *money payments* allegedly wrongfully received by Richard Chan, Aventi (although I found no evidence of Aventi receiving the payments), OAFL, Alwie and Susiana. The claim in conversion relates only to the *MEGL shares* allegedly wrongfully received by Aventi, Johanes, OAFL and Alwie. They are two *entirely different and separate* claims and causes of action, which do not overlap whatsoever. In contradistinction, in *Yeow Chern Lean*, the claim in moneys had and received was brought in the alternative to a claim in conversion for identical subject matter: two cheques, allegedly misappropriated. In that situation, the claim in restitution functioned only as a *remedy*, and not a substantive cause of action as in the case here. As the Court of Appeal clearly stated (at [52]):

> … The House of Lords has made it clear in *United Australia v Barclays Bank Ltd* [1941] 1 AC 1 that *the 'waiver' was really an election to take a gain-based rather than loss-based award for the tort.* In the absence of the tort, this claim in restitution fails. … [emphasis added]

Receipt of benefit at the plaintiffs' expense

84 Turning to the first element, it seems clear to me that OAFL, Alwie and Susiana have benefitted from the receipt of the payments from Antig through MEGL. The payments are clearly valuable, financially

quantifiable, and were not received by them as an incidental benefit or ministerially as agents (*Seagate Technology Pte Ltd v Goh Han Kim* [1994] 3 SLR(R) 836 at [26]).

85 The next question to be determined is whether the benefit of the payments was *at the plaintiffs' expense*. The test for this depends on whether the plaintiffs are seeking a personal or proprietary restitutionary claim. A personal claim in unjust enrichment is a claim for a personal restitutionary remedy, *ie*, a claim that the defendant should pay the claimant a sum of money corresponding to the value of a benefit that he unjustly received at the claimant's expense. On the other hand, a proprietary claim in unjust enrichment is a claim for a proprietary restitutionary remedy, *ie*, a declaration that the claimant has title to the property owned by the defendant, accompanied by whatever order is needed to enable the claimant to realise his proprietary right (see Goff & Jones, *The Law of Unjust Enrichment*, (Sweet & Maxwell, 8th Ed, 2011) ("*Goff & Jones*") at paras 7-01 and 7-02).

86 While a claimant seeking a proprietary restitutionary remedy must establish some proprietary link to the money claimed via rules of following and tracing (*Foskett v McKeown* [2001] 1 AC 102 ("*Foskett*") at 130), a claimant seeking a personal restitutionary remedy must show that he has suffered a loss sufficiently linked to the defendant's gain. The plaintiffs seem to have pleaded both a personal as well as a proprietary restitutionary claim; they have pleaded that the first to sixth defendants have been unjustly enriched and are holding the said property under a constructive trust (*ie*, a proprietary restitutionary claim premised on establishing the plaintiffs' proprietary interest in the payments and/or the MEGL shares transferred to the first to sixth defendants) and, also, that the share purchase price paid out to the first to sixth defendants are payable under an action for money had and received (*ie*, a personal restitutionary claim since the plaintiffs are demanding that the defendants personally account for those sums).

87 To succeed in their proprietary restitutionary claim, the plaintiffs must be able to trace their PT Deefu shares to the payments transferred to OAFL, Alwie and Susiana. Tracing is the process of identifying a new asset as the substitute for the old, and has its basis in property law rather than the law of unjust enrichment (*Foskett* at 127–128). A plaintiff seeking a proprietary restitutionary remedy must thus show how his proprietary rights in the original asset have been converted into proprietary rights in the substituted property. I find that the plaintiffs' PT Deefu shares cannot be traced into the payments paid out by Antig to OAFL, Alwie and Susiana. There is no evidence that these payments came from the sale of the PT Deefu shares or were in any way obtained by Antig through dealing with the PT Deefu shares. These funds were instead MEGL's reserves which were used to pay for the PT Deefu shares. This

being the case, it cannot be said that title in the PT Deefu shares were converted into proprietary rights in the payments, and the plaintiffs' proprietary restitutionary claim must, accordingly, fail.

88 As regards the plaintiffs' personal restitutionary claim, the nexus between the plaintiffs' loss and the defendants' gain is easily established in a two-party case once it is shown that the plaintiff had transferred property to the defendant under circumstances resulting in the defendant being unjustly enriched. It has been observed that the complexion of the case changes in a multiple-party setting, where the question is, as *Goff & Jones* describes at para 6-52:

> [W]hether [the claimant] can show that [the defendant's] enrichment was at [the claimant's] expense, where [a third party] has conferred a benefit on [the defendant] that was destined for [the claimant], and that would have accrued to [the claimant] but for [the defendant's] interceptive receipt.

89 Even though the present case features three parties, the basic principle that there must be a nexus between the plaintiffs' loss and the gain by OAFL, Alwie and Susiana nevertheless applies.

90 On the present facts, the analysis proceeds on two tracks. First, the sums of S$334,429.20 and US$157,525 received by Alwie and Susiana respectively, which were sums paid out of US$6m of the Cash Component, were directly receivable by the plaintiffs under Clause 4.02(2). The plaintiffs say that on the completion day of the 1st SPA, *ie*, 13 June 2006, Richard Chan/MEGL had prepared a cheque for S$334,429.20 (which was equivalent to US$210,000 at the material time) made out to Coutts Bank in Singapore. This payment was therefore not strictly in compliance with Clause 4.02(2). He caused Tjong to sign on the photocopy of the cheque so as to make it appear that Tjong had received the cheque. The plaintiffs say that, without authority from Tjong, Richard Chan kept the cheque for himself and/or gave it Alwie. In his defence, Alwie admits that he (not OAFL) did receive the cheque for the sum of S$334,429.20 issued to Coutts Bank as part of a "commission" due to him for brokering the sale of the shares to Antig. In the course of the trial, he produced documents showing that the cheque for S$334,429.20 was indeed paid into a Coutts Bank account held by OAFL but beneficially owned by Alwie himself. According to Alwie, Tjong had offered him a finder's fee of US$340,000 if he could find a buyer for the mine concession owned by PT Batubara. There is no agreement recording the amount of commission, the conditions upon which it would be paid, and how it would be paid. Alwie was not even able to identify the date on which the alleged commission agreement was concluded. He prevaricated as to whether the agreement was reached *before* or *during* the negotiations of the 1st SPA. In the premises, there is no evidence that Alwie is entitled to the commission/finder's fee. That finding establishes that Tjong did not agree to the payment, thereby supporting my conclusion that Antig's

payment of S$334,429.20 was not in accordance with Tjong's instructions and/or Clause 4.02(2).

91 The plaintiffs also claim that the sum of US$157,525 was paid to Susiana without their authority. Further, Tjong claims that he does not owe Susiana any money and there was no reason to have paid her the sum of US$157,525. Susiana claims that the payment of US$157,525 to her was on account of Alwie's entitlement to commission and his personal loan to Tjong. Not only was there no evidence to support the commission, there is equally no evidence to support the existence of this personal loan. This, again, corroborates my finding that the payment of US$157,525 to Susiana was not in accordance with Tjong's instructions and/or Clause 4.02(2).

92 It would appear that the plaintiffs, in advancing the argument that Alwie and/or Susiana were not entitled to receive the two sums, did not appreciate that such an argument would in effect undermine their own case for money had and received in relation to those two sums. This is because, by the plaintiffs' own case, Antig acted contrary to Clause 4.02(2) by paying out the sums of S$334,429.20 and US$157,525 to Alwie and Susiana respectively. Further, Tjong did not agree to these two payments. The gains of S$334,429.20 and US$157,525 by Alwie and Susiana were therefore not at the expense of the plaintiffs, given that their recourse against Antig *vis-à-vis* the two sums remained alive. On this premise, the plaintiffs' claim for money had and received in relation to the sums of S$334,429.20 and US$157,525 cannot succeed.

93 Second, unlike the two sums of S$334,429.20 and US$157,525, Antig was contractually obliged to pay US$550,000 to OAFL under Clause 4.02(2). Although OAFL was entitled to receive it "for and on behalf of" the plaintiffs, OAFL is not entitled to *retain* the same (see [96] to [119] below). Given that Antig has discharged its obligation *vis-à-vis* the US$550,000 under Clause 4.02(2), the plaintiffs have lost their contractual recourse as against Antig in relation to that sum. Concommitantly, OAFL has received the payments pursuant to Clause 4.02(2). In other words, the nexus has been constituted by Antig's performance of its obligation under Clause 4.02(2), which simultaneously extinguished the plaintiffs' right of recourse against Antig and conferred a benefit upon OAFL. This is akin to a situation where money due to a claimant has been transferred by a third party to the claimant's authorised agent (see, for example, *Asher v Wallis* (1707) 88 ER 956 (QB)). This leaves the court with the issue of whether the requirement of an unjust factor has been made out by the plaintiffs *vis-à-vis* the receipt by OAFL of US$550,000.

Unjust factor

94 Having found that OAFL's receipt of US$550,000 was at the plaintiffs' expense, what is the unjust factor? The approach taken by our courts, as well as the courts in England, requires the identification of a *specific* unjust factor to justify disgorging a defendant of his benefit. There is, as yet, no *general* principle giving a claimant a right of recovery from a defendant who has been unjustly enriched at the claimant's expense (*Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 at 196–197 *per* Lord Browne-Wilkinson), and the courts do not have "a discretionary power to order repayment whenever it seems … just and equitable to do so" (*Kleinwort Benson Ltd v Birmingham City Council* [1996] 4 All ER 733 at 737 *per* Evans LJ). Hence, "it will not do for claimants to plead generalised claims in unjust enrichment, nor is it acceptable to assert that the circumstances make the defendant's enrichment unfair in a broad sense … specific reasons anchored in the case law must be given to justify the assertion that the defendant's enrichment is unjust" (*Uren v First National Home Finance Ltd* [2005] EWHC 2529 (Ch) at [16]).

95 OAFL has received, and seek to retain, the sum of US$550,000. The 1st SPA, via Clause 4.02(2), clearly confers authority on OAFL to *receive* this sum. Does the 1st SPA also confer authority on OAFL to *retain* this sum for its personal benefit? This depends on a construction of Clause 4.02(2).

CONSTRUCTION OF CLAUSE 4.02(2)

96 Clause 4.02(2), which is reproduced at [23] above, expressly states that the payments and the allotments of MEGL shares are made to Aventi and OAFL who are "authorised to receive the same for and on behalf of" the plaintiffs. Does this phrase mean that Aventi and OAFL were not meant to retain or benefit from the payments received by them, or does it mean that Aventi and OAFL are entitled to retain them as outright transfers without having to account to the plaintiffs? As a starting point, it is crucial to note that Clause 4.02(2) expressly stipulates that the entire purchase price, *ie*, US$18m is "*due to*" the plaintiffs. Indeed, Alwie and Susiana admit in their defence that the US$18m was to be paid by Antig "to the plaintiffs".

97 Alwie claims that Clause 4.02(2), when interpreted in its context and with reference to the factual matrix surrounding the creation of the contract, authorises OAFL to retain the payments it had received for its own benefit based on the circumstances surrounding the formation of the 1st SPA, *ie*, *to benefit* from the transfer. The contextual approach to contractual interpretation was affirmed by the Court of Appeal in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich*") at [114]. The Court of Appeal

further explained that extrinsic evidence is admissible to assist in interpretation even if there is no ambiguity in the contract sought to be interpreted (*Zurich* at [115]). I would, however, caution against parties misusing, or indeed, abusing the authority of *Zurich* to distort the true interpretation of the contract at hand. The *Zurich* contextual approach is far from a *carte blanche* route to the admission of any and all extrinsic evidence to aid a party's interpretation of a contract. On the contrary, the *Zurich* contextual approach is to be applied in a cautious manner with strict adherence to the guiding principles laid out by the Court of Appeal. First, extrinsic evidence will *not* be admitted to *add to, vary or contradict* the contract (*Zurich* at [132(b)]). Second, extrinsic evidence would not be admitted to create a different interpretation *if the relevant contractual language was plain and unambiguous with reference to the existing facts* (*Zurich* at [116]). Finally, if a different interpretation from the plain language is to be accepted, the factual context of the contract *must be clear and obvious* (*Zurich* at [129]).

98 Mr Murugaiyan submits that the 1st SPA is silent as to whether the payments were paid to OAFL on its own right or on behalf of the plaintiffs. I disagree. On a plain reading of Clause 4.02(2), it seems clear that Aventi and OAFL were not meant to benefit from the receipt of the payments and the MEGL shares since both parties merely hold them "for and on behalf of" the plaintiffs. If Alwie wishes this court to adopt an interpretation different from the plain language, the threshold requirement he must first satisfy is that the factual context of the contract should be clear and obvious.

99 Has he satisfied this threshold requirement? Far from it. As I have noted above at [25], the parties have provided scant details of the events surrounding the execution of the 4th Supplemental which introduced Clause 4.02(2) in its present form into the 1st SPA. Further, in the course of these proceedings, Alwie sought to rely on three vastly different factual matrices which he says constitute the factual context of the 1st SPA entitling him to retain the sum of US$2m. The first factual matrix, relied upon in his closing submissions, centres around Tjong's earlier attempt to sell his shares in PT Batubara. According to Alwie, Tjong had purchased the PT Batubara shares from Ms Roosnawati and Mr Happy in August 2004 and was willing to sell them for a quick profit. Tjong then entered into an agreement with one Benny Tjokrosaputro ("Benny") for a loan of US$1m with an option to purchase 67% of Tjong's shares in PT Batubara upon payment of a further US$7m. The deal with Benny eventually fell through, and Tjong then approached Alwie for assistance to look for a buyer for the PT Batubara shares. Johanes and Alwie then structured the present sale on the basis that the plaintiffs would be paid US$6m for 72% of the plaintiffs' shares in PT Deefu (which in turn owns 95% of the shares in PT Batubara) and the balance purchase price (whatever that amount

might be) would be paid to both Johanes and Alwie to take steps to make the mining concession commercially viable. As such, the 1st SPA was drafted to allow for payment of US$2m to be made to OAFL, of which Alwie was the sole shareholder and director, and payment of US$10m to Aventi. Coincidentally, Richard Chan agreed with Alwie as regards the alleged true nature of the 1st SPA though he conceded that this was not reflected in the terms of the 1st SPA.

100 The second version of facts relied upon by Alwie as constituting the factual context of the 1st SPA is premised on a credit agreement dated 6 June 2006 that he entered into with Tjong ("the Credit Agreement"). I note that the existence of the Credit Agreement was first raised by Alwie in support of his application to set aside the injunction. He filed an affidavit dated 9 March 2010 alleging that he had disbursed a sum of US$3m to Tjong pursuant to the Credit Agreement for the working capital requirements of PT Batubara to justify the payments and the MEGL shares received from Antig.

101 However, at the trial, Alwie acknowledged that his affidavit filed on 9 March 2010 to this effect was false in that he did not disburse the US$3m or any other sum to Tjong. In his AEIC, he purported to present a completely different account of the Credit Agreement, claiming that it was drafted by his in-house counsel. He alleged that the Credit Agreement was prepared to protect his US$2m entitlement because Tjong was at that time taking steps to sell the 72% share in PT Deefu at a higher price to other parties after concluding the 1st SPA with Antig. He claimed that Tjong was required to pay him US$3m (an uplift of US$1m) in the event that he was able to sell the shares to another party at a price higher than US$18m. In my view, this is a fallacious allegation concocted by Alwie to mislead the court. First, this is a complete departure from his earlier affidavit for the injunction hearing which he subsequently admitted to be false. In other words, by his own admission, Alwie is capable of filing false affidavits to advance his case. Second, there is no provision in the Credit Agreement which refers to any uplift of an additional US$1m in the event of a sale at a price above US$18m. It seems illogical to prepare an agreement to protect Alwie's entitlement in the event of a contingency without specifying the alleged contingency. Third, Alwie's claim that the Credit Agreement was drafted by his in-house counsel (while intending to give it a veneer of respectability) makes it all the more unbelievable since that intention was not even remotely expressed in Credit Agreement. Finally, this case theory was not even raised in the defence in spite of two rounds of amendments, the latest being in August 2011.

102 As a result, the factual context which Alwie seeks to rely on is far from "clear and obvious", and therefore the threshold test laid down in *Zurich* ([97] *supra*) is not satisfied. Hence, I find that Alwie is unable to rely on any extrinsic evidence to persuade this court to adopt an

interpretation of Clause 4.02(2) which is divergent from its plain meaning. In any event, as explained at [99] to [101] above, the so-called extrinsic evidence not only fails to support the defence, it also serves to further undermine Alwie's credibility.

103 On a plain reading of Clause 4.02(2), I find that the plaintiffs did not intend for Aventi and OAFL to retain the payments and the MEGL shares received from Antig for their own benefit. In fact, the language of Clause 4.02(2) points to the contrary. Further, there is absolutely no evidence to prove that the plaintiffs intended the payments and the allotments of MEGL shares as outright transfers to Aventi and OAFL. In fact, Richard Chan was compelled to concede in cross-examination that there is nothing on the face of Clause 4.02(2) which allows OAFL (Alwie) and Aventi (Johanes) to retain the payments and the MEGL shares in their own right. Alwie purported to establish that consideration was provided to the plaintiffs for the payments and the MEGL shares by relying on the Credit Agreement, which I have found to be completely fallacious. Finally, in an attempt to support Alwie's defence that the plaintiffs were only entitled to receive US$6m out of the US$18m purchase price, Gardy, who had previously worked for Tjong, testified that he had seen a clause in the 1st SPA stating that the plaintiffs were only entitled to US$6m. I did not find Gardy to be a credible witness. If such a clause had existed in the 1st SPA, Alwie or Richard Chan would have produced it and that would have easily resolved the construction issue in respect of Clause 4.02(2) against the plaintiffs. Gardy also claimed that the plaintiffs had produced several drafts of the 1st SPA. He was however not able to explain why they have not been produced by Richard Chan or Alwie if such drafts existed.

104 No alternative construction of Clause 4.02(2) has been put forward by Aventi or Johanes given their non-participation at the trial. My finding is premised on the clear language of Clause 4.02(2). I cannot see what Johanes and/or Aventi could have said differently from Alwie that would have caused me to arrive at a different interpretation.

105 I should add that Mr Murugaiyan also submitted that since OAFL and Alwie are strangers to the 1st SPA, they cannot be saddled with the obligations to repay the payments and the MEGL shares which they had received from Antig pursuant to the 1st SPA. However, this argument is misplaced because the plaintiffs' claim based on money had and received is not a contractual claim under the terms of the 1st SPA. The plaintiffs are only seeking to rely on Clause 4.02(2) as evidence of the lack of entitlement of OAFL and Aventi to retain the payments, so as to establish their claims in money had and received.

OBJECTIVE EVIDENCE IN SUPPORT OF THE CONSTRUCTION OF CLAUSE 4.02(2)

106 There is also a body of objective evidence before this court which is entirely consistent with my finding that the plaintiffs had no intention to benefit Aventi and OAFL and that the entire purchase consideration is due to Tjong

107 First, Richard Chan provided the guarantee to Tjong stating that he "will personally guarantee a payment of US$18 million" to Tjong and "not through Aventi and OAFL". This is disputed by Richard Chan, who claims that the guarantee is forged. As will be elaborated below at [188] to [209], I find that Richard Chan did in fact provide the guarantee to Tjong. It follows, clearly, that the provision of the guarantee is, at the very least, an admission by Richard Chan that the plaintiffs are entitled to the entire purchase price of US$18m. This is entirely consistent with my finding as regards the construction of Clause 4.02(2) and that the plaintiffs did not intend to benefit Aventi and OAFL with the payments and the MEGL shares received from Antig.

108 Second, Alwie also signed a letter dated 15 June 2006 in which he expressly acknowledged that he "will return the monies and shares received from [MEGL], and [Antig] to Tjong". When Alwie was cross-examined on this letter, he initially admitted that the signature found on the letter was his but claimed that his signature was purportedly lifted from another document. However, when confronted with his AEIC wherein he alleged that the signature on the letter was a forgery, he recanted his earlier answer and claimed that it was forged. Given Alwie's conflicting evidence on a matter clearly within his personal knowledge, I asked him to look at the signature carefully to clarify his answer. He paused for a few minutes before confirming that the signature on the letter was not his, *ie*, a forgery. Finally, although Alwie claims the signature on the letter was a forgery, I found it particularly disquieting that he did not ask his handwriting expert to support his evidence since he had already engaged the expert to comment on several other allegedly forged documents. Mr Murugaiyan submitted that the handwriting expert was not asked to comment on the 15 June 2006 letter because Alwie "is the best person to give evidence as to his own signature". Evidently, this was not the case since Alwie had initially admitted on the witness stand that the signature on the 15 June 2006 letter was his. In addition, there is at least one instance when he had admittedly provided false evidence (see [101] above). He is therefore capable of giving false testimony when it suits him. In light of his initial answer under cross-examination that the signature on the letter of 15 June 2006 was his, together with his inexplicable failure to secure the assistance of his handwriting expert to support his forgery claim, I find that Alwie has failed to prove that the letter of 15 June 2006 was a forgery. That being the case, the letter acknowledges that OAFL is *not* entitled to retain the

payments and the MEGL shares from Antig. This is also entirely consistent with the clear language of Clause 4.02(2).

109 Third, Tjong relies on four letters dated 18 February 2005, 13 June 2006, 29 October 2007 and 12 November 2007 which he wrote to Antig and addressed to the attention of Richard Chan, in which he essentially sought to remind Antig to pay the entire purchase price of US$18m to him instead of Aventi and OAFL. Richard Chan denies receiving the letters and claims that they were fabricated by Tjong. In addition, the plaintiffs also rely on a fax dated 13 May 2007 ("the 13 May fax"), which they claim was sent by Richard Chan to support their entitlement of the full purchase price. Not unexpectedly, this fax was also alleged by Richard Chan to be fabricated. Having heard the evidence at the trial, I am satisfied that the four letters (the 13 May fax is dealt with separately below) were not fabricated by Tjong and that they were in fact sent contemporaneously and received by Antig. I attach particular significance to the fact that each of the four letters which were translated from Bahasa Indonesia by a certified translator, Mr Hamid Ibrahim (who was also the sworn interpreter for the Indonesian witnesses at the trial) contained a date of the translation which preceded the commencement of the present action. These four letters again support the plain meaning of Clause 4.02(2), *viz*, that the plaintiffs are entitled to the entire US$18m and that Aventi and OAFL were never authorised to retain the payments and the MEGL shares.

110 The English translation of the 13 May fax (originally in Bahasa Indonesia including the handwriting at the top of the fax) reads:

> Very, there is one copy about PT. BESS still written by Noor, FYI ! Thanks
>
> I, the undersigned:
>
> Name: Tjong Very Sumito
>
> …
>
> Hereby declare and confirm:
>
> That the payment for the sale of 72% of PT Deefu Chemical Indonesia's shares to Antig Investments Pte. Ltd in the amount of USD 18,000,000 (eighteen million US dollars) which has been made to Aventi Holdings Ltd. and OAFL (Overseas Alliance Financial Ltd.) will be returned in the future to me personally and as the assignee of Iman Haryanto and Herman Aries Tintowo by virtue of power of attorney dated 9 June 2006 which they signed before Notary Arman Lany, SH.
>
> I made this Letter of Statement truthfully under no coercion in any form and from any party.
>
> Signed on May 13, 2007
>
> [signed]
>
> Tjong Very Sumito

Approved by:

[signed]

Richard Chan

According to Tjong, this fax was prepared by one Ms Noor Meurling ("Noor") of Soebagjo, Jatim, Djarot & Partners ("SJD"), a lawyer retained by Antig in Indonesia to handle matters in connection with the 1st SPA. Tjong claims that Noor had passed a copy of this fax for him to sign, and that after signing it he returned it to Noor before it was faxed back to Tjong. Tjong initially said that it was MEGL which had faxed it to him but later said that it was faxed over from Noor: I note that the header on the face of the 13 May fax, which reads "13 May 2007 4:52PM MAGNUS ENERGY", suggests that it was faxed by MEGL on 13 May 2007. However, Richard Chan denies having faxed this document to Tjong. While Tjong maintains otherwise, he claims that he has not been able to find the original fax. Tjong further says that when he received the 13 May fax, Richard Chan had already signed on the document and had written the words at the top of the fax. While Richard Chan accepts that the handwriting at the top of the 13 May fax and the signature were indeed his (after some hesitation), he nonetheless claims that the signature was fabricated.

111 In challenging the authenticity of the 13 May fax, Richard Chan says that his signature was lifted from a cancelled payment voucher dated 6 September 2005 ("the Cancelled Payment Voucher"). Richard Chan relies on the evidence of Mr Yap Bei Sing ("Mr Yap"), a Consultant Forensic Scientist of the Health Sciences Authority who was called as an expert witness for Richard Chan, Alwie and Susiana. Mr Yap's evidence is that the signature of Richard Chan found on the 13 May fax as well as that found on the Cancelled Payment Voucher are "almost identical and superimposable in respect of the formation, relative positioning and spacing of strokes and the baseline between them". Mr Yap thus concluded that the signature found on the 13 May fax "was reproduced with an enlargement in size from the specimen signature of Richard Chan" found on the Cancelled Payment Voucher. I note that Mr Yap's evidence on this point was not challenged by the plaintiffs. I also observe that the strokes of Richard Chan's signature as well as the position of his signature relative to the signature line on the 13 May fax do bear an uncanny similarity to Richard Chan's signature on the Cancelled Payment Voucher. However, I am not satisfied that Richard Chan has discharged the high burden of proof to establish that the 13 May fax was fabricated by Tjong. The fabrication could only have been done by a person with possession of the Cancelled Payment Voucher. The logic of this premise was accepted by Mr Yap in cross-examination. There is however no evidence that the plaintiffs, in particular, Tjong was ever provided with a copy of the Cancelled Payment Voucher. There is also no rational reason

why a copy would have been provided to Tjong in any event. If so, how could Tjong have fabricated the 13 May fax? In fact, Mr Yap rightly conceded that since Richard Chan had possession of the Cancelled Payment Voucher, he himself could have reproduced the signature from the Cancelled Payment Voucher onto the 13 May fax. I am however not making any finding that the reproduction was done by Richard Chan.

112 Further, there is no dispute that the handwriting at the top of the 13 May fax was Richard Chan's. When asked why there was a necessity for the 13 May fax to come into existence with his handwritten remarks, all Richard Chan could say was that the 13 May fax was fabricated, without more. Further, he testified on the witness stand as well as in his AEIC that his original signature on the Cancelled Payment Voucher was in *blue* ink. I then asked for the original to be produced and "lo and behold" it was in *black* ink instead.

113 In the premises, Richard Chan has failed to satisfy this court that the signature on the 13 May fax was lifted by Tjong from the Cancelled Payment Voucher. In fact, the 13 May fax lends further support to the plaintiffs' claim that they are entitled to the full purchase price and is entirely consistent with the provision of the guarantee by Richard Chan.

114 Fourth, the suspicious manner in which the sum of US$5.7m was purportedly prematurely *paid* on the written and/or oral instructions of Aventi also points to Richard Chan's complicity with the fact that Aventi and OAFL were not authorised to retain the payments or the MEGL shares, and that Richard Chan was told by Tjong not to make the payments to Aventi and OAFL and had given the assurance to Tjong following receipt of the four letters.

(a) Under the 1st SPA, the sum of US$5.7m which Antig is required to pay to Aventi (who is authorised to receive the payments for and on behalf of the plaintiffs) was payable in two tranches, the first amount being US$2m within 12 months from the completion date, *ie*, 13 June 2007 and the second amount being the balance of US$3.7m within 24 months from the completion date, *ie*, 13 June 2008. Richard Chan agreed under cross-examination that any payment instructions must come from the plaintiffs since, legally, the entire purchase price belonged to the plaintiffs.

(b) Antig, through MEGL, purportedly acted on the written instructions of Aventi by letter dated 20 July 2006 in issuing a cheque in favour of Credit Agricole for the discounted sum of US$1.88m, instead of US$2m, in consideration of early payment. The letter (without any letterhead, address, *etc*) was addressed to Richard Chan as the managing director of MEGL. Apart from the fact that this "discount" was extended on the instructions of Aventi, a non-party to the 1st SPA, it was done without the knowledge or approval of the

plaintiffs, who were the contracting parties to whom the entire purchase price was due. However, in an e-mail dated 7 June 2006, Richard Chan represented to the Chief Financial Officer of MEGL that the instructions to pay to Credit Agricole came from the plaintiffs and that the accounts in Credit Agricole belonged to the plaintiffs. Under cross-examination, he agreed that both representations set out in the e-mail to MEGL were false.

(c) MEGL issued a statement dated 13 November 2007 that Antig had acceded to Aventi's request for early payment of the balance US$3.7m. In fact, by an e-mail dated 28 September 2007, Richard Chan represented to MEGL that he had received such a request from Aventi. A discount of 5.6% was agreed by Aventi and a sum of US$3,492,800 was purportedly released to Aventi in September 2007 instead of the due date of 13 June 2008. Richard Chan, who testified that MEGL and Antig would always insist on written instructions for early payment, was however not able to produce any such written instructions in respect of the US$3.7m payment. Further, to-date, no evidence has been produced to prove that the discounted sum of US$3,492,800 was in fact paid to Aventi other than the statement issued by MEGL. While it is highly suspicious that MEGL and/or Antig would agree to early payment against a discount without any written instructions from even Aventi, the indisputable fact remains that Antig acceded to the early request for a discounted payment, at best, on the oral instructions of a non-party, Aventi, without the knowledge and approval of the plaintiffs. Richard Chan again admitted in cross-examination that this discounted payment was not in accordance with the 1st SPA. This highly unusual arrangement must be contrasted with the strict manner in which payments were released to Tjong. Every payment received by Tjong was preceded by a written request prepared for him to sign even though he was a party to the 1st SPA but Antig and MEGL seem to be content to accept the oral instructions of a non-party whom Richard Chan, their MD, shockingly claims not to have personally dealt with in connection with the 1st SPA.

(d) The highly irregular *early* discounted payments purportedly on the instructions of Aventi must also be contrasted with the *late* payments to Tjong in respect of a much smaller sum of US$2.8m.

(e) As it was apparent to Antig, and therefore Richard Chan, that Aventi was only authorised to receive the payments for and on behalf of the plaintiffs, it must have been plain and obvious to Richard Chan that early discounted payment, which is tantamount to a variation of the payment terms of the 1st SPA, could not have been made without the concurrence of the plaintiffs. This much was admitted by Richard Chan. That early discounted payments had been made without

Tjong's knowledge is also consistent with the fact that Richard Chan did not want Tjong to know that payments had been made to OAFL, and purportedly to Aventi, in spite of his assurance to Tjong that he, through Antig, would not do so.

(f) Finally, both early payments were not made directly to Aventi. Instead, they were paid to Credit Agricole without specifying the account holder (see [45] and [46] above). Why would Antig and Richard Chan risk paying substantial sums to Credit Agricole when such payments were not in strict compliance of the 1st SPA, either as to time or payee? Mr Gabriel sought to suggest that it was because Richard Chan was the ultimate beneficiary of the payments to Credit Agricole. However, as stated in [47] above, this has not been pleaded and, in any event, there is no satisfactory evidence before this court as to who is the ultimate owner of the Credit Agricole account. Speculative submission by the plaintiffs would not suffice.

(g) Finally, I think it is apt at this juncture to comment on the conduct of the plaintiffs in commencing the Antig Suit against Antig for the sum of US$3.7m on 20 May 2008, shortly prior to the contractual due date of 13 June 2008. Richard Chan says that if the plaintiffs believe that the balance purchase price due to them was about US$12m as they are now claiming in this action, there can be no conceivable reason for them to file a claim for just US$3.7m in the Antig Suit. Tjong explained in cross-examination that the amount claimed in the Antig Suit was filed on the advice of his then solicitors to obtain an injunction to stop Antig from making the payment of US$3.7m to Aventi. It is at least clear that when the Antig Suit was brought, the plaintiffs were completely oblivious to the fact that Antig had some seven months ago paid a discounted sum of US$3,492,800 to Credit Agricole purportedly on the written instructions of Johanes. In fact, when the plaintiffs' solicitors wrote a letter of demand dated 9 April 2008 to Antig for the payment of the US$3.7m, there was no response from Antig stating that the payment had already been made. Viewed in this context, I do not regard the amount claimed in the Antig Suit as a reflection of the plaintiffs' recognition or admission that they are not entitled to the entire balance purchase price. It was instituted for the specific purpose of stopping the payment of a specific sum which was due at that time. Finally, in the letter of demand dated 9 April 2008, the plaintiffs' then solicitors specifically stated that "[n]o admission is made that the total consideration of US$18 million has been satisfied".

115 Fifth, the sum of US$500,000, which Alwie accepted was received by OAFL, was in fact paid in two tranches; the first for the sum of US$93,396.62 on 26 January 2006 and the second for the sum of US$406,603.38 on 16 June 2006. This revelation only emerged during the

cross-examination of Richard Chan who claimed that the first sum of US$93,396.62 was advanced to OAFL to meet the costs and expenses incurred on behalf of the plaintiffs. This advance was admittedly made without the prior authorisation of the plaintiffs. There is also no claim by OAFL against the plaintiffs for reimbursement of these expenses allegedly incurred on their behalf. If so, by such conduct, both Alwie and Richard Chan implicitly accepted that the payments were due to and for the benefit of the plaintiffs, and not Aventi or OAFL.

116 Finally, I also find it to be extremely bizarre that Richard Chan is of the same mind with Alwie on the construction of Clause 4.02(2). If it had been the plaintiffs' intention for Aventi and OAFL to retain the payments and the MEGL shares in their own right, that intention could, and should, have been expressly stated in the 1st SPA, which was drafted by lawyers instructed by MEGL/Antig. Richard Chan went so far as to testify that there had been, from "Day 1", three groups of vendors (*ie*, the plaintiffs, Aventi and OAFL). Yet, inexplicably, only the plaintiffs were identified as the vendors under the 1st SPA. Further, Clause 4.02(2) makes it clear that the entire purchase price is *due to the plaintiffs* and further states that Aventi and OAFL are merely "authorised to receive the same for and on behalf of" the plaintiffs. Not only is there a complete absence of any provision in the 1st SPA to the contrary, the insertion of Clause 4.02(2) is entirely consistent with the usual expectation that as vendors, the plaintiffs are indeed entitled to receive the entire purchase price.

117 To give false credence to Aventi and OAFL's entitlement to the payments and the MEGL shares, MEGL issued a shareholders' circular dated 14 October 2005 over SGXNet stating that Johanes and Alwie were the plaintiffs' creditors "from whom the [plaintiffs] acquired all the issued shares of PT Deefu". This announcement was made to explain the reasons why Aventi and OAFL were authorised to receive the payments and MEGL shares on behalf of the plaintiffs. This announcement, which sought to create a creditor-debtor relationship between the plaintiffs, Aventi and OAFL on the basis that the plaintiffs' shares in PT Deefu were in turn acquired from Johanes and Alwie, was patently false since Johanes and Alwie were never owners of the shares in PT Deefu. This was accepted by Richard Chan, although he sought to present it as an "honest inadvertent error" in his defence and AEIC.

118 I will deal with this alleged "honest inadvertent error" separately below when I consider the claim in fraudulent misrepresentation and under the guarantee (see [167] to [171] and [205] to [207] below). In the meantime, suffice it to say that the "false" announcement by MEGL raises the question as to why MEGL or Antig and/or Richard Chan should be so concerned about the ultimate beneficiaries of the payments and the MEGL shares beyond the clear language of Clause 4.02(2). There is no doubt in my mind that Richard Chan was responsible for the fraudulent

misrepresentation that Aventi and OAFL were the original shareholders of PT Deefu. He was referred to an e-mail dated 15 January 2006 where he informed MEGL that Tjong *and* Alwie were *both* shareholders of PT Deefu. When confronted with the e-mail, Richard Chan was unable to explain why he had wrongly informed MEGL about Alwie's alleged status as a shareholder. As purchasers, Antig must ensure that the entire purchase price is paid in strict conformity with the 1st SPA. It is pertinent to highlight that it is not Richard Chan's case that Antig had fulfilled its obligation under the 1st SPA by simply making payments to Aventi and OAFL in accordance with Clause 4.02(2). Instead, it is Richard Chan's positive case, notwithstanding the clear language of Clause 4.02(2) to the contrary, that Aventi and OAFL are entitled under Clause 4.02(2) to retain the payments and the MEGL shares in their own right as Johanes and Alwie were "creditors" of the plaintiffs.

119 By his own admission, Richard Chan has no personal knowledge of the alleged circumstances which purportedly gave rise to the alleged creditor relationship. Under cross-examination, this allegation by Richard Chan morphed from creditors of Tjong to creditors of PT Deefu. Why would MEGL, Antig and Richard Chan go to such lengths to create a false impression of a fictitious creditor relationship when it should simply be their task to pay the plaintiffs the entire purchase price in accordance with Clause 4.02(2)? In my view, the false SGXNet announcement, as well as the false testimony of Richard Chan, acknowledges that Aventi and OAFL were not intended, under the 1st SPA, to retain or benefit from the payments and the MEGL shares. That was precisely the reason why a false explanation had to be presented in order to justify the payments and the allotment of MEGL shares to them. Further, Richard Chan also accepted that in the SGXNet announcement, the MEGL shares were described to have been allotted to Aventi and OAFL as the plaintiffs' *nominees*. That constitutes a further acknowledgment by MEGL, Antig and Richard Chan that the entire purchase price comprising the payments and MEGL shares were always rightfully due to the plaintiffs from the outset.

Conclusion on money had and received

120 It is clear, based on the plain meaning of Clause 4.02(2), that OAFL has no authority to retain the payments made to it under the 1st SPA. This constitutes the relevant unjust factor required to establish the money had and received claim. As observed in *Goff & Jones* at paras 8-01–8-02, the want of authority to retain money constitutes an unjust factor where:

> [A] defendant, D, obtains an enrichment by immediate transfer from a claimant, C, in *circumstances* where C did not consent to the enrichment. It is also common for a defendant, D, to obtain an enrichment from a claimant, C, more remotely, as a result of the actions of a third party, X, which were neither authorised nor consented to by C …

> *Where X holds assets subject to duties and powers to deal with them for C's benefit, and acts within his authority, C will have no remedy. But where X acts outside his authority, his 'want of authority' will itself constitute a sufficient ground for recovery by C.*
>
> [emphasis added]

121 As OAFL and/or Alwie have not pleaded any defences to unjust enrichment, it is not necessary for me to examine and discuss the same. Before I leave this section of the Judgment, I should make some observations about the credibility of Richard Chan. From my assessment of the evidence, I found him to be an exceptionally untruthful witness. On many occasions, he had to concede to numerous falsehoods in his AEIC, his earlier interlocutory affidavits, his oral testimony, and even in representations made to the SGX (see, for example, [25] and [117] to [119] above, [206] to [207] and [245] below). When confronted with unfavourable documents, his default response is typically to allege either forgery or fabrication even in respect of documents in the Agreed Bundle (see, for example, [109] to [113] above and [245] below). He contradicted himself on numerous occasions. This finding will be particularly relevant when I deal with the claims against Richard Chan, especially under the guarantee (at [188] to [241] below).

122 In the circumstances, I have no hesitation to find that the plaintiffs are entitled to recover the sum of US$550,000 from OAFL and/or Alwie as money had and received.

…

Conversion

135 The conversion claim is restricted only to the MEGL shares. The first, and fundamental, question is whether the plaintiffs have standing to sue for the common law tort of conversion. Having established *locus standi*, the plaintiffs would then have to show that there has been deliberate conduct on the part of Aventi and OAFL inconsistent with the plaintiffs' possessory rights, and that such conduct was so extensive an encroachment on the plaintiffs' rights as to exclude them from use and possession of the MEGL shares (*Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101 ("*Orix Leasing*") at [92]).

136 The plaintiffs claim that Aventi and/or Johanes are liable in conversion for unlawfully, and without the plaintiffs' consent, taking into their possession the allotment of the 124,856,364 MEGL shares. Alternatively, they claim that those shares were converted when Aventi sold them without the plaintiffs' consent. In the case of OAFL and/or Alwie, although the plaintiffs have merely pleaded that OAFL and/or Alwie have taken into their possession the 42,102,727 MEGL shares allotted to them under the 1st SPA, it transpired during the trial, through

Alwie's admission, the MEGL shares have since been sold. Assuming that standing is not an issue, conversion would be made out since Aventi and OAFL who were to hold the shares for and on behalf of the plaintiffs had, by withholding and selling the shares, clearly acted inconsistently with the plaintiffs' rights (*Orix Leasing* at [45]).

Locus standi

137 To satisfy the court that they have standing, the plaintiffs must establish that at the material time, they had either actual possession or a right to immediate possession of the MEGL shares. Having title to the property concerned does not necessarily mean having a right to immediate possession, and hence, a right to sue for conversion (see, for example, *The Cherry* [2003] 1 SLR 471 at [58] and *Orix Leasing* at [49]). Similarly, a person who merely has an equitable right in the property without possession would not have standing to sue for conversion (*MCC Proceeds Inc v Lehman Bros International (Europe)* [1998] 4 All ER 675 at 691). The centrality of the concept of possession to the law on conversion was aptly put by Michael G Bridge in *Personal Property Law* (Oxford University Press, 3rd Ed, 2002) at pp 62–63:

> [T]he common law failed to develop a sophisticated concept of ownership of personalty. The place of ownership was occupied by possession, which had the consequence that the protection of property interests was left to the law of tort … Conversion, a tort concerned with the protection of ownership, lay therefore at the behest of those in possession of the chattel at the time of the wrongful act and was later extended, because of the limitations of possession, to those with a right to immediate possession. Despite assertions sometimes made to the contrary, it does not as such lie in favour of those with an equitable interest in chattels.

138 Unfortunately, the submissions by Mr Gabriel and Mr Murugaiyan focussed on the question of *ownership* of the MEGL shares, and omitted to address the court on whether the plaintiffs had any *possessory interest* in the MEGL shares. Mr Gabriel, in his initial submissions, simply assumed that if the plaintiffs are entitled to the MEGL shares, it follows that the sale of the shares by Aventi and OAFL must necessarily constitute conversion. This is, however, incorrect. On 29 May 2012, I invited Mr Gabriel and Mr Murugaiyan to address this issue as they only concerned the plaintiffs, OAFL and/or Alwie (Johanes and Aventi are not before this court). Both counsel eventually filed submissions on this issue on 4 June 2012, and I now set out my findings with the benefit of their further submissions.

139 It is quite clear that the plaintiffs never had actual possession of the MEGL shares because the shares were issued by MEGL directly to Aventi and OAFL. Did the plaintiffs, nonetheless, have a right to immediate possession? Mr Gabriel argues in further submissions that they did, and

that such right to immediate possession was borne out in two ways. First, he argues that Aventi and OAFL were *bailees* of the MEGL shares, and that when they sold the MEGL shares without the knowledge or consent of the plaintiffs who were bailors, they had committed an act repugnant to the terms of the bailment such that the right to immediate possession of the shares had thereby re-vested in the plaintiffs. Second, Mr Gabriel argues that Aventi and OAFL received the MEGL shares as *agents* of the plaintiffs, giving the plaintiffs the immediate right to demand delivery of the shares to them, and thus, vesting in them the right to immediate possession. I will deal with each argument in turn.

Bailment

140 In the plaintiffs' further submissions filed on 4 June 2012, they asserted that Aventi and OAFL were mere bailees holding the MEGL shares for them, and when Aventi and OAFL sold the MEGL shares without their knowledge or consent, they had committed an act which was repugnant to the terms of the bailment such that the right to immediate possession of the shares re-vests in the plaintiffs.

141 A bailment relation is founded exclusively on one person's voluntary possession of goods which belong to another (*The Pioneer Container* [1994] 2 AC 324 at 342). Thus, the old requirement in law that a bailment involves a delivery of goods from the bailor to the bailee is no longer strictly necessary (*Palmer on Bailment* (Sweet & Maxwell, 3rd Ed, 2009) at para 1-023). In this connection, the plaintiffs have pleaded that Aventi and OAFL had received the MEGL shares which are rightfully due to them. The fact that Aventi and OAFL took possession of the MEGL shares is clearly borne out by the objective evidence (see [44] and [49] above).

142 In a bailment for a fixed period of time, termination of the bailment would occur upon expiry of the term. However, there is no time period prescribed for the bailment between the plaintiffs and Aventi and OAFL. There is also no clause in the 1st SPA entitling the plaintiffs to determine the bailment. Under the common law, a bailment is terminated and the right of possession to the bailed property re-vests in the bailor if the bailee behaves in a manner that is utterly repugnant to the terms of the bailment (*Orix Leasing* ([135] *supra*) at [52]). In order to deprive the plaintiffs of their common law rights as bailors, "very clear language" must be specified in the 1st SPA (*Union Transport Finance Ltd v British Car Auctions Ltd* [1978] 2 All ER 385 at 390). There is no such provision in the present case.

143 It is clear to me that Aventi and OAFL, as bailees of the MEGL shares, had acted in a manner utterly repugnant to the terms of the bailment when they, who have not proven their entitlement to retain the MEGL shares in their own right, sold the MEGL shares. From the

evidence, Aventi had sold at least 100 million of the 124,856,364 MEGL shares allotted to it. As for the shares allotted to OAFL, Alwie testified that he has since sold them. Hence, at the point of selling the MEGL shares, Aventi and OAFL had terminated the bailment and the right to immediate possession of the shares had thereby re-vested in the plaintiffs, conferring on them the legal standing to sue for conversion.

Agency

144 Mr Gabriel also submits that Aventi and OAFL had received the payments and the MEGL shares under the 1st SPA as agents of the plaintiffs and are bound to pay over or account for them to the plaintiffs. This, Mr Gabriel says, gives the plaintiffs a right to immediate possession of the MEGL shares. Mr Gabriel's submissions did not specifically address this court on whether an agency relationship was created between the plaintiffs and Aventi and OAFL, and how that is to be reconciled with Tjong's seemingly contradictory factual assertions.

145 An agency is the fiduciary relationship that arises when one person, the principal, manifests assent to another person, the agent, that the agent shall act on the principal's behalf and be subject to the principal's control, and the agent manifests assent or otherwise consents so to act (Tan Cheng Han, *The Law of Agency* (Academy Publishing, 2010) ("*Tan Cheng Han*") at para 01.006, citing with approval the *Restatement of Law Third, Agency*; see also *Bowstead & Reynolds on Agency* (Sweet & Maxwell, 19th Ed, 2010) ("*Bowstead & Reynolds*") at para 1-003 to para 1-005). Thus, the two core elements of an agency relationship appear to be (a) consent of both the principal and agent; and (b) authority conferred or power granted to the agent to legally bind the principal (*Tan Cheng Han* at para 01.007 to para 01.019). The concomitant duties of an agent are only triggered by the power and authority granted to him by the principal.

146 Subject to a few exceptions (as when agency arises by operation of law) and qualifications (*eg*, where there is retrospective ratification of a purported agent's act), the essence of agency is the consent of the principal and the agent (*Garnac Grain Company Incorporated v H M F Faure & Fairclough Ltd* [1968] AC 1130 ("*Garnac Grain*") at 1137 *per* Lord Pearson (applied in *Win Line (UK) Ltd v Masterpart (Singapore) Pte Ltd* [1999] 2 SLR(R) 24 at [23]); see also *Tan Cheng Han* at para 01.007 to para 01.010). At first blush, the plaintiffs seem to suggest that they had not consented to making Aventi and OAFL their agents under the 1st SPA. After all, it is their case that Tjong, who acted for himself, Iman and Herman during the negotiations of the 1st SPA, had "no dealings with or knowledge of Aventi and OAFL". Further, Tjong stated in his AEIC that he was told by Richard Chan and Alwie that any money paid or MEGL share allotted to Aventi and OAFL would only be done upon his written authorisation. It was also Tjong's evidence that no

such authorisation had been given by him, and that he had in fact instructed Antig not to pay anything to Aventi and OAFL.

147 However, as I have observed above (at [26]), the words "for and on behalf of the [plaintiffs]" were added to Clause 4.02(2) and the parties are bound by it. It is Richard Chan's evidence that those words were added after all parties in the negotiation had agreed to the amendment. In any case, the plaintiffs had also signed the 4th Supplemental, thereby signaling their consent to appoint Aventi and OAFL as their agents to receive the payments and the MEGL shares. As observed by Lord Pearson in *Garnac Grain* at 1137:

> The relationship of principal and agent can only be established by the consent of the principal and the agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship, *even if they do not recognise it themselves and even if they have professed to disclaim it*, as in *ex parte Delhasse*. But the consent must have been given by each of them, either expressly or by implication from their words and conduct. [emphasis added]

148 Mr Gabriel relies on the language of Clause 4.02(2) to say that Aventi and OAFL had authority to receive the payments and the MEGL shares. I have dealt at length with the interpretation of Clause 4.02(2) which clearly states that while the payments and the MEGL shares to be paid and allotted under the 1st SPA are rightfully due to the plaintiffs, Aventi and OAFL were authorised to *receive* the payments and the MEGL shares though not to beneficially retain the same (see [96] to [104] above).

149 I am satisfied that the plaintiffs have a right to immediate possession of the MEGL shares because Aventi and OAFL, in receiving the payments and the MEGL shares on behalf of the plaintiffs, have a duty to account to the plaintiffs *qua* agent, and must hand over such property "on demand" (*Blaustein v Maltz, Mitchell and Company* [1937] 2 KB 142 at 156; see also *Nickolson v Knowles* (1820) 5 Madd 47; 56 ER 812 and Bowstead & Reynolds at para 6-099). This was also recognised by the court in *Edgell v Day* (1865) LR 1 CP 80 ("*Edgell*"), a case which Mr Gabriel relies on in his further submissions. In *Edgell*, the plaintiff, as executrix of one deceased Mr Edgell, brought, *inter alia*, a claim in tort to recover monies which had been received by the defendant. The defendant was previously employed by Mr Edgell as the latter's solicitor for the sale of certain property and had received the monies as deposits from the buyers of Mr Edgell's property. The plaintiff successfully argued that the defendant was bound to hand over the money to Mr Edgell on demand because he was employed as Mr Edgell's agent to receive the deposits on the terms that he would account for them. The Court of Common Pleas also observed that the general principle of law is that a payment of money to an agent is payment to the principal (*Edgell* at 84).

150 On the facts in *Edgell*, a demand was made for the defendant to hand over the money, still in his possession, to Mr Edgell. However that is

not to say that a prior demand is essential before the principal is vested with a right to immediate possession. In a situation where the agent is still in possession of the property on behalf of the principal, the conversion is consummated when the agent refuses to hand over possession on demand by the principal. However, in a situation where the agent has sold the property without authority, the sale in itself constitutes the act of conversion. In that situation, a prior demand is irrelevant.

151 I draw support from two decisions in somewhat similar circumstances, namely, *Bute (Marquess) v Barclays Bank Ld* [1955] 1 QB 202 ("*Bute*"), and *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 ("*Lipkin Gorman*").

152 In *Bute*, one McGaw was appointed manager of three farms in Scotland belonging to the plaintiff, the Marquess of Bute. McGaw's duties included the making of applications to the Department of Agriculture for Scotland for certain subsidies in respect of the farms on the plaintiff's behalf. In January 1949, McGaw forwarded three such applications. In May 1949, McGaw left the plaintiff's employment. No fresh instructions were sent by the plaintiff to the Department of Agriculture, and in September 1949, the Department, in accordance with their usual practice, sent to McGaw three warrants "in respect of Hill Sheep Subsidy, 1949" payable to McGaw but also marked with the words "(for the Marquess of Bute)". McGaw then applied to a bank in Yorkshire for permission to open a personal account with the warrants, and the bank credited the amount of the warrants to an account in his name and permitted McGaw to draw on the account. The plaintiff sued the bank for conversion, and the court found that the plaintiff had a right to immediate possession of the warrants at the time of conversion on two grounds. First, it was held that, upon termination of McGaw's employment, the plaintiff was entitled to require McGaw to deliver the warrants to him when received since McGaw's only title to receive the warrants stemmed from his appointment as the plaintiff's agent (*Bute* at 211). Secondly, the court found that the words "for Marquess of Bute" on the warrants represented a promise to pay McGaw for the plaintiff, and connotes that the plaintiff was the true owner of the warrants leaving McGaw accountable to the plaintiff. The duty of McGaw to account to the plaintiff gave the plaintiff a right to immediate possession of the warrants (*Bute* at 212). The court was of the view that at the date of the conversion by the agent, the principal was entitled to immediate possession and, accordingly, entitled to sue in conversion (*Bute* at 211). This was the position even though no demand was made by the principal at any time.

153 In *Lipkin Gorman*, one Cass was a partner in the plaintiff firm of solicitors and had authority to operate the firm's client account at the bank. On one occasion, Cass, acting within his authority, procured

through the firm's cashier, a banker's draft for £3,735 drawn in favour of the firm, paying for it by a cheque from the firm's client account. He then endorsed the banker's draft and proffered it to the defendant gambling club which accepted it in exchange for chips. The House of Lords found that the plaintiff firm had the right to immediate possession of the banker's draft as soon as the bank handed over the banker's draft to the firm's cashier because the banker's draft was made payable to them and neither the firm's cashier nor Cass had any right to retain the banker's draft against the plaintiff firm. The House of Lords did not require the principal to have made a demand for delivery up of the property held by his agent, stating that "the effect of the banker's draft in the present case having been made payable to the [plaintiffs] is, in my opinion, that the [plaintiffs] had the right to immediate possession of the draft … On this basis, as it seems to me, the [plaintiffs] had vested in them, as from the moment when the banker's draft was delivered to Cass (through Chapman) by the bank, sufficient title to enable them to bring an action for damages for conversion of the draft" (*Lipkin Gorman* at 587 *per* Lord Goff).

154 In the present case, the MEGL shares held by Aventi and OAFL as agents of the plaintiffs were expressly stated to be due to the plaintiffs. Thus, the plaintiffs have a right to immediate possession of the MEGL shares from the moment they were issued and allotted to, and received by Aventi and OAFL "for and on behalf of" the plaintiffs (*Lipkin Gorman* at 587), or certainly at least when they had consummated the conversion of the MEGL shares by selling them (*Bute* at 211).

Scripless shares

155 The plaintiffs' conversion claim also raises the interesting question of whether the MEGL shares (which Mr Narayanan confirmed at the 29 May 2012 hearing were scripless shares) can form the subject matter of conversion. After examining the further submissions, in particular the plaintiffs', I am satisfied that the scripless nature of the shares does not render the MEGL shares any less capable of being converted.

156 While it remains an open question in Singapore whether intangible property can form the subject matter of conversion (the House of Lords in *OBG Ltd v Allan* [2008] 1 AC 1 decided in a 3-2 majority that conversion is not actionable for choses in action), the law is fairly settled that corporeal objects representing the value of intangible property, such as cheques (see *Yeow Chern Lean v Neo Kok Eng* ([82] *supra*)), Preferential Additional Registration Fee certificates (see *Cycle & Carriage Motor Dealer Pte Ltd v Hong Leong Finance Ltd* [2005] 1 SLR(R) 458) and share certificates (see *EG Tan & Co (Pte) v Lim & Tan (Pte)* [1985–1986] SLR(R) 1081), can be subject matters for a claim in conversion.

157 Although the MEGL shares are scripless, they are essentially scripless only for the purposes of trading. Such shares in Singapore are traded by way of book-entry in the Central Depository (CDP) register rather than by way of an instrument of transfer like share certificates and transfer forms (see s 130A of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act"). However, these shares are still represented by physical share certificates issued by the issuing company that are deposited with the CDP and registered in the name of the CDP or its nominee (s 130C of the Companies Act). This is also the case for the MEGL shares.

Damages

158 Given the foregoing, Aventi and OAFL who were to hold the MEGL shares *for and on behalf of* the plaintiffs had, by withholding and selling the shares, clearly acted inconsistently with the plaintiffs' rights. I am satisfied that the plaintiffs' conversion claim is made out. The only outstanding issue is thus the quantum of damages recoverable by the plaintiffs.

159 The plaintiffs submit that damages are to be assessed as at the time of conversion, citing *BBMB Finance (Hong Kong) Ltd v Eda Holdings Ltd* [1990] 1 WLR 409. This principle of assessing damages was affirmed by the Court of Appeal in *Chartered Electronics Industries Pte Ltd v Comtech IT Pte Ltd* [1998] 2 SLR(R) 1010 ("*Chartered Electronics*") at [18].

160 The Court of Appeal explained that the general position is to assess damages at the time of conversion because "[t]he general principle in the quantification of tortious damages is *restitutio in integrum*: the plaintiff is entitled to recover the amount which will put him in the position he would have been in had the tort never been committed" (*Chartered Electronics* at [16]). I can see no reason why this method of assessment should not be used in this case.

161 Based on the CIMB Daybreak report dated 2 November 2006 adduced by the plaintiffs, 80,000 shares were sold by Aventi and/or Johanes on 6 November 2006 at the price of S$0.22 each. It is not clear when the balance of 44,856,364 MEGL shares were sold by Aventi and/or Johanes and at what price. However, in light of Aventi's non-appearance and to avoid the unnecessary expense of an assessment hearing, I will instead assess the damages using the same sale price of S$0.22 for the entire 124,856,364 MEGL shares allotted to Aventi. Accordingly, the plaintiffs are awarded damages against Aventi for the conversion of the MEGL shares in the sum of S$27,468,400 (S$0.22 x 124,856,364). As for the shares allotted to OAFL, Alwie admitted that they have since been sold. Although he agreed to procure the documents from his private banker on the details of the sale, he failed to do so in spite of three separate reminders from the court. Alwie is therefore liable to the

plaintiffs for the conversion of 42,102,727 MEGL shares with damages to be assessed based on their actual sale price.

…

Claims based on duress

243 An interesting feature of the duress claim is that while such claims are generally made where pressure is exerted by one contracting party on another, the duress alleged on the present facts had allegedly emanated from Richard Chan who is, strictly speaking, a non-party to the 2nd and 3rd SPAs, *ie*, the claims against Jake, AAML and Edwin are *indirect*. As will be discussed (see [269] to [272] below), there are a number of ways to bridge this gap. On the present facts, the plaintiffs have done so by pleading unlawful means conspiracy amongst Richard Chan, MEGL, Antig and Jake *vis-à-vis* the 2nd SPA, and Richard Chan, MEGL, Antig, AAML and Edwin *vis-à-vis* the 3rd SPA. In my examination of this issue, MEGL and Antig will not feature in the equation.

244 According to the plaintiffs' pleaded case, Richard Chan knew that Tjong was in need of cash and had coerced Tjong into selling the Remaining Shares. This was purportedly done by threatening that if Tjong refused, (a) Tjong would not be paid the balance of the purchase price for the sale of 72% of PT Deefu shares ("Threat 1"); (b) Richard Chan would cancel the 1st SPA, so that 72% of PT Deefu shares would be returned to the plaintiffs, and Tjong would have to return the money already received under the 1st SPA ("Threat 2"); and (c) PT Deefu would issue more shares to dilute Tjong's shareholding therein ("Threat 3") (collectively referred to as "the Threats").

245 I find it more likely than not that the Threats were made by Richard Chan as alleged. Richard Chan agrees that he was, in June 2007, withholding the completion payments that were due to the plaintiffs under the 1st SPA. In the meantime, early payments totaling US$5.7m were surreptitiously made to a Credit Agricole account without the plaintiffs' knowledge (see [45] to [46] and [114] above). He conceded in cross-examination that he wanted to acquire the Remaining Shares while withholding the payments due to the plaintiffs:

Mr Gabriel:	Withholding all these payments, you then wanted to acquire the remaining shares at $2 million. Correct?
A:	Correct.

This appears to have stemmed from Antig's desire to increase its stake in PT Deefu and PT Batubara, as evidenced by letters written by Antig's solicitors, SJD, to Tjong, dated 7 December 2006, 11 December 2006 and 5 June 2007 referring to Antig's plan to take over *all* the Remaining Shares. Richard Chan disingenuously attempted to distance himself from the letters by SJD first by claiming that they were not genuine letters, but

when confronted with the fact that the letters were included in the Agreed Bundles, he changed his position claiming that SJD was wrong in writing the letters in those terms. He however eventually conceded that on the face of the letters, Antig was desirous of purchasing the Remaining Shares. This exchange is but one of the many falsehoods spewed by Richard Chan throughout the trial.

246 I find that it is likely that Richard Chan had issued the Threats in order to acquire the Remaining Shares on Antig's behalf at a low price. All three threats are consistent with Antig's desire to increase its shareholding in PT Deefu and PT Batubara, by either acquiring the Remaining Shares from Tjong, or by diluting Tjong's existing shareholding. Having said that, I must then deal with the following legal issues in turn:

(a) whether there had been illegitimate pressure exerted on Tjong by Richard Chan, resulting in a coercion of Tjong's will when he signed the 2nd and 3rd SPAs; and

(b) if so, whether Jake, AAML and Edwin were sufficiently implicated in the duress such that the 2nd and 3rd SPAs may be set aside.

Whether there had been illegitimate pressure exerted on Tjong by Richard Chan, resulting in a coercion of Tjong's will when he signed the 2nd and 3rd SPAs?

247 There are two elements to constitute duress, *viz*, (a) the exertion of illegitimate pressure and (b) such pressure amounting to the compulsion of the victim's will (see, for example, *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366 at 400, *Tam Tak Chuen v Khairul bin Abdul Rahman* [2009] 2 SLR(R) 240 ("*Tam Tak Chuen*") at [22] and *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd* [2011] 2 SLR 232 ("*E C Investment*") at [51]). The causative threshold a plaintiff needs to meet is discussed in *Treitel* at para 10-005 (endorsed in *E C Investment* at [52]) as follows:

> *[T]he two factors may also be said to be interdependent in the sense that the more illegitimate the pressure the lower the causal threshold.* This may explain why, for duress of the person, it need only be proved that the threat was one reason why the contract was entered into, whereas *for economic duress the minimum requirement before it can be said that the threat was a significant cause is to satisfy the 'but for' test, i.e. that the agreement would not have been made at all or on the terms it was made.* [emphasis added]

248 In their written closing submissions, the plaintiffs have concentrated on establishing element (a) while Jake, AAML and Edwin have focused on denying the existence of element (b). I find that the Threats did amount to illegitimate pressure on the present facts.

However, there was no compulsion of Tjong's will at the material time, and therefore the duress claim fails.

Illegitimate pressure

THE LAW

THREATS OF UNLAWFUL ACTS

249 Threats of unlawful action, *eg* contractual breach, can amount to illegitimate pressure. Mr Gabriel relies on *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705 ("*North Ocean Shipping*") for the proposition that a threat to break a contract without legal justification may amount to economic duress. In *North Ocean Shipping*, a contract between ship owners and ship builders allocated the risk of currency devaluation to the builders. However, upon devaluation of the currency, the builders threatened to breach the contract unless additional payments were made by the owners. Although the duress claim ultimately failed due to a subsequent waiver of the right to avoid the re-negotiated contract, Mocatta J found that illegitimate pressure had indeed been applied by the builders (*North Ocean Shipping* at 719):

> … A threat to break a contract may amount to … 'economic duress' … I think the facts found in this case do establish that the agreement to increase the price by 10 per cent … was caused by what may be called 'economic duress.' *The [builders] were adamant in insisting on the increased price without having any legal justification for so doing and the owners realised that the [builders] would not accept anything other than an unqualified agreement to the increase* … The owners made a very reasonable offer of arbitration coupled with security for any award in the [builder]'s favour that might be made, but this was refused. They then made their agreement, which … have been made under compulsion, by the telex of June 28 without prejudice to their rights. [emphasis added]

In essence, as the threat to breach the contract in *North Ocean Shipping* was made in support of an illegitimate demand, it amounted to illegitimate pressure (Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (Sweet & Maxwell, 2006) ("*Enonchong*") at para 3-007). This is an important point to note as not all threats of contractual breach would constitute illegitimate pressure.

250 *North Ocean Shipping* may be contrasted against the case of *Sharon Global Solutions Pte Ltd v LG International (Singapore) Pte Ltd* [2001] 2 SLR(R) 233 ("*Sharon Global*"). The plaintiff company (SGS) contracted to sell steel products to the defendant company (LG), which in turn entered into a back-to-back agreement to sell the steel products to an important customer (POSCO). Due to SGS's inexperience, it could only find a vessel to ship the steel at a higher freight cost. SGS was prepared to breach the contract unless LG agreed to share the additional costs. LG

reluctantly agreed as it was worried about the serious commercial consequences of failing to fulfil its obligations to POSCO. Citing *Chitty on Contracts* (Sweet & Maxwell, 28th Ed, 1999), Kan Ting Chiu J distinguished between threatened contractual breaches which would amount to duress and those that would not (*Sharon Global* at [32]):

> … *[D]eliberate exploitation of the victim's position with a view to gaining some advantage unrelated to the contract and to which the threatening party knows he is not entitled is clearly illegitimate. Conversely, an apparent threat should not be treated as illegitimate if it was really no more than a true statement that, unless the demand is met, the party making it will be unable to perform; nor if the party has a genuine belief that he is legally entitled to the amount demanded.* It is suggested that a demand made in good faith, in the sense that the party demanding has a genuine belief in the moral strength of his claim — for example, because he has encountered serious and unexpected difficulties in performing and will suffer considerable hardship if his demand is not met; or to correct an acknowledged imbalance in the existing contract — might in some circumstances also be treated as legitimate. Here the behaviour of the victim, for example whether he protests, will be relevant. First, it will go to causation … secondly, payment without protest may leave the demanding party believing that the justice of his demand is admitted, whereas it will be harder for him to prove that he was acting in good faith if he ignores the victim's protests. [emphasis added]

251 On the facts of *Sharon Global*, no illegitimate pressure was established as there had been no exploitation of the alleged victim's position (*Sharon Global* at [34]–[39]):

> … [T]he spirit of the venture must be taken into account. From the start, both parties intended to co-operate to gain entry into the HBI business … The second relevant factor is the cause for the plaintiff's demand that the defendant share the additional costs. The plaintiff through its inexperience, misjudged the freight costs badly … [and] was unable to bear the additional costs alone … [and] the plaintiff bore a greater burden under the agreement of 12 August by paying its share of the additional freight than it would have under the performance bond … *Against this background it cannot be said that the plaintiff was seeking to exploit the situation to increase its profits* when it informed the defendant that it would not charter the vessel unless the defendant agreed to share the additional costs … two matters stood out for consideration. *First, the plaintiff was not seeking to improve its financial position by seeking the contribution instead of forfeiting the performance bond. Second, the plaintiff was not seeking to shift the burden of the additional costs entirely to the defendant, and had agreed to bear a share of it even when it did not have the funds for that purpose.* [emphasis added]

Threats of lawful action

252 Threats of lawful action can also constitute duress. However, a corollary of the rule that a party pleading duress must prove illegitimate pressure, as opposed to mere commercial pressure, is that where the

threatened act is in itself lawful, it would be extremely difficult, and indeed, rare, to be able to prove economic duress, especially in the commercial context (*CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714 ("*CTN Cash and Carry*") at 719 and *E C Investment* ([247] *supra*) at [47] and [51]). This arises from the need to ensure certainty in the commercial bargaining process (*Tam Tak Chuen* ([247] *supra*) at [50] and *E C Investment* at [48]–[49]). Four factors are relevant to the question of whether a threat of lawful action is illegitimate (*Enonchong* at para 3-022, *Tam Tak Chuen* at [50] and *E C Investment* at [48]), *viz*:

(a) whether the threat is an abuse of legal process;

(b) whether the demand is not made *bona fide*;

(c) whether the demand is unreasonable; and

(d) whether the threat is considered unconscionable in the light of all the circumstances.

253 The buyer in *CTN Cash and Carry* paid a sum of money to his supplier as a result of the supplier's threat to otherwise stop the buyer's credit facilities in their future dealings. Significantly, the supplier was not contractually bound to sell goods to the buyer; separate contracts were made from time to time and credit facilities, which were effective until withdrawn, were granted by the supplier in its absolute and unfettered discretion. Further, the supplier acted in the *bona fide* belief that such sum was owing to it. Steyn LJ readily accepted that the fact that the defendants have used lawful means did not by itself remove the case from the scope of the doctrine of economic duress. However, he cautioned against a too-ready finding of lawful act duress in a purely commercial setting (*CTN Cash and Carry* at 718–719):

> … On the other hand … *English courts have wisely not accepted any general principle that a threat not to contract with another, except on certain terms, may amount to duress.* … [A]n extension [of the categories of duress] capable of covering the present case, involving 'lawful-act duress' in a commercial context in pursuit of a *bona fide* claim, would be a radical one with far-reaching implications. It would introduce a substantial and undesirable element of uncertainty in the commercial bargaining process. Moreover, it will often enable b*ona fide* settled accounts to be re-opened when parties to commercial dealings fall out. The aim of our commercial law ought to be to encourage fair dealing between parties. But it is a mistake for the law to set its sights too highly when the critical enquiry is not whether the conduct is lawful but whether it is morally or socially unacceptable. … *Outside the field of protected relationships, and in a purely commercial context, it might be a relatively rare case in which 'lawful-act duress' can be established.* And it might be particularly difficult to establish duress if the defendant *bona fide* considered that his demand was valid. In this complex and changing branch of the law I deliberately refrain from saying 'never'. But as

> the law stands, I am satisfied that the defendants' conduct in this case did not amount to duress. [emphasis added]

Steyn LJ's conclusion that there had been no illegitimate pressure was based on three crucial findings (*CTN Cash and Carry* at 717–718):

> [First, *t]he dispute arises out of arm's length commercial dealings* between two trading companies. … The fact that the defendants were in a monopoly position cannot therefore by itself convert what is not otherwise duress into duress.
>
> [Second,] *the defendants were in law entitled to refuse to enter into any future contracts with the plaintiffs for any reason whatever or for no reason at all.* Such a decision not to deal with the plaintiffs would have been financially damaging to the defendants, but it would have been lawful. *A fortiori* it was lawful for the defendants, for any reason or for no reason, to insist that they would no longer grant credit to the plaintiffs. The defendants' demand for payment of the invoice, coupled with the threat to withdraw credit, was neither a breach of contract nor a tort.
>
> [Third, t]he defendants exerted commercial pressure on the plaintiffs in order to obtain payment of a sum which they *bona fide* considered due to them. *The defendants' motive in threatening withdrawal of credit facilities was commercial self-interest in obtaining a sum that they considered due to them.*
>
> [emphasis added]

254 This concern to safeguard certainty in the commercial bargaining process was echoed in the High Court decision of *E C Investment* which involved an experienced businessman (AA) looking to raise urgently-needed funds using a property he owned. The plaintiff, sensing a money-making opportunity, drove a hard bargain and eventually entered into an arrangement with AA, pursuant to which the plaintiff was granted an option to purchase the property at $20m for an option fee of $1.5m. The option gave AA an opportunity to cancel it upon refunding the $1.5m option fee and cancellation fee of $180,000. AA was confident that he would be able to settle this "loan" and cancel the option within one or two months. At the material time, AA had legal advice and did not protest. After a detailed examination of the law on economic duress, Quentin Loh J held that (*E C Investment* at [55]–[59]):

> If the Plaintiff had agreed to lend AA $2m with the Property as security, delayed matters to the last minute and when AA turned up to pick up his cheque he was then presented with a loan agreement, a smaller sum of $1.5m and an option to sell the Property to the Plaintiff for $20m (instead of $22m) which was even below the forced sale value, and it was by then too late for AA to refuse and look for other sources of funds, then … there may have been sufficient illegitimate pressure and coercion of AA's will to set aside the option to purchase the Property at $20m. I emphasise the word 'may'.
>
> … AA is a seasoned businessman who has been through much in his business career. *The figures were not final when the meeting commenced on 5 June*

> *2009. There was no promise or agreement. … [T]hey were there to negotiate. …* There was certainly no protest or suggestion of illegitimate pressure from AA or his advisers or that some understanding had been breached.
>
> *The fact that AA was very desperate for funds and that fact was known to the Plaintiff only meant that they had the upper hand in the negotiations. That was a legitimate commercial advantage and not pressure because the Plaintiff was not obliged to lend AA money* … Holding otherwise would mean that many hard pressed debtors would be able to avoid contractual obligations on this ground. That fact alone cannot amount to unlawful exploitation or illegitimate pressure. The truth is … that AA entered into this transaction … because he was confident he could repay that sum within one or two months. *AA had the benefit of advice from his lawyer and his CFO, both of whom were also with him at the 5 June 2009 meeting. He understood what he was signing. I therefore cannot see how there is any duress in this case that could vitiate the contract or that there is any illegitimate coercion which vitiated the will.*
>
> [emphasis added]

THE PRESENT FACTS

255 I am of the view that the Threats amounted to illegitimate pressure exercised on Tjong. Threats 1 and 2 are essentially threats to breach the 1st SPA, *ie*, threats of unlawful action. As in *North Ocean Shipping* ([249] *supra*), there was no legal justification for Richard Chan's demand for Tjong to enter into the 2nd and 3rd SPAs or risk not being paid under the 1st SPA. The 2nd and 3rd SPAs were completely unrelated to the performance of the 1st SPA. The present factual matrix is also a far cry from that in *Sharon Global* ([250] *supra*), where the "threat" was really no more than a true statement that, unless the demand was met, performance of the contract by the party issuing the threat would be rendered onerous or impossible. I find, to the contrary, that Threats 1 and 2 were made deliberately to exploit Tjong's weak financial position with a view to procuring the Remaining Shares at an undervalue – an advantage which is completely unrelated to the 1st SPA (*Sharon Global* at [32]).

256 The exploitative nature of Threats 1 and 2 becomes apparent when one considers the huge "discount" at which the Remaining Shares were sold under the 2nd and 3rd SPAs. Mr Gabriel draws an analogy between the present facts and the facts in *Tam Tak Chuen* ([247] *supra*). The plaintiff in that case (Tam) sought to set aside the sale of certain shares to the first defendant (Khairul) on the ground of duress. Khairul had apparently confronted Tam with an incriminating video evidencing Tam's extramarital affair, and had threatened to tender the footage as evidence in court if Tam did not agree to the sale. Judith Prakash J held that (*Tam Tak Chuen* at [58]):

> The facts of this case also support the finding that Dr Khairul's threat to make the photographs and video footage public was made to support an unreasonable demand … Even using LYS's valuation, the sum paid by Dr

> Khairul for the shares was not even 25% of their value of $212,361 … As the demands made by Dr Khairul in respect of the consideration for the transfer of all the plaintiff's shares in all the companies were unreasonable, his threat was illegitimate on this basis as well.

Mr Gabriel argues that, as in *Tam Tak Chuen*, the Remaining Shares were obtained at a discount of more than 75%. Indeed, Richard Chan, Jake and Edwin admit that the Remaining Shares were sold at undervalue. Richard Chan agreed during cross-examination that "from [Tjong's] point of view", selling the Remaining Shares for US$2m was a "gross undervalue". Similarly, Edwin conceded on the stand that to his knowledge the sale of the remaining 28% of PT Deefu shares had been sold at undervalue as Tjong needed cash. Jake also stated in his AEIC that he found the deal to be a "worthwhile punt" because while MEGL had valued the 5% of PT Batubara shares at US$1.3m, he was able to procure them at US$320,000. The fact that Jake and Edwin were able to shortly after resell the Remaining Shares for A$12.64m (see [30] above) underscores the undervalued nature of the transactions under the 2nd and 3rd SPAs.

257 In oral closing submissions, Counsel for Jake, AAML and Edwin, Mr Jeffrey Ong ("Mr Ong"), relied on *E C Investment* ([247] *supra*) to argue that extracting the sale of the Remaining Shares from Tjong at an undervalue with the knowledge of Tjong's financial situation was at most an exertion of legitimate commercial pressure. *E C Investment*, and similarly, *CTN Cash and Carry* ([252] *supra*), are not, however, directly applicable to the present facts since those cases did not involve any threatened breach of contract; parties in those cases were in the *pre-contractual* bargaining stage and were not obliged to transact. In those cases, the knowledge *per se* that a party to the negotiation was desperately in need of funds only gave the other party an upper hand in the bargaining process. By contrast, Antig was under existing payment obligations to Tjong under the 1st SPA. Knowing that Tjong was in need of cash, Richard Chan then threatened to withhold those payments unless Tjong agreed to sell the Remaining Shares at an undervalue. In other words, this is not a case where the defendants had simply used their commercial muscle to extract an attractive bargain for themselves. There appeared instead to be an exploitation of Tjong's allegedly weak financial position with a view to gaining an advantage unrelated to the 1st SPA.

258 As for Threat 3, there is nothing in PT Deefu's Articles of Association indicating that the threatened share issue would be a contravention of the Articles. Apart from matters to do with amendment of the Articles, merger, consolidation, acquisitions, dissolution and liquidation, which require 75% shareholders' approval, the Articles state that all other resolutions may be reached via 50% shareholders' resolution. In other words, Threat 3 is a threat of lawful action. Nonetheless, I am of the view that it amounted to illegitimate pressure,

since it was unreasonably made to extract the sale of the Remaining Shares at undervalue. Richard Chan, who knew of Tjong's weak financial position, was aware that Tjong would not have been able to subscribe to any new issue of shares, thus leading to the inevitable dilution of his Remaining Shares. More importantly, Threat 3 must be assessed in light of Threats 1 and 2 as they were all made to achieve the same purpose. Given the exploitative nature of the Threats, I find that they did indeed amount to illegitimate pressure.

Compulsion of Tjong's will

THE LAW

259 Whether an illegitimate threat amounts to duress depends on its coercive effect in each case. There is no coercion of will where, *eg*, the alleged victim "considered the matter thoroughly, chose to avoid litigation, and formed the opinion that the risk in giving the guarantee was more apparent than real" ([*Pao On v Lau Yiu Long* [1980] AC 614 ("*Pao On*")] at 635). In determining the extent of such coercive effect, the court will consider the factors enumerated by Lord Scarman in *Pao On*, which have been repeatedly relied on as guidelines by our courts (see, for example, *Tam Tak Chuen* at [62] and *E C Investment* at [44]), *viz*:

(a) whether the person alleged to have been coerced did or did not protest;

(b) whether, at the time of the alleged coercion this person did or did not have an alternative course open to him;

(c) whether he was independently advised; and

(d) whether after entering into the contract he took steps to avoid it.

THE PRESENT FACTS

ACCESS TO LEGAL ADVICE AND FAILURE TO PROTEST OR TAKE STEPS TO AVOID THE 2ND AND 3RD SPAS

260 The defendants emphasise that Tjong (a) had failed to protest until the issue of the present proceedings in 2010, *ie*, more than 2.5 years after the 2nd and 3rd SPAs were executed; (b) had access to independent advice from Mr Manjit Singh and from his lawyers in Indonesia; (c) had access to, and did get advice from, other sources such as Dr Irwan; and (d) had alternative courses open to him at the material time.

261 Mr Ong relies on *Third World Development Ltd v Atang Lateif* [1990] 1 SLR(R) 96 ("*Third World*") to argue that failure to take steps to avoid the contract within reasonable time is fatal to a claim for economic duress. Pursuant to written agreements, the company in *Third World* engaged the respondents as exclusive operators of a casino in a building

project. The appellant, who was the chairman, managing director and 99% shareholder of the company, executed a letter of undertaking in which he undertook that if, for any reason, the respondents were not permitted to operate the casino at the building, he would refund on demand payments made in advance by the respondents. On being subsequently sued on the letter of undertaking, the appellant relied on the vitiating ground of economic duress. He alleged that the respondents knew that he and the company were in grave financial difficulties and that alternative finances would not be readily available. They had then deliberately and wrongfully refused to pay the full amount of advance rent that was due to the company, thus coercing him into executing the letter of undertaking. In rejecting the defence of economic duress, L P Thean J held that (*Third World* at [11]–[18]):

> … [I]mmediately or soon after the undertaking was executed and the remaining half of the advance rent was paid to the company, the appellant did not make any complaint of the undertaking; he did not initiate any step to challenge or seek to avoid the undertaking; nor did he notify the respondents that as he was coerced into signing the undertaking he was seeking legal advice on the effect or validity of the undertaking. … It is significant that, *even [when] confronted with a demand for payment of the amount under the undertaking, not a word was uttered by the appellant that the undertaking was forced on him or that the respondents in any way pressurised him to execute the undertaking. It was only after this action was started that the appellant complained that he was coerced into signing the undertaking* … There is nothing before us which could really support the appellant's allegation that there was any coercion of his will in signing the undertaking. [emphasis added]

262 The 2nd and 3rd SPAs were executed on 12 July 2007, and from then till commencement of the present suit in February 2010, a period of about 30 months, no step was taken by Tjong to avoid those transactions. There was also nothing to show that Tjong had intended to sell the Remaining Shares for more than US$2m, but was forced by Richard Chan to settle for US$2m. The circumstances do not suggest that Tjong had been coerced to enter into the 2nd and 3rd SPAs.

Alternative courses were opened to Tjong

263 Mr Ong and Mr Narayanan also argue that alternative courses were opened to Tjong at the material time. In relation to Threat 1, they pointed out that Tjong, by his own case, had by then extracted the guarantee from Richard Chan, which he must have believed to be enforceable. Mr Narayanan further suggested that Tjong's will could not have been overborne if he had been able to obtain the guarantee from Richard Chan.

264 In relation to Threat 2, Mr Narayanan pointed out that, by Tjong's own case, he had intentionally withheld documents from Antig in order to extract the guarantee from Richard Chan. It was argued, therefore, that

Tjong had himself been prepared to run the risk of cancellation of the 1st SPA. There could not therefore have been a coercion of his will. Indeed, Tjong has given evidence that he did not respond to several written and verbal requests by Antig and Richard Chan to provide the relevant documents as he had wanted an assurance that the balance purchase price would be paid to him.

265 In *B & S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 419 ("*B & S*"), a contractor who had undertaken to erect stands for an exhibition told his customer, less than a week before the exhibition, that the contract would be cancelled unless the customer paid an additional sum of money to meet claims which were being made against the contractor by his workmen. The cancellation of the contract would have gravely damaged the customer's reputation and might have exposed him to heavy claims for damages from the exhibitors. Eveleigh LJ held that "it was clear at that stage that there was no other way for [the customer] to avoid the consequences that would ensue if the exhibition could not be held from his stands than by paying the [additional sum of money] to secure the workforce" (*B & S* at 424). In these circumstances, duress was established.

266 *B & S* may be contrasted against *Pao On* ([259] *supra*), where the plaintiffs threatened to breach a contract with a company unless the defendants, who were the shareholders in the company, gave the plaintiffs a guarantee against loss resulting from performance of the contract. The defendants, thinking that the risk of such loss was small, gave the guarantee in order to avoid adverse publicity which the company might suffer if the contract was not performed. There was no "coercion of the will" on the facts of *Pao On*. Similarly, I find that there was also no compulsion of Tjong's will. His failure to protest, in particular, and the existence of the guarantee, which he extracted, providing him with an alternative recourse to obtaining the full US$18m, militate against a finding that he would not have entered into the 2nd and 3rd SPAs but for the Threats.

267 Significantly, while Tjong claims that he owed friends, other businesses and Benny "several million US", he has not produced any evidence of the extent of his debts. As Kan J held in *Sharon Global* ([250] *supra* at [42]–[45]):

> Without elucidation from the defendant, I do not understand what the serious commercial consequences [of the threat to breach the contract] alluded to were. Questions which should be addressed were not … How strong were those concerns, and how much did they influence the defendant's decision … ? *When a defence of economic duress is raised, it is incumbent on the party raising it to show that the duress placed it in a position where it was compelled to accede to the other party's demands … On the part of the defendant, I did not have a clear picture that it had no alternative but to*

> *accept the plaintiff's terms because it had to fulfill its obligations to POSCO under any circumstances*. [emphasis added]

In fact, by the time the 2nd and 3rd SPAs were executed in July 2007, Tjong had received about US$3m from Antig under the 1st SPA. While Tjong might have been in need of funds, there is no basis to find that he was in such *desperate* need to have compelled him to accede to the Threats.

Whether Jake, AAML and Edwin were sufficiently implicated in the duress such that the 2nd and 3rd SPAs may be set aside

268 Given my foregoing conclusion that there had been no duress operative upon Tjong *vis-à-vis* his execution of the 2nd and 3rd SPAs, the question of whether Jake, AAML and Edwin have been implicated in any such duress becomes moot. I will however deal with this issue since parties have made extensive submissions on it.

No direct duress claim against Jake, AAML and Edwin

269 It is agreed that no *direct* pressure had been applied on Tjong by Jake or Edwin. Nonetheless, as I have alluded to at [243] above, a contract may sometimes be set aside on the ground of duress exerted by someone who is, strictly-speaking, a third party to the contract. For example, the authors of *Chitty on Contracts* vol 1 (Sweet & Maxwell, 30th Ed, 2008) observed (at para 7-052) that:

> Where it is sought to avoid a contract on the ground of duress exercised, not by the party seeking to enforce the agreement, but by some third party, the party seeking to avoid the contract *must prove that the other party knew of the duress, or had constructive notice of it or had procured the making of the contract through the agency of the party who exercised the duress*. [emphasis added]

It is similarly observed in *Enonchong* at para 21-007 that, aside from agency situations, a transaction may also be set aside on the ground of duress, undue influence or unconscionable dealing of a third party if the contracting party had actual or constructive notice of such third party conduct. The rationale supporting the doctrine of notice in this context was briefly summarised in *Enonchong* at para 23-002 to para 23-003 as follows:

> Under English law if A is induced by C's duress or undue influence to contract with B, normally B is entitled to rely on A's apparent consent and in the ordinary case B can enforce the contract against A in spite of the duress of undue influence of C. However, if B was aware of the duress or undue influence of C then B will not be allowed to enforce the contract … First, such a person cannot claim to rely on the other contracting party's apparent consent, since he is aware of the reality that there was no free consent. Secondly, there is no question of protecting security of transactions where the

> contracting party has notice of the fact that the consent of the other party was improperly procured … [he] knows from the start that the agreement is one that will be unenforceable since it has been procured by wrongdoing … Thirdly, although the party with knowledge may be considered to be innocent of the wrongdoing, as he is not involved in it, nevertheless he cannot really be considered to be acting in good faith or in accordance with good conscience.

270 The operation of the doctrine of notice in this context is illustrated in *Kesarmal s/o Letchman Das v N K V Valliappa Chettiar s/o Nagappa Chettiar* [1954] 1 WLR 380 ("*Kesarmal*") and *Halpern v Halpern* [2006] EWHC 603 (Comm) ("*Halpern*"). *Kersarmal* involved interesting facts that took place during the Japanese occupation in Malaya. The respondent sought to impugn his transfer of a property to the appellants, alleging that the agreement was signed under duress at the Sultan's residence. The Sultan and the appellants were all present at the signing, together with two Japanese officers. The Sultan had apparently told the respondent that he must sign the transfer agreement. When the respondent hesitated, one of the Japanese told him that he had to obey the Sultan's orders. The Privy Council upheld the lower court's findings that the transfer agreement had been procured by duress, and that the appellants, as transferees, had actual knowledge of the exercise of the duress; the Privy Council held that it was undisputed that both duress and knowledge of it by the appellants were established, such that the transaction must be set aside (*Kesarmal* at 384).

271 *Halpern* concerned an application for summary judgment, and alternatively, an order to strike out certain parts of the defence. The defendants argued that a compromise agreement entered into with the plaintiffs during settlement negotiations had been procured by duress. The defendants alleged that the arbitrator (the Rabbi) had insisted that, in the absence of a compromise, the defendants were obliged to make a ritual oath (which, on the evidence, an observant Jew would not in practice be willing to swear), the making of which they could avoid by paying a sum of money (*Halpern* at [85]). The plaintiffs disputed that such pressure had been exerted and argued, *inter alia*, that, in any event, the putative duress emanated from the Rabbi who was a non-party to the agreement, and thus could not avail the defendants (*Halpern* at [95]). In allowing a trial on the issue of duress (*Halpern* at [107] and [117(d)]), Christopher Clarke J held that (*Halpern* at [96]):

> *[T]he fact that Rabbi Schmerler was the person who exercised the alleged duress does not automatically exonerate the claimants. But it would have, at the least, to be established that Samuel knew that Rabbi Schmerler was exerting illegitimate pressure on Mordechai and took the benefit of it.* In the present case, if there was duress, it seems to me that there is a realistic prospect of the [defendants] establishing that it was a duress which is capable of making the contract voidable … it would seem at least arguable that Samuel was pressing

> Rabbi Schmerler to do something that he knew was not justified in order to procure a compromise. [emphasis added]

272 Jake, AAML and Edwin accept that if it can be shown that Richard Chan was their agent, a direct claim of duress against Jake, AAML and Edwin would be possible. However, while the plaintiffs have pleaded that Richard Chan "was an agent and/or had actual or apparent/ostensible authority to act on behalf of MEGL, Antig, Jake and AAML", they have not conducted their case on that basis. Instead, at the trial, they have proceeded on the basis that Jake, AAML and Edwin were the nominees of MEGL/Antig/Richard Chan in relation to the purchase of the Remaining Shares, and their claim against Jake, AAML and Edwin is indirect and "in conjunction" with their claim against Richard Chan, based on conspiracy. Similarly, while they argue that Jake, AAML and Edwin had been wilfully blind to the procurement of the 2nd and 3rd SPAs by duress, this argument was made in support of their case based on conspiracy, and not in relation to any direct claim against Jake, AAML and Edwin.

…

Conclusion

298 By reason of my findings, the plaintiffs succeed in the following claims:

(a) as against OAFL and/or Alwie, the sum of US$550,000 for money had and received;

(b) as against Aventi, damages for conversion of 124,856,364 MEGL shares;

(c) as against OAFL and/or Alwie, damages for conversion of 42,102,727 MEGL shares;

(d) as against Richard Chan, liability under the guarantee for the balance purchase price remaining unpaid to the plaintiffs, *ie*, US$12,471,227, comprising:

(i) US$6,721,227 (being the US$12.25m Cash Component less the US$5,528,772 received by the plaintiffs); and

(ii) the entire Shares Component representing US$4.3m and US$1.45m received by Aventi and OAFL respectively for and on behalf of the plaintiffs; and

(e) as against Richard Chan, damages for fraudulent misrepresentation in respect of the undervalue sale of the Remaining Shares under the 2nd and 3rd SPAs.

299 I make the following orders for the claims relating to the Cash Component representing US$12.25m under the 1st SPA (see [24] above),

(a) OAFL and/or Alwie are to pay the plaintiffs the sum of US$550,000 under [298(a)];

(b) Richard Chan is liable to the extent of US$6,721,227 under [298(d)(i)];

(c) interest at 5.33% on the above sums from the date of the writ to the date of judgment; and

(d) for avoidance of doubt, in respect of the Cash Component, the plaintiffs are only entitled to a total of US$6,721,227, excluding interest and costs, collectively from Richard Chan, OAFL and Alwie, and each up to the respective sums stated above.

300 I make the following orders for the claims relating to the Shares Component representing US$5.75m under the 1st SPA (see [24] above):

(a) Aventi is to pay the plaintiffs damages in the sum of $27,468,400 for conversion of 124,856,364 MEGL shares under [298(b)];

(b) OAFL and/or Alwie are to pay the plaintiffs damages to be assessed for conversion of 42,102,727 MEGL shares under [298(c)];

(c) Richard Chan is liable to the extent of US$5.75m under [298(d)(ii)];

(d) interest at 5.33% on the above sums from the date of the writ to the date of judgment and, in the case of assessment, interest at such rate and for such period to be reserved to the Registrar; and

(e) for avoidance of double recovery, in the event that Richard Chan discharges the judgment debt of US$5.75m under [300(c)], and the plaintiffs recover damages for conversion:

(i) against Aventi under [300(a)], the plaintiffs shall refund to Richard Chan such amount representing double recovery up to the maximum sum of US$4.3m; and

(ii) against OAFL and/or Alwie under [300(b)], the plaintiffs shall refund to Richard Chan such amount representing double recovery up to the maximum sum of US$1.45m.

301 I make the following orders for the claims relating to the 2nd and 3rd SPAs:

(a) Richard Chan is to pay Tjong damages to be assessed for fraudulent misrepresentation in respect of the undervalue sale of the Remaining Shares;

(b) interest at such rate and for such period to be reserved to the Registrar; and

(c) the claims against Jake, AAML and Edwin are dismissed with costs to be taxed if not agreed on a standard basis.

302 Although the plaintiffs did not succeed in every cause of action, they have substantially succeeded on practically all their claims against Richard Chan, Aventi, and OAFL/Alwie. In the premises, I will award the plaintiffs the following costs orders:

(a) full costs on a standard basis in respect of all the claims brought against Richard Chan to be taxed if not agreed;

(b) full costs on a standard basis in respect of all the claims brought against Aventi to be taxed if not agreed; and

(c) full costs on a standard basis in respect of all the claims brought against OAFL and/or Alwie to be taxed if not agreed. Although the claim against Susiana is dismissed, that claim is inextricably linked to the claim against Alwie. As such, there will be no separate order of costs in relation to Susiana.

Postscript

303 The totality of my findings places the bulk of the liability against Richard Chan. According to my assessment of the evidence, he was unequivocally the prime mover of the 1st, 2nd and 3rd SPAs. The entire transaction involving all three SPAs led by Richard Chan, assisted by Alwie and, perhaps, the "phantom", Johanes, smells of foul play. On the face of my decision, the total award exceeds the entire purchase consideration of US$18m. This consequence arose as a result of the plaintiffs' entitlement to the 166,959,091 MEGL shares representing US$5.75m of the entire purchase consideration which have since been sold for several times their original par value. It, however, remains unresolved as to the true identities of the ultimate "beneficiaries" of both the Credit Agricole and the Coutts Bank accounts and the windfall profits arising from the sale of the MEGL shares. Having said that, the payments and the MEGL shares allotments would not have been possible without Richard Chan and Alwie's complicit involvement. They will have to settle their liabilities arising from my decision *inter se* with such "beneficiaries", whoever they might be.

Reported by Ang Ming Sheng Terence and Chong Wan Yee Monica.