Ng Swee Hua v Auston International Group Ltd and Another
[2008] SGHC 241

Case Number : Suit 129/2007

Decision Date : 29 December 2008

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Boey Swee Siang and V Jesudevan (Rajah & Tann) for the plaintiff; N Sreenivasan and Valerie Ang (Straits Law Practice LLC) for the defendants

Parties : Ng Swee Hua — Auston International Group Ltd; Auston Institute of Management & Technology Pte Ltd

Contract

29 December 2008

Belinda Ang Saw Ean J:

Background

1 The background to this case may be shortly stated. The first defendant, Auston International Group Ltd ("Auston") is a company listed on the Singapore Stock Exchange. It is in the business of providing tertiary and post-graduate education. The second defendant, Auston Institute of Management & Technology Pte Ltd ("AIMT") is a wholly owned subsidiary of Auston. AIMT was incorporated on 22 July 2005.

2 In early 2005, Auston was in financial difficulties and in need of funding assistance. Its managing director, one Ricky Ang, approached the plaintiff, Ng Swee Hua ("Mr Ng") who, at the request of Ricky Ang, agreed to (i) provide an urgent injection of funds in the sum of $200,000 to meet Auston's financial obligations, and (ii) manage its tertiary education business under AIMT in accordance with Auston's corporate restructuring plans. A loan of $200,000 was duly made by Mr Ng.

3 By an Investment Agreement dated 15 December 2005 ("the Investment Agreement"), Mr Ng, Auston and AIMT agreed that Mr Ng would subscribe for convertible bonds of an aggregate principal amount of up to $600,000 on the terms and subject to the conditions in the Investment Agreement. Of this principal amount of $600,000, Mr Ng was obliged by cl 2.1.1 to subscribe and AIMT was correspondingly obliged to issue the first tranche of convertible bonds for a principal amount of $200,000 (hereinafter referred to as "the first tranche of convertible bonds"). It was also expressly stated that Mr Ng's loan of $200,000 would be utilised in satisfaction of the consideration for the subscription of the first tranche of convertible bonds which, at the option of Mr Ng, could be converted into shares of either Auston or AIMT, or a combination of both. Apart from the first tranche of convertible bonds, Mr Ng could, within six months, subscribe for an additional $400,000 worth of convertible bonds to be issued by AIMT. However, some six months later, the Investment Agreement was amended by a Supplemental Investment Agreement of 14 June 2006 ("the Supplemental Investment Agreement"). It is common ground that the year "2005" appearing on the first page of the Supplemental Investment Agreement was a typographical error. I shall come back to the relevant terms of the Supplemental Investment Agreement a little later.

4 Mr Ng was the Managing Director of AIMT from 3 January 2006 to 13 September 2006, and a

director of both defendants from 2 May 2006 to 4 January 2007. Mr Ng was also appointed President and Chief Operating Officer of Auston from 10 July 2006 to 13 September 2006.

5 On 3 November 2006, Mr Ng sent his notice in writing to both defendants directing them to procure the issuance of 5,000,000 fully paid ordinary shares of Auston pursuant to the Investment Agreement ("the Notice of Conversion"). A reminder was sent on 17 November 2006. Instead of responding directly to Mr Ng, the defendants instructed their then solicitors, M/s Colin Ng & Partners, to draft a circular to the shareholders seeking, *inter alia*, shareholders' approval to execute the conversion pursuant to Mr Ng's conversion notice. That draft circular, however, was never finalised and acted upon.

6 On 4 January 2007, Mr Ng resigned from all his directorships in the defendants. He instituted the present action on 1 March 2007 to enforce the terms of the Investment Agreement and Supplemental Investment Agreement (hereinafter collectively referred to as "the Agreements").

Competing arguments

The plaintiff's case

7 The plaintiff's case is that he had fulfilled all his obligations under the Agreements having paid in full $200,000 for the first tranche of convertible bonds. Mr Ng maintained that AIMT breached its obligations under the Investment Agreement as it had since 14 June 2006 failed to issue the first tranche of convertible bonds. That breach, as the argument developed, resulted in Mr Ng losing a real and substantial chance of converting the first tranche of convertible bonds into shares of Auston. Apart from damages, interest is also claimed pursuant to cl 2.3 of the Investment Agreement and cl 4.1 of Schedule 1 thereto.

8 Counsel for Mr Ng, Mr Boey Swee Siang, contended that separately, Auston breached the Agreements in two respects: first, in failing to ensure that AIMT issued the first tranche of convertible bonds and second, in failing on 4 January 2007 to convert the convertible bonds into shares in Auston.

9 It was argued that if the defendants are correct and shareholders' approval was necessary for both the issuance of the first tranche of convertible bonds and conversion of the same into shares in Auston, the onus was on Auston to call the necessary general meeting of its shareholders. At all material times, Auston was the sole shareholder of AIMT, and since Auston failed to call the necessary general meeting, it breached its obligations under the Investment Agreement. By their defaults, Mr Boey submitted that damages should be assessed on or around 4 January 2007 because that was the time (i) Mr Ng resigned as director of the defendants and (ii) the defendants evinced an intention to abandon the Agreements. Pausing here, I did not view the latter assertion as a claim for repudiatory breach simply because Mr Boey had included, albeit as an alternative plea, a claim for specific performance. Such a relief is not consistent with the innocent party's election to treat the contract as discharged from further performance by the defendants.

The defendants' case

10 The defendants denied liability for several different reasons. First, there was no issuance of any convertible bonds as completion contemplated under the Investment Agreement did not take place. Counsel for the defendants, Mr N Sreenivasan, argued that the non-action of Mr Ng to complete, effectively rescinded the Agreements. Second, even if the Agreements were not rescinded, the condition precedent numbered as cl 3.4(i) was not fulfilled, viz the Listing Manual mandated that

shareholders' approval had to be sought to approve the issuance of the convertible bonds as well as the exercise of the convertible bonds for the issue and allotment of the conversion shares to Mr Ng.

11 Specifically, clause 2(c) of the Supplemental Investment Agreement reads:

> Clause 3.4 shall be added as follows:-
>
> Conditions Precedent: The issue of the Convertible Bonds and the issue of any Conversion Shares pursuant to the terms of this Agreement shall be subject to the following conditions precedent:-
>
> (i) if required under the Listing Manual of the SGX-ST, the shareholders of Auston International Group Limited having passed an ordinary resolution at general meeting of Auston International Group Limited to approve the issue of Convertible Bonds as well as the exercise of the Convertible Bonds for the issue and allotment of Conversion Shares to Ng Swee Hua.
>
> (ii) the allotment and issue of Conversion Shares not being prohibited by any statute, order, rule, regulation or directive promulgated or issued by any legislative, executive or regulatory body or authority of Singapore which is applicable to the Parties; and
>
> (iii) all consents, approvals, authorisations or other orders of all relevant regulatory authorities required for or in connection with the issue of the Convertible Bonds and upon its exercise, the conversion of the Convertible Bonds into Convertible Shares to be allotted and issued to Ng Swee Hua, having been unconditionally obtained and are in full force and effect.

12 The parties referred to rules in the SGX Listing Manual and it is now convenient to reproduce them:

> 804 Except in the case of an issue made on a pro rata basis to shareholders or a scheme referred to in Part VIII of this Chapter, no director of an issuer, or associate of the director, may participate directly or indirectly in an issue of equity securities or convertible securities unless shareholders in general meeting have approved the specific allotment. Such directors and associates must abstain from exercising any voting rights on the matter. The notice of meeting must state:-
>
> (1) the number of securities to be allotted to each director and associate;
>
> (2) the precise terms of the issue; and
>
> (3) that such directors and associates will abstain from exercising any voting rights on the resolution.
>
> 805 Except as provided in Rule 806, an issuer must obtain the prior approval of shareholders in general meeting for the following:-
>
> (1) The issue of shares or convertible securities or the grant of options carrying rights to subscribe for shares of the issuer; or
>
> (2) If a principal subsidiary of an issuer issues shares or convertible securities or options that will or may result in:-
>
> (a) the principal subsidiary ceasing to be a subsidiary of the issuer; or

(b) a percentage reduction of 20% or more of the issuer's equity interest in the principal subsidiary. For example, if the issuer has a 70% interest in a principal subsidiary, shareholders' approval will be required for any issue of shares in the principal subsidiary reducing the issuer's equity interest to 56%.

806 (1) Approval by an issuer's shareholders under Rule 805(1) is not required if shareholders had, by ordinary resolution in a general meeting, given a general mandate to the directors of the issuer, either unconditionally or on such conditions to issue:-

(i) shares; or

(ii) convertible securities; or

(iii) additional convertible securities issued pursuant to Rule 829, notwithstanding that the general mandate may have ceased to be in force at the time the securities are issued, provided that the adjustment does not give the holder a benefit that a shareholder does not receive; or

(iv) shares arising from the conversion of the securities in (b) and (c), notwithstanding that the general mandate may have ceased to be in force at the time the shares are to be issued.

…

812 (1) An issue must not be placed to any of the following persons:-

(a) The issuer's directors and substantial shareholders.

(b) Immediate family members of the directors and substantial shareholders.

(c) Substantial shareholders, related companies (as defined in Section 6 of the Companies Act), associated companies and sister companies of the issuer's substantial shareholders.

(d) Corporations in whose shares the issuer's directors and substantial shareholders have an aggregate interest of at least 10%.

(e) Any person who, in the opinion of the Exchange, falls within category (a) to (d).

(2) The Exchange may agree to a placement to a person in Rule 812(1) if specific shareholder approval for such a placement has been obtained. The person, and its associates, must abstain from voting on the resolution approving the placement.

13 The defendants' case is that Rule 805(2) of the Listing Manual requires shareholders' approval for AIMT to issue the convertible bonds which may result in Auston's equity in AIMT being reduced by 20% or more. Furthermore and in the alternative, Rules 804 and 812(1), read with Rule 812(2) of the Listing Manual require shareholders' approval for the specific allotment of 5,000,000 Auston shares and for the issue of convertible bonds to directors. In short, the defendants maintained that it was necessary to obtain the approval of Auston shareholders to (i) issue the first tranche of convertible bonds, and (ii) to approve the conversion of the first tranche of convertible bonds into Auston shares.

14 The defendants observed that any failure to obtain the necessary shareholders' approval was caused by Mr Ng himself in that as the Managing Director of AIMT and a director of Auston the

plaintiff could have obtained the necessary sanction. In other words, any loss was caused by Mr Ng himself. The defendants asserted that this action was brought by Mr Ng only because he knew that he would not be able to obtain the necessary shareholders' approval at this present juncture.

Summary of the issues in closing arguments

15 By the end of the trial, the main question was whether the shareholders' approval was required for (i) the issuance of the first tranche of convertible bonds; and (ii) the issue of conversion shares in Auston. In examining this poser, the debate centred on the application and precise terms of the condition precedent numbered cl 3.4(i) ("hereinafter referred to as "Condition Precedent 3.4(i)") and the rules of the Listing Manual. Essentially, the court was asked to decide whose interpretation of the Agreements including the rules of the Listing Manual was more likely. At this juncture, I must mention that the Agreements contain glaring and appalling typographical errors that did not speak well of the draftsman. Separately, there were also material errors in the SGX announcement of 19 December 2005 and in the Directors' Report contained in Auston's Annual Report for the financial year 2006. On both occasions, Auston stated that it was the issuer of the unsecured convertible bonds contrary to the Investment Agreement whereby AIMT was to issue the unsecured convertible bonds.

16 At the trial, both sides took the view that AIMT had not issued the first tranche of convertible bonds. However, that is not to say that the court is confined to the version advanced by the parties if, as was the case here, the evidence or the reading of it shows otherwise. As I see it, the plaintiff and defendants had equated issuance of the convertible bonds and the delivery to Mr Ng of the convertible bond certificates as one and, hence, concluded that AIMT had not issued the first tranche of convertible bonds since AIMT had not given Mr Ng any certificates bearing his name. It was argued for the defendants that come 14 June 2006, any issuance of convertible bonds by AIMT was subject to shareholders' approval and as there was never one, the defendants could not be said to be in breach of the Investment Agreement.

Non-completion and recession of the Investment Agreement

17 Under the Investment Agreement, completion of the first tranche of convertible bonds was to take place within seven days of the agreement, *viz* 22 December 2005 ("the Completion Date"). Completion was to take place at the office of the solicitors of Auston. By cl 3.3, completion of the first tranche of convertible bonds entailed AIMT delivering to Mr Ng the definitive certificates representing the convertible bonds and certified copies of the necessary resolutions from Auston and AIMT authorising the transaction. Clause 3.6 provides for the contingency if completion does not take place on the scheduled date. It reads:

> 3 . 6 **Rescission**: If any of the documents required to be delivered to the Investor on the Completion Date are not forthcoming for any reason or if in any other respect the foregoing provisions of this Clause are not complied with, the Investor shall be entitled (in addition to and without prejudice to all other rights or remedies available to each of them, including the right to claim damages) *to elect to rescind this Agreement or to effect completion so far as practicable having regard to the defaults which have occurred or to fix a new day for completion* (not being more than seven days after the original Completion Date in which case the foregoing provisions of this Clause shall apply to completion as so deferred). [Emphasis added]

Was the first tranche of convertible bonds issued by AIMT?

18 It is common ground that cl 3.3 was not observed. That being the case, Mr Sreenivasan, as stated, took the position that the first tranche of convertible bonds was not issued and as such the

Notice of Conversion could not be acted upon. An added argument in the alternative is that the first tranche of convertible bonds could not be issued because the Condition Precedent 3.4(i) had to be complied with and it was not.

19 The defendants raised one other point which is that since completion did not take place, Mr Ng would have been entitled under cl 3.6 of the Investment Agreement to either complete as best as practicable or rescind the transaction. However, as Mr Ng did not opt to complete nor gave any notice to complete, the effect of his non-action must be that he, by his conduct, rescinded the Agreements. Mr Sreenivasan cited *Aberfoyle Plantations Ltd v Cheng* [1960] 1 AC 115, *Chi Liung Holdings Sdn Bhd v Attorney General* [1994] 2 SLR 354 and *Tan Cheow Gek v Gimly Holdings Pte Ltd* [1992] 2 SLR 817 for the proposition that when a conditional contract of sale fixed a date for completion, then those conditions must be fulfilled by that date, failing which there is no binding obligation on either party to complete the sale. The defendants' argument in this regard appears to be built on the fiction that because Mr Ng had failed to elect from one of his options under cl 3.6 of the Investment Agreement, the Agreements were rescinded by his own conduct. Notably, cl 3.6 of the Investment Agreement does not state that the Investment Agreement will automatically lapse if certain conditions are not fulfilled within the original completion date; it gives Mr Ng the *right* to elect between certain options. Clause 3.6 does not take away the rights of Mr Ng under that Investment Agreement.

20 Mr Boey argued that even though completion prescribed by cl 3.3 never took place, the defendants' own representatives had, prior to the filing of the defence on 22 March 2007, acted in a manner as if the Investment Agreement continued to bind the defendants.

21 Notwithstanding the legal arguments that were canvassed at the trial, the parties had, on 14 June 2006, accepted that the first tranche of convertible bonds was issued. It must be remembered that six months after the Investment Agreement, the parties signed the Supplementary Investment Agreement whereby they acknowledged that the first tranche of convertible bonds was issued on or about 19 December 2005. Of significance is the material change in the Supplemental Investment Agreement whereby "Convertible Bonds" have been redefined to:

> … the Convertible Bonds of an aggregate principal amount of up to S$600,000 to be issued by the Company to the Investor, the first tranche of S$200,000, *which was issued…to the Investor on or about 19 December 2005.* [Emphasis added]

22 Earlier, the Investment Agreement defined "Convertible Bonds" to mean:

> … the Convertible Bonds of an aggregate principal amount of up to S$600,000 to be issued by the Company to the Investor, *the first tranche of which shall be issued on the Completion Date pursuant to Clause 3 and in accordance with the Conditions.* [Emphasis added]

2 3 The italicized words of the definition of Convertible Bonds in the Supplementary Investment Agreement are unambiguous. The parties to the Supplementary Investment Agreement (*i.e.* Mr Ng, and the defendants) must be taken to intend that if they signed a document of some degree of formality, it would have the effect that it purported to have. The effectiveness of the document could not alter the fact that the plaintiff and the defendants had the requisite intention at that time. Admission to the issue of the convertible bonds for the first tranche of $200,000 was by the Supplementary Investment Agreement and signatures in there. Furthermore, the meeting of directors held on 9 January 2007 passed a resolution to ratify the Supplementary Investment Agreement[note: 1]. In the circumstances, it is the court's duty, as it was lawful, to give effect to the intention of the parties and what was a validly executed Supplementary Investment Agreement. In addition, the

warranty in cl 6.1 of Schedule 1 to the Investment Agreement is plain. The defendants in cl 6.13 warranted and undertook to Mr Ng that the issue by AIMT and the subscription by the Investor of the Convertible Bond under the Investment Agreement was not prohibited by any statute, order, rule, directive or regulations promulgated by any legislative, executive or regulatory body or authority of Singapore. In addition, by cl 6.2 (b) of Schedule 1, the defendants warranted that

> its entry into, exercise of its rights and/or performance of or compliance with its obligations under this Agreement do not and will not violate, or exceed any power or restriction granted or imposed by (a) any law, regulation, authorization, directive or order (whether or not having the force of law) to which it is subject, (b) its constitutive documents, where applicable or (c) any agreement to which it is a party or which is binding on it.

24 In my judgment, the significance of the matters in [23] above prevailed over the absence of any convertible bond certificates. Their omission did not detract from the fact that the unsecured loan of $200,000 was made on terms that the debt could be converted into shares in AIMT or Auston or a combination of both. The right to convert the debt into shares, which lay within the control of Mr Ng, was an essential term of the bargain between the parties to the Investment Agreement. There is a *chose in action* in existence notwithstanding the absence of any convertible bond certificate. The function of the certificate is one of convenience. The primary record of ownership of the convertible bond is in the register of bondholders (see cl 2.1 of Schedule 1). A share certificate provides the member with a convenient evidence of ownership. Likewise, a convertible bond certificate is *prima facie* evidence of the title of the named holder to the bond specified in the certificate. As the Investment Agreement allows for the transfer of the certificate (see cl 2.2 and 2.4 of Schedule 1), the certificate is for that purpose as it would be on a transfer that the certificate is required.

Conditions Precedent in Supplemental Investment Agreement

25 This leads me to the next point in this judgment which is that the amendments in cl 2 of the Supplemental Investment Agreement to include conditions precedent were not meant to apply to the first tranche of convertible bonds but only to the additional convertible bonds of $400,000. This analysis is borne out by the clauses in the Supplementary Investment Agreement and the prevailing evidence. I shall consider first the text of the Supplementary Investment Agreement.

26 The starting point for a court faced with the task of interpreting a clause or provision in a document in which the parties have sought to record their whole agreement is to examine the document as a whole. It is in the context of the whole agreement between them that meaning has to be given to the words used in the particular clause or provision. It is clear from the recital that the parties entered into the Supplementary Investment Agreement with two aims: (i) to extend the option period for Mr Ng to subscribe to the additional $400,000 worth of convertible bonds; and (ii) to provide for conditions precedent for compliance with the Listing Manual due to Mr Ng's appointment as executive director on the board of Auston. In my judgment, the amendments in cl 2 of Supplementary Investment Agreement relates only to the additional $400,000 worth of convertible bonds. As stated, it is plain from the language used in the Supplementary Investment Agreement that by 14 June 2006, the parties have accepted that the first tranche of convertible bonds had been issued on or about 19 December 2005. An extension of time up to 15 December 2006 was given to Mr Ng to subscribe for the additional convertible bonds. Clause 2 is clearly specific to the extension of time granted to Mr Ng. Clauses 2(a) and (b) relate to the additional $400,000 convertible bonds. It logically follows that cl 2(c) also applies to the additional $400,000 convertible bonds and not the first tranche of convertible bonds which have already been issued on or about 19 December 2005 as expressly stated in the redefinition of "Convertible Bonds" in the Supplementary Investment Agreement.

27 Notably, the parties' conduct after the execution of the Supplementary Investment Agreement on 14 June 2006 was consistent with and supported the interpretation ascribed here. Lee Liang Ping (DW 2) admitted that the problem was not with issuance of the first tranche of convertible bonds. The quandary was over the conversion into shares without shareholders' approval. [note: 2] His testimony is consistent with what was stated in the Supplementary Investment Agreement which is that the first tranche of convertible bonds had been issued. The Annual General Meeting to approve the audited accounts for the period from 1 January 2005 to 31 March 2006 was held on 31 July 2006. The Directors' Report dated 1 June 2006 stated that "[a]s at 31 March 2006, Mr Ng Swee Hua has subscribed for the unsecured convertible bonds of $200,000 in principal amount." [note: 3] Mr Boey pointed out that after receipt of Mr Ng's Notice of Conversion of 3 November 2006, the defendants' corporate lawyers, M/s Colin Ng & Partners went about as if the first tranche of convertible bonds had been issued in that in November 2006, the lawyers prepared and sent to Mr Ng a draft shareholders' resolution to approve the issue of the Auston shares.

28 The defendants also introduced in evidence exhibit D1 which is the minutes of a meeting held on 5 March 2007 between the defendants and their lawyers. At that meeting, M/s Colin Ng & Partners recounted that they had on 15 November 2006 advised Mr Ng that shareholders' approval was required for the conversion shares, it being accepted by all concerned that the first tranche of convertible bonds had been issued. I should pause here to state that Goh Sia (DW 4) from First Trust Partnership Certified Public Accountants ("First Trust") testified that although he had not sighted "the physical issuance of the convertible bonds", from an audit perspective based on the documents he sighted, he was satisfied that there was in existence the unsecured convertible bonds.[note: 4] First Trust was replaced as auditors in the next financial year by M/s Nexia Tan & Sitoh. Kim Yoon Sook (DW3) from M/s Nexia Tan & Sitoh said that the $200,000 loan was reclassified as current liability as she did not see the convertible bond certificates. As I stated earlier, the anomaly in the accounts of Auston is that the convertible bonds would be issued by Auston. Before me, both sides accepted that the issuer of the convertible bonds under the Investment Agreement was AIMT.

29 In these proceedings, the defendants incongruously argued that Condition Precedent 3.4(i) applies in relation to the issuance of the first tranche of convertible bonds. It is not logical to contend, on the one hand, that the first tranche of convertible bonds had been issued on or about 19 December 2005 as the definition of "Convertible Bonds" had acknowledged and, on the other hand, to insist that Condition Precedent 3.4(i) still applies to the first tranche of convertible bonds.

30 Even if for the sake of argument that Condition Precedent 3.4(i) applies to the first tranche of convertible bonds, the defendants must overcome some obstacles. First, the Listing Manual applies to a public listed entity like Auston and not AIMT, the entity that was to issue the convertible bond. Second, Mr Sreenivasan argued that Rule 508(2) of the Listing Manual applies so much so that shareholders' approval for the issuance of the convertible bonds is necessary. For Rule 508(2) to apply, the defendants have to demonstrate that AIMT as at 15 December 2005 or, at the latest, on 19 December 2005 was a principal subsidiary within the meaning of the Listing Manual. A "principal subsidiary" is

> a subsidiary whose latest audited consolidated pre-tax profits (excluding the minority interest relating to that subsidiary) as compared with the latest audited consolidated pre-tax profits of the group (excluding minority interest relating to that subsidiary) accounts for 20% or more of such pre-tax profits of the group. In determining profits, exceptional and extraordinary items are to be excluded.

Only the consolidated audited accounts of the group and Auston for the relevant period ended 31 March 2006 was before me. Seeing that AIMT has a paid up capital of less that $1,000, including the

pre-tax losses, the defendants have not shown that, at the material time, AIMT was a principal subsidiary of Auston within the meaning of the Listing Manual.

31 Coming back to the first point that the Listing Manual applies to a public listed entity like Auston and not AIMT, the follow up question on share conversion is whether Condition Precedent 3.4(i) applies to the conversion of the first tranche of convertible bonds to shares in Auston as opposed to AIMT shares. In relation to Condition Precedent 3.4(i), the words "Conversion Shares" by definition mean AIMT Shares. It expressly states that "Convertible Shares" are subject to the conditions precedent. The Supplemental Investment Agreement defines "Convertible Shares" to

> … such number of new AIMT shares to be issued credited as fully paid up upon conversion of the Convertible Bonds in accordance with the terms of this Agreement and the Conditions, such AIMT shares to rank *pari passu* in all respects with all other existing AIMT shares.

By definition, Auston shares are excluded and consequently, the conditions precedent reproduced earlier in [11] above do not apply if the shares to be converted are shares in Auston as was the case here. It seems to me that the conditions precedent in the whole of cl 3.4 relate to the additional $400,000 convertible bonds and to the conversion into AIMT shares.

Other relevant provisions in the Investment Agreement

32 That is not the end of the matter. It is necessary to consider what other provisions there are in the Investment Agreement that must be complied with in relation to the exercise to convert the first tranche of convertible bonds to Auston shares. It seems to me that cl 3.2.5 of the Investment Agreement is relevant. It reads:

> Auston's Board Meeting. Auston shall procure the holding of a meeting of the Directors and the passing thereat of resolutions:-
>
> …
>
> 3.2.5 authorising the registration of the Investor in the books of the Company in respect of the Auston Conversion Shares upon receipt of the Conversion Notice and the issue by the Company of the relevant share certificates to the Investor in respect of their Auston Conversion Shares ...

33 In the Investment Agreement, the "Company" is identified as AIMT. Clause 3.2.5 on its face bears out a clear error of drafting which has led to a meaningless clause. A literal reading gives rise to absurdity. It is plain from the language used that a mistake was made by the draftsman. It is necessary to cure the drafting error to reflect the true intention of the draftsman. It is clear what corrections need to be made in order to cure the mistake. Reference to "Company" in cl 3.2.5 should read as Auston.

34 In *East v Pantiles (Plant Hire) Ltd* [1982] 2 EGLR 111, Brightman LJ said that a mistake in a written instrument could be corrected as a matter of construction if two conditions were satisfied:

> first there must be a clear mistake on the face of the instrument; secondly, it must be clear what correction ought to be made in order to cure the mistake. If those conditions are satisfied, then the correction is made as a matter of construction. If they are not satisfied then either the claimant must pursue an action for rectification or he must leave it to a court of construction to reach what answer it can on the basis that the uncorrected wording represent the manner in which the parties decided to express their intention.

35 In the present case there is no difficulty in satisfying either of the above conditions. In the light of cll 3.2, 3.3 and 6 of Schedule 1 it is obvious that a mistake had been made in cl 3.2.5. Clause 3.2.5 on its face with the drafting error is inconsistent with cll 3.2, 3.3 and 6 of Schedule 1.

36 Having given the warranties in the Investment Agreement, it is a matter of logic that the defendants have the obligation and responsibility to ensure that the conversion into Auston shares would not fall foul of any of the warranties to their detriment. Given the nature of the warranties, the defendants would be in default if they could not make good the warranties.

General mandate to directors

37 Between 15 and 19 December 2005, there was in existence a general mandate passed at the meeting of shareholders on 30 May 2005 empowering the directors of Auston to issue shares in Auston (see cl 3.2.5). It is a convenient juncture to now mention that in the context of cl 3.2.3 of the Investment Agreement, Auston had confirmed that AIMT had on 1 August 2005 passed an ordinary resolution empowering the directors of AIMT to issue shares in AIMT on such terms as the board thinks fit.[note: 5] That authorisation was valid until the conclusion of the first Annual General Meeting or the expiration of the period within which the first Annual General Meeting of AIMT was required by law to be held whichever was the earlier. According to Auston's SGX-ST announcement dated 4 August 2005, Ricky Ang was the sole director of AIMT. [note: 6]

38 However, in the case of conversion shares that are the subject matter of this dispute, the material date is the date of the Notice of Conversion. In the context of cl 3.2.5 of the Investment Agreement, the general mandate given at a general meeting on 30 May 2005 authorizing its directors to issue shares in Auston did not assist the plaintiff. This is because at the time of the Notice of Conversion of 3 November 2006, the authorization granted in that general mandate had expired. The general mandate of 30 May 2005 provides for the authorization to remain valid until "the conclusion of the next Annual General Meeting or the expiration of the period within which the next Annual General Meeting of Auston is required by law whichever is earlier." [note: 7] The Annual General Meeting for 2006 was held on 31 July 2006. Notably, at the 2006 Annual General Meeting, the shareholders were asked to pass a similar resolution empowering the directors of Auston to issue shares in Auston, namely "Resolution 13" as it is known in the Annual Report 2006.[note: 8] Evidence was not led as to whether Resolution 13 was passed, although, ordinarily, it would be passed as a matter of course. However, in my judgment, it is for the plaintiff to produce the necessary evidence if he wishes to rely on a general mandate and to establish its validity.

Convening shareholders' meeting

39 In any event, I agreed with Mr Sreenivasan that shareholders' approval must be sought because Mr Ng was a director of Auston on 3 November 2006. His subsequent resignation would not change things. The material date is 3 November 2006. Rules 804 and 812 of the Listing Manual would have to be complied with, and shareholders' approval at general meeting has to be sought for the issuance of the shares in Auston.

40 I was not persuaded by the defendants' argument that the plaintiff did not see to getting the necessary shareholders' approval. A shareholders' meeting of Auston is not an event that could come about on its own or through the act of an third party. In fact a shareholders' meeting of Auston could only come about if, broadly speaking, the directors of Auston convened one. In other words, the warranties in this case are likened to a *promissory* condition which Auston has promised to bring about. Auston has to seek the necessary approval on account of the warranties it had given in the Investment Agreement.

41 Ewan McKendrick, *Contract Law* (2nd Ed, 2005) distinguishes between the two types of conditions at p 941 (see also *Chitty on Contracts*, 29th Ed, Vol 1, (Sweet & Maxwell 2004) at para 12-027):

> Conditions may be either contingent or promissory. A contingent condition refers to an event that neither party has promised to bring about and upon which hinges the obligation to perform… A promissory condition, on the other hand, is a reference to an event which one party has promised to bring about or not to bring out, as the case may be.

42 It must be observed from the context of the Agreements that Mr Ng was entering into the Agreements *qua* investor, or put simply, just like any other third party investor injecting new funds. In such circumstances, the responsibility of convening the shareholders' meeting would naturally fall on Auston. This conclusion seems to me so obviously right that I find it astonishing that the defendant should have persisted with their contention down to a full trial of the action.

43 The defendants also contended that it was Mr Ng's own fault for not convening the meeting since he was a director of Auston from 2 May 2006 to 4 January 2007. Mr Ng was not the only director of Auston at that time and clearly he was not in a position to convene the meeting since his interests were being implicated. Rule 804 of the Listing Manual states that interested directors and associates must abstain from exercising any voting rights on the matter and it would not be consonant with Rule 804 to expect an interested director to convene the very meeting itself.

44 It was also argued that SGX-ST approval is required under Rule 866 of the Listing Manual for the issue or registration of new shares. The defendants said that SGX-ST would not have approved the conversion into shares of Auston because the traded share price at the material time between 3 November 2006 and 3 January 2007 was higher than the price stated in the Investment Agreement. That argument is not a defence or legal excuse for not seeking the necessary approval having regard to the warranties that have been given in the Investment Agreement. It is for the defendants to make good the warranties it had given in the Investment Agreement.

45 The analysis thus far is that Auston has breached its obligation under the Agreements by failing to call for a shareholders' meeting to seek approval to issue the shares in Auston. Whilst no timeline was prescribed under the Agreements for the calling of the shareholders' meeting, one would expect the defendants to convene the meeting within a reasonable time after Mr Ng issued the Notice of Conversion dated 3 November 2006. The defendants took no action whatsoever and Mr Ng commenced this action on 1 March 2007. Even though the defendants subsequently offered to convene such a meeting – that, unfortunately, is too little too late and does not prejudice Mr Ng's rights under the Agreements. Mr Ng is thus entitled to claim for damages arising out of this breach by Auston.

46 It was agreed at the hearing that I should rule at this stage on only the main issues on liability. Accordingly, I did not hear evidence or arguments directed to issues of quantum, and they remain to be determined on a future occasion.

Conclusion

47 To summarise,

(i) The first tranche of convertible bonds was issued on or about 19 December 2005. The plaintiff is entitled to interest at the contractual rate and for the period prescribed in cl 4 of Schedule 1.

(ii) On the issue of conversion into Auston shares, the first defendant is in breach of the Investment Agreement, and I enter judgment on liability in favour of the plaintiff. I order that damages for the loss of chance to convert to Auston shares be assessed. At assessment, the appropriate date to assess damages shall be determined.

48 On the question of costs, the defendants are to pay the plaintiff the costs of the action to be taxed.

[note: 1]AB at 710.

[note: 2]Transcripts of Evidence dated 14.2.08 p 295

[note: 3]AB 849

[note: 4]Transcript of Evidence dated July 2008 p 395

[note: 5]PB 37

[note: 6]Ricky Ang's AEIC para 32 & p 270

[note: 7]AB 719

[note: 8]DB 57 & 58