

Auston International Group Ltd and Another v Ng Swee Hua
[2009] SGCA 36

Case Number : CA 207/2008
Decision Date : 05 August 2009
Tribunal/Court : Court of Appeal
Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s) : N Sreenivasan and Valerie Ang (Straits Law Practice LLC) for the appellants;
Boey Swee Siang and V Jesudevan (Rajah & Tann LLP) for the respondent
Parties : Auston International Group Ltd; Auston Institute of Management & Technology
Pte Ltd — Ng Swee Hua

Companies – Bonds – Convertible bond certificates not issued – Whether bonds issued at law

Companies – Shares – Allotment – Director holding convertible debt securities exercising right of conversion – Whether shareholder's approval required – Rules 804 and 812 SGX-ST Listing Manual

Companies – Shares – Convertible securities issued pursuant to general mandate with conversion after expiry of said mandate – Whether fresh shareholders' authorisation required for conversion – Section 161(4) Companies Act (Cap 50, 2006 Rev Ed)

Damages – Loss of chance – Failure to deliver shares of listed company – Whether damages ought to be assessed on basis of loss of chance

5 August 2009

Judgment reserved.

Chan Sek Keong CJ (delivering the judgment of the court):

Introduction

1 This is an appeal from the decision of the judge in Suit No 129 of 2007 (“the Judge”) in holding that the appellants, Auston International Group Ltd (“Auston”) and Auston Institute of Management & Technology Pte Ltd (“AIMT”) (collectively, “the appellants”), were in breach of contract under an investment agreement with one Ng Swee Hua (“the respondent”) (see *Ng Swee Hua v Auston International Group Ltd* [2008] SGHC 241 (“the GD”)).

2 Auston is a company listed on the Singapore Exchange (“SGX”). AIMT was, at the material time, a wholly owned subsidiary of Auston. In early 2005, Auston was in need of funding assistance and its then managing director, one Ricky Ang, sought a loan of \$200,000 on behalf of Auston from the respondent. The loan was duly made. By an investment agreement entered into between the respondent, Auston and AIMT on 15 December 2005 (“the Investment Agreement”), it was agreed that the respondent would subscribe for convertible bonds of an aggregate principal of \$200,000 (“the Convertible Bonds”). The bonds were convertible into either Auston or AIMT shares, or a combination of both. The Investment Agreement also provided that the respondent’s existing loan of \$200,000 would be utilised as consideration for the bonds. Further, the respondent would have the option to subscribe for an additional \$400,000 worth of bonds within six months from completion of the Investment Agreement.

3 Under cl 3.3 of the Investment Agreement, AIMT undertook to deliver to the respondent the definitive bond certificates on completion date (defined in cl 1.1 as the day falling on seven days after the execution of the Investment Agreement or such other date as the parties might agree in

writing). Clause 6.5 of Schedule 1 to the Investment Agreement provided that:

[t]he delivery of Auston Shares upon the exercise of any right of conversion of any Convertible Bond ... shall be effected by crediting the securities account designated by the holder of the Convertible Bond.

4 Clause 3.6 of the Investment Agreement provided for the consequences of non-delivery of the bond certificates:

Rescission: If any of the documents required to be delivered to the [respondent] 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 [respondent] 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).

5 The respondent was the managing director of AIMT from 3 January 2006 to 13 September 2006, and was also a director of both the appellants from 2 May 2006 to 4 January 2007.

6 On 14 June 2006, the parties amended the Investment Agreement by a supplementary investment agreement ("the Supplementary Investment Agreement") to add, *inter alia*, the following clauses:

"Convertible bonds" means the Convertible Bonds of an aggregate principal amount of up to S\$600,000, to be issued by [AIMT] to the [respondent], *the first tranche of S\$200,000, which was issued to the [respondent] on or about 19 December 2005;*

...

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] having passed an ordinary resolution at general meeting of [Auston] 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 [the respondent];

(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 [the respondent], having been unconditionally obtained and are in full force and effect.

[emphasis added]

7 A few months later, on 3 November 2006, the respondent sent a conversion notice (“the Conversion Notice”) to the appellants directing them to procure the issuance of 5m ordinary shares of Auston (“the Conversion Shares”). Auston did not act on the Conversion Notice, but instructed its then solicitors to draft a shareholders’ circular to seek shareholders’ approval to issue the Conversion Shares on the basis that such approval was required as the respondent was then a director of the company. The draft circular was, however, never finalised. On 4 January 2007, the respondent resigned from his directorships in the appellants. He then commenced the present action on 1 March 2007 claiming specific performance for the issuance of the Conversion Shares or alternatively damages.

The decision below

8 In the court below, the respondent’s case was that AIMT was in breach of its obligations under the Investment Agreement since 14 June 2006 in failing to issue the Convertible Bonds (or the bond certificates to be more precise) and that he was entitled to damages on the basis of the loss of a real and substantial chance of converting the Convertible Bonds into the Conversion Shares. He also claimed interest on his loan pursuant to cl 2.3 of the Investment Agreement and cl 4.1 of Schedule 1 thereto. The respondent claimed separately that Auston was in breach of its contractual obligations in failing to issue the Conversion Shares and in ensuring that AIMT would issue the Convertible Bonds.

9 The appellants denied liability on several grounds, as follows:

(a) The Convertible Bonds had not been issued as completion did not take place as contemplated by the Investment Agreement, and the respondent had rescinded the agreements (*viz*, the Investment Agreement and the Supplemental Investment Agreement) by his inaction.

(b) Even if the Investment Agreement was not rescinded, the conditions precedent in cl 3.4 (introduced by the Supplementary Investment Agreement) were not fulfilled, *viz*, the SGX-ST Listing Manual required shareholders’ approval for the issuance of the Convertible Bonds as well as the conversion of the bonds into equity shares and the allotment of such shares to the respondent as he was a director of Auston at the time of the Conversion Notice.

10 At the conclusion of the trial, the Judge made the following findings:

(a) The Convertible Bonds had been issued on or about 19 December 2005 (the GD at [26] and [47]).

(b) The conditions precedent in cl 3.4 (introduced by way of the Supplementary Investment Agreement) had no application to the Convertible Bonds (the GD at [29] and [31]).

(c) Auston was in breach of the Investment Agreement and that damages ought to be assessed on the basis of the loss of chance to convert the Convertible Bonds into the Conversion Shares (the GD at [47]).

The Judge also held that the respondent was entitled to interest at the contractual rate as provided in the Investment Agreement.

11 The basis on which the Judge found that the Convertible Bonds had been issued is set out at [26] – [28] of the GD, as follows:

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 [the respondent] 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 [the respondent'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 [the respondent] to subscribe for the additional convertible bonds. Clause 2 is clearly specific to the extension of time granted to [the respondent]. 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. 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, [the respondent] has subscribed for the unsecured convertible bonds of \$200,000 in principal amount." Mr Boey pointed out that after receipt of [the respondent's] Notice of Conversion of 3 November 2006, the [appellants'] 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 [the respondent] a draft shareholders' resolution to approve the issue of the Auston shares.

28 The [appellants] also introduced in evidence exhibit D1 which is the minutes of a meeting held on 5 March 2007 between the [appellants] and their lawyers. At that meeting, M/s Colin Ng & Partners recounted that they had on 15 November 2006 advised [the respondent] 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. ...

12 The reasoning of the Judge as set out in these passages is clear. As far as the Convertible Bonds were concerned, the appellants had accepted that they had been issued to the respondent as the latter had subscribed and paid for them by utilising his loan to Auston as consideration for the bonds. The issue of the Convertible Bonds on or about 19 December 2005 was confirmed by the Supplementary Investment Agreement which acknowledged the issuance. As such, the conditions precedent in cl 3.4 did not apply to the Convertible Bonds. The Judge's finding that the Convertible

Bonds had been issued was not intended to refer to the issue of the bond certificates but to the acquisition of legal rights to the Convertible Bonds by reason of the respondent having paid for them, and of Auston treating the Convertible Bonds as having been issued notionally. At [24] of the GD, the Judge said:

... [t]here is a *chose in action* in existence notwithstanding the absence of any convertible bond certificate. The function of the certificate is one of convenience. ... [emphasis in original]

The appellants' case on appeal

13 We turn now to the appeal proper. The appellants' principal complaint against the Judge's decision is that in entering judgment on liability in favour of the respondent, she had gone beyond the parties' written pleadings and oral submissions that the Convertible Bonds had not been issued. The appellants' counsel contended that at the trial below, both parties proceeded on the basis that the respondent had amended his pleadings to agree with the appellants' defence that the Convertible Bonds had not been issued, and not simply that the related bond certificates had not been issued. He also contended that counsel for the respondent had argued his case on that basis. However, the Judge refused to accept the parties' pleaded case and made her finding on what she considered the true facts to be, *ie*, the Convertible Bonds had been issued, and that counsel for both parties had confused the issue of the said bonds with the issue of the bond certificates. In her view, the true dispute between the parties was simply whether the appellants were in breach of their obligations, notwithstanding the non-issuance of the bond certificates, to issue the Conversion Shares upon receipt of the Conversion Notice. At [16] and [47] of the GD, she said:

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 [respondent] and [the appellants] had equated issuance of the convertible bonds and the delivery to [the respondent] 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 [the respondent] any certificates bearing his name.* It was argued for the [appellants] that come 14 June 2006, any issuance of convertible bonds by AIMT was subject to shareholders' approval and as there was never one, the [appellants] could not be said to be in breach of the Investment Agreement.

...

47 To summarise,

(i) The first tranche of convertible bonds was issued on or about 19 December 2005. The [respondent] 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, [Auston] is in breach of the Investment Agreement, and I enter judgment on liability in favour of the [respondent]. 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.

[emphasis added]

14 Counsel for the appellants submitted before us that the Judge was wrong in law to go beyond

the issue(s) pleaded by the parties. He referred to principles established by case law, such as *Ong Seow Pheng v Lotus Development Corp* [1997] 3 SLR 137 and *The Ohm Mariana* [1993] 2 SLR 698. Counsel for the respondent, on the other hand, relied on cases such as *PT Tenar Indoam Oil Services v Third Wave Group Ltd* [2008] SGHC 18 in support of the contention that there is no absolute rule prohibiting a court from making findings of fact outside of the pleadings.

What was the respondent's pleaded case?

15 We have examined the sequence of pleadings in this case and it is apparent to us that there was no confusion in respect of the respondent's pleaded case. It may be that counsel for the respondent was himself confused and had confused the court below by his written and oral submissions by not drawing a legal distinction between the issuance of the Convertible Bonds and the issuance of the certificates for the bonds. In this respect, the respondent had initially pleaded unequivocally that the Convertible Bonds were issued and his claim was for specific performance for the issuance of the Conversion Shares or for damages. The relevant paragraphs of the (last amended) statement of claim ("SOC") (notwithstanding that the SOC was amended thrice, the relevant paragraphs were not amended in substance and were essentially the same as the paragraphs appearing in the original SOC) were as follows:

5 Subsequently, it was agreed between the [respondent] and the [appellants] that the Loan would be formalised, by way of the issuance to the [respondent] of convertible bonds worth S\$200,000 to be issued by [AIMT]. Therefore [the Investment Agreement] was entered into between the [respondent] and the [appellants] under which *the [respondent] subscribed for S\$200,000 worth of convertible bonds issued by [AIMT]* with an option to subscribe for a further S\$400,000 worth of convertible bonds by 14 June 2006 ("the option").

...

10 By a letter dated 3 November 2006 ("the Conversion Notice") to the [appellants], the [respondent] conveyed his intention to convert the Loan into 5,000,000 fully paid ordinary shares in the capital of [Auston] ("Auston Shares") at the price agreed between parties of S\$0.04 per Auston Share pursuant to the [Investment] Agreement and as amended by the Supplemental [Investment] Agreement.

[emphasis added]

16 It can be seen in para 5 of the SOC that the respondent had pleaded that he had "subscribed for S\$200,000 worth of convertible bonds issued by [AIMT]". In other words, he had agreed that his outstanding loan of \$200,000 to Auston be treated as a subscription for the Convertible Bonds which, as agreed between the parties, were treated as issued, and that only the certificates remained to be delivered to the respondent.

17 However, after the SOC was served on the appellants, the appellants filed their defence which pleaded, *inter alia*, at paras 6 and 9 (in the original defence, and at paras 7 and 10 in the last amended defence) as follows:

(a) Completion did not take place and the Convertible Bonds were not issued to the respondent as the definitive bond certificates were not delivered to the respondent as required under cl 3.3 of the Investment Agreement.

(b) The conditions precedent in cl 3.4 of the Investment Agreement (as amended by the

Supplementary Investment Agreement) were not satisfied, given especially the failure to obtain shareholders' approval.

18 The appellants' pleaded defence was that because the certificates had not been issued or delivered to the respondent, it resulted in the transaction not being completed, and therefore the Convertible Bonds were not issued. The appellants' pleading equated the failure to issue the certificates with the failure to complete the purchase of the bonds. The appellants pleaded their defence in this way because they took the view that cll 3.4 and 3.6 of the Investment Agreement (as amended by the Supplementary Investment Agreement) were applicable to the issue of the Convertible Bonds. Specifically, the defence was that they were under no obligation to issue the bonds as the conditions precedent, in cl 3.4, especially the requirement of shareholders' approval, had not been satisfied. The defence based on cl 3.6 was that the respondent had rescinded the Investment Agreement.

19 In view of the appellants' position that they had not issued the Convertible Bonds, the respondent amended the SOC by adding, amongst others, paras 9A and 11A as follows:

9A Notwithstanding [AIMT's] clear obligations under the [Investment] Agreement, it has failed, refused and/or neglected to issue the convertible bonds to the [respondent]. Further, [Auston] and/or [AIMT] has failed, refused and/or neglected to take any steps to procure the issuance of the convertible bonds.

...

11A In addition, the [respondent] has suffered loss and damages, from [AIMT's] breach in failing to issue the convertible bonds, since 14 June 2006 following the execution of the Supplementary [Investment] Agreement, in that he lost the opportunity to convert the same into Auston Shares...

20 Unfortunately, the apparent lack of linguistic clarity of the words in paras 9A and 11A of the amended SOC, *ie*, the purported suggestion that there was non-issuance of the Convertible Bonds (without making clear that the pleadings were intended to refer to the certificates and not the bonds themselves), led counsel for the appellants to argue that the respondent had agreed that the Convertible Bonds had not been issued. However, given the circumstances in which para 9A was included as an amendment, the relevant words in para 9A are wholly consistent with the assertion that the appellants had failed to issue the bond certificates, rather than the assertion that the transaction relating to the Convertible Bonds had not been completed. The averment that [AIMT] had "clear obligations under the [Investment] Agreement" but "failed, refused and/or neglected to take any steps to *procure the issuance* of the convertible bonds" [emphasis added] is clearly a reference to the bond certificates. This reading of para 9A fits in well with para 5 which was not amended in substance and which stated that the Convertible Bonds had been subscribed for and issued. Similarly, para 11A also fits in well with para 5 as it merely asserted that the respondent had suffered loss and damages because he had been denied the opportunity to convert the Convertible Bonds into the Conversion Shares. We should mention that the respondent had also pleaded at, *inter alia*, paras 4C and 5 of his amended reply (and again with the same lack of clarity) that the Convertible Bonds had not been issued. However, the meaning of this "admission" must be considered in the context of the amended defence, and so considered, it was simply a reiteration of the claim that the appellants had failed to issue the bond certificates. This is made clear in para 9 of the amended reply which states:

... The [respondent] avers that, prior to November 2006, he had not requested for the issuance of the convertible bonds, as he had been under the impression that the same had already been

done. ...

21 Thus, when the appellants pleaded in their defence that the Convertible Bonds had not been issued as the terms of the Investment Agreement (as amended by the Supplementary Investment Agreement) were not met, the respondent replied to the defence by asserting that since AIMT admitted that the Convertible Bonds were not issued, it was in breach of its obligations to issue them. This reply could not be regarded as an abandonment of his allegation that the failure of AIMT to issue the bond certificates and/or the Conversion Shares was a breach of the appellants' obligations under the Investment Agreement and that the respondent was entitled to damages for the breach.

22 The respondent's evidence before the court is likewise consistent with the above interpretation. At para 26 of his affidavit of evidence-in-chief, he said:

Notwithstanding its contractual obligations, [AIMT] has failed, refused and/or neglected to comply with its contractual obligations to *physically issue the convertible bonds* or to pay any interest to me. It is therefore in breach of the Investment Agreement. [emphasis added]

23 The transcript of the respondent's re-examination by his counsel confirms this point:

Q So let me just rephrase the question. What do you mean by to you the convertible bonds were not issued?

A When I say that, what I meant was though I have an impression that it was issued, but I have not received it, because during the course of that time, I did ask for it, and they said "Yes, it's done but it's on the way".

Q Sorry, just let me stop you there. Let's be very specific, Mr Ng. When they say, "It's on the way", what is "it"?

A It's done.

Q So---

A To me, it's done, your Honour, that---

Court: No, counsel's question is what is "it"?

Boey: Yes, that's right, your Honour. But essentially I think he more or less---

Court: Just ask him to answer again.

Q So could you just answer what do you mean by "it", you know? What do you---when you used the word "it", "It's on the way", you know, what is on the way? What is "it" which is on the way? You know, in your mind.

A The bond is on the way, my certificate is on the way.

Q Right, it's the certificate, isn't it, Mr Ng?

A Yes. Yes, your Honour.

Q So just to clarify, what was your impression as to whether they had actually done the necessary to issue the convertible bonds or not? What was your impression as to whether they had taken the necessary steps to issue the convertible bonds or not?

A The impression I had basically every time when I talked to Lee Liang Eng is that CNP, Colin Ng & Partner do it already, so I take it as it is.

Q So you took it as all the necessary steps were already taken for the issuance of the bond, you just hadn't received---

A Yes.

Q ---the certificate.

A Yes, your Honour.

Q So it was just a formal step for you to receive the certificates.

A Yes.

24 In the circumstances, the appellants' complaint that the Judge had decided a case not pleaded by the parties has no merit. The Judge decided the case as pleaded by the respondent and rejected the case as pleaded by the appellants. The Judge was fully entitled, as a matter of law, to find on the basis of the respondent's pleaded case before her that the Convertible Bonds had been issued.

25 As for the Judge's finding that the Convertible Bonds were issued on or around 19 December 2005, the evidence is clear beyond doubt that as between Auston and the respondent, the former had acknowledged in its annual accounts that the latter was in law the owner of the Convertible Bonds, even though the certificates had not been delivered to him. Auston's auditor had testified (see [\[11\]](#) above) that although he had not sighted "the physical issuance of the convertible bonds", from an audit perspective and based on the documents he sighted, he was satisfied that there was in existence the (unsecured) Convertible Bonds. Auston's annual audited accounts approved at its annual general meeting showed that the Convertible Bonds had been issued. Although Auston had not issued the physical bond certificates, Auston had treated the respondent as being notionally the owner of the Convertible Bonds. In our view, the Judge was correct to state at [24] of the GD that the absence of the certificates did not detract from the legal position that Auston had recognised the respondent as the owner of the Convertible Bonds and that the "function of the certificate is one of convenience" (see the GD at [24]; referred to at [\[12\]](#) above).

26 Counsel for the appellants has not produced any statutory or case authority to show that because the bond certificates had not been issued, Auston's acknowledgement in its books that the

respondent was the owner of the Convertible Bonds could not provide a legal basis upon which the respondent could convert them into the Conversion Shares. We agree with the Judge that the bond certificates in the present case were only documentary evidence of the respondent's ownership of the bonds. The failure of the appellants to procure the issue of the certificates could not be a ground for depriving the respondent ownership of the Convertible Bonds.

Whether the conditions precedent in cl 3.4 apply

27 Before us, counsel for the appellants also contended that the Judge erred in finding that the conditions precedent in cl 3.4 of the Investment Agreement (as amended by the Supplementary Investment Agreement) did not apply to the Convertible Bonds.

28 In our view, this argument has no merit. As pointed out by the Judge, the definition of "Convertible bonds" in the Supplementary Investment Agreement (see [6] above) acknowledged that "the first tranche of S\$200,000" worth of convertible bonds had been issued in or around 19 December 2005. Both parties are as such evidentially estopped from denying that the bonds had not been issued. It follows that cl 3.4 had no application to the Convertible Bonds. They were applicable and were intended to apply only to the additional \$400,000 worth of convertible bonds which the respondent must subscribe for within the time prescribed for in the Investment Agreement.

Obligation to obtain shareholders' approval

29 The next issue we have to decide is whether the conversion of the Convertible Bonds required shareholders' approval in order to comply with the requirements of the SGX-ST Listing Manual. This is a regulatory issue that is different from the contractual issue under the Investment Agreement (as amended by the Supplementary Investment Agreement), concerning the conditions precedent in cl 3.4. We have decided that the contractual issue raised by the appellants has no merit (see [28] above). The appellants have argued that that under the SGX-ST Listing Manual, such approval was necessary because the respondent became a director of Auston after the Convertible Bonds had been issued to him and was a director at the time of conversion. The appellants argued that such shareholders' approval had not been obtained and therefore they were not in a position to effect the conversion of the said bonds into the Conversion Shares.

30 The Judge rejected this argument as irrelevant to Auston's liability as she held that under the terms of the Investment Agreement, the onus was on Auston to obtain its shareholders' approval for the issuance of the Convertible Bonds as well as for their conversion into the Conversion Shares. We agree.

The necessity for a fresh general mandate

31 However, we need to deal with one other point (which, although not necessary to the disposition of this appeal, may have significance for investors generally). In the court below, the Judge accepted that there existed a general mandate empowering the directors of Auston to issue shares in December 2005 when the Convertible Bonds were issued, but that on 3 November 2006 (the date of the Conversion Notice), that general mandate had lapsed and the respondent had failed to lead evidence to show that the mandate was renewed (the GD at [37]- [38]):

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. 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.

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." 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. 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 [respondent] to produce the necessary evidence if he wishes to rely on a general mandate and to establish its validity.

32 We do not think this analysis is correct. It seems to us to be contrary to commercial practice for a person in the position of the respondent to have agreed to subscribe for the Convertible Bonds without an assurance of the tradability of the Conversion Shares on the SGX without any further approval by Auston. Otherwise, the respondent would have assumed the risk of the Convertible Bonds being unilaterally rendered "unconvertible" by Auston. It may be recalled that cl 6.5 of Schedule 1 to the Investment Agreement provided that "[t]he delivery of Auston Shares upon the exercise of any right of conversion of any Convertible Bond ... shall be effected by crediting the securities account designated by the holder of the Convertible Bond" (see [\[3\]](#) above). This clause is indicative of the existence of a shareholders' resolution approving the issue of the Convertible Bonds to the respondent, with the right of conversion without any further approvals. Otherwise, there would have been some language to state expressly that further shareholders' approval is necessary for the conversion itself. In this connection, s 161(4) of the Companies Act (Cap 50, 2006 Rev Ed) makes provision for this situation:

Approval of company required for issue of shares by directors

161.—(1) Notwithstanding anything in a company's memorandum or articles, the directors shall not, without the prior approval of the company in general meeting, exercise any power of the company to issue shares.

(2) Approval for the purposes of this section may be confined to a particular exercise of that power or may apply to the exercise of that power generally; and any such approval may be unconditional or subject to conditions.

(3) Any approval for the purposes of this section shall continue in force until —

(a) the conclusion of the annual general meeting commencing next after the date on which the approval was given; or

(b) the expiration of the period within which the next annual general meeting after that date is required by law to be held,

whichever is the earlier; but any approval may be previously revoked or varied by the company in general meeting.

(4) *The directors may issue shares notwithstanding that an approval for the purposes of this section has ceased to be in force if the shares are issued in pursuance of an offer, agreement or option made or granted by them while the approval was in force and they were authorised by the approval to make or grant an offer, agreement or option which would or might require shares to be issued after the expiration of the approval.*

[emphasis added]

33 In the case of Auston, the relevant shareholders' resolution passed on 30 May 2005 was as follows:

AUTHORISATION TO ISSUE SHARES PURSUANT TO SECTION 161 OF THE COMPANIES ACT, CAP. 50

IT WAS RESOLVED THAT the Directors be and are hereby authorised pursuant to the provisions of Section 161 of the Companies Act, Cap. 50 (the "Act") to allot and issue shares and convertible securities of the Company *on such terms and conditions and with such rights or restrictions as they may deem fit ...*

[emphasis added]

34 In the light of s 161(4) of the Companies Act, the relevant resolution was sufficiently broad to authorise the directors of Auston to issue the Convertible Bonds with a conversion date after the expiry of the general mandate to the respondent. In the present case, we would have expected the terms of the relevant resolution to apply expressly to the issue of the Conversion Shares even after the expiry of the general mandate. In our view, the resolution passed on 30 May 2005 was in itself sufficient as it authorised the directors to issue convertible securities on such terms and conditions as they may deem fit.

Subsequent appointment of the respondent as director of Auston

35 The Judge below also expressed the view that shareholders' approval was required for the conversion of the Convertible Bonds as the respondent was a director of Auston on 3 November 2006 at the time when he elected to convert his bonds. In essence, she agreed with the appellants' submission that Rules 804 and 812 of the SGX-ST Listing Manual would have to be complied with. For ease of reference, we set out the relevant rules below:

PART II GENERAL REQUIREMENTS FOR AN ISSUE OF SECURITIES

...

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. ...

PART IV ISSUE OF SHARES, COMPANY WARRANTS AND CONVERTIBLE SECURITIES FOR CASH (OTHER THAN RIGHTS ISSUE)

809 An issuer may issue shares, company warrants or other convertible securities for cash other than by way of a rights issue.

...

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. ...

(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.

[Rule 812(2) has since been amended on 24 March 2009 and now provides as follows: "Rule 812(1) will not apply 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."]

The expression "equity securities" is defined in the SGX-ST Listing Manual as "shares (including preference shares) and convertible equity securities, and securities (other than debt securities) classified by the Exchange as equity securities."

36 In our opinion, Rules 804 and 812 have no application when a person who is holding convertible bonds is appointed to the board of directors and subsequently exercises his right of conversion. In our view, the said rules contemplate shareholders' approval only for the issue of convertible securities, and not their conversion. This is because the right to convert would already be vested in the holder before he became a director. The purpose of those rules is to avoid conflicts of interest by preventing directors from issuing shares or convertible securities to themselves in the absence of shareholders' approval.

37 On the facts, it is therefore clear to us that the appellants were in breach of their obligation in failing to issue and credit the Conversion Shares into the securities account designated by the respondent pursuant to cl 6.5 of Schedule 1 to the Investment Agreement.

Damages

38 The remaining issue we have to decide is how damages should be assessed. Having found that the Convertible Bonds were issued, the Judge decided the issue of liability against the appellants and also that damages be assessed on the basis of the loss of chance to convert the Convertible Bonds into the Conversion Shares. We do not agree with this basis for assessment. The doctrine of "loss of chance" was recently revisited by this court in *JSI Shipping (S) Pte Ltd v Teofoongwonglcloong (a firm)* [2007] 4 SLR 460 at [147]-[156], wherein the principles laid down in *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602 ("*Allied Maples*") were re-endorsed. In essence, where the loss of chance caused by the defendant's default is dependent upon the action of an independent third party, a plaintiff might not be required to show on a balance of probabilities that the chance would have come to fruition. Damages would be assessed so long as the chance is a real or

substantial one, as opposed to a speculative one. On the other hand, if no third party is involved, a plaintiff must prove what he would have done if there had been no breach on a balance of probabilities. The distinction is evident from the following extract from *McGregor on Damages* (Sweet & Maxwell, 17th Ed, 2003) ("*McGregor*"), at paras 8-034–8-037:

In his judgment [in *Allied Maples*] Stuart-Smith L.J. distinguished between three types of situation or categories. In his first category fall cases in which the defendant's negligence consists in some positive act of misfeasance and the question of causation is one of historical fact; this is of course the situation to which Lord Reid averted in *Davies v Taylor* and proof on the balance of probabilities prevail here. In the second category fall cases in which the defendant's negligence consists of an omission where causation depends not upon a question of historical fact but upon the answer to the hypothetical question what would the claimant have done if there had been no negligence; how the claimant would have reacted is again subject to proof on the balance of probabilities. In the third category fall cases in which the claimant's loss depends upon the hypothetical action of a third party, whether in addition to action by the claimant or independently of it; here the claimant need only show that he had a substantial chance of the third party acting in such a way as to benefit him.

...

From the above it can be seen that what is required to bring loss of a chance into play is the hypothetical action of a third party.

...

... there is undoubtedly today an unfortunate tendency to argue loss of a chance in situations where it can have no conceivable application. The temptation is of course great; if total success cannot be achieved, aiming for a percentage success is attractive.

39 In the present case, the respondent's loss as a result of his being deprived of his conversion was due to a breach of contract by the appellants: it had nothing to do with the hypothetical action of a third party. This is an ordinary case of breach of contract for failing to deliver shares. The respondent did not lose any chance to acquire the Conversion Shares and thereafter sell them at a higher price at a later date because he could have gone into the market upon breach to purchase the equivalent 5m Auston shares. His loss, if any, would be the difference between the total cost of purchasing 5m Auston shares in the market and \$200,000. The issue the court will have to decide is the relevant date on which the respondent should have gone into the market to buy 5m Auston shares.

40 Before us, counsel for the respondent contended that the earliest possible date to issue the Conversion Shares was 4 January 2007 and damages should be assessed on that date. This contention is based on the appellants' position that shareholders' approval to issue the Conversion Shares was required, and 4 January 2007 would, reasonably, be the earliest date to obtain such approval. On the other hand, counsel for the appellants argued that damages should be for failure to issue the Convertible Bonds and for assessment purposes, the court should take the price of Auston shares on 22 December 2005, that being the contemplated date for completion under the Investment Agreement.

41 We do not accept both arguments. The respondent's contention that 4 January 2007 was the relevant date for assessment is premised on the belief that shareholders' approval was required, while the appellants' contention of 22 December 2005 was premised on the Convertible Bonds not having

been issued. Both are wrong.

42 The general principles applicable in determining damages on the seller's failure to deliver securities are set out in *McGregor* where the point is made (at para 24-003) that "[t]he normal measure of damages is the market price of the shares at the contractual time for delivery less the contract price." This would represent the amount that the buyer must obtain to put himself in the position he would have been in had the contract been performed, since to do so he must purchase equivalent shares in the market (*ibid*). It is also observed that the cases that have been adjudicated upon "indicate an application of [such] common principles while at the same time bringing out small differences" (*McGregor* at para 24-005). Thus, the date of breach may be postponed if the seller had sought more time to issue the shares and the buyer was willing to grant such indulgence, and the market price on the postponed date will therefore be the relevant one (*ibid*, citing *Wilson v London and Globe Finance Corp* (1897) 14 TLR 15). Whether these principles apply depend on the facts of the cases on which they were based. With reference to the present case, it will be necessary for the assessor to take into account the system of share trading on a scripless basis in the SGX. This means that the Conversion Shares, upon their issue, have to be transferred and registered in the name of the Central Depository (Pte) Limited ("CDP") to be held by the CDP for the account of the respondent before they can be traded in the SGX. Therefore the appropriate date for determining the measure of damages should be the date on which the Conversion Shares become listed on the SGX for trading.

43 What this date is depends on the facts. In the present case, there appears to be some evidence on record indicating that the appellants had asked the respondent for time to sort out the problem of getting shareholders' approval, which the respondent appeared to have agreed to, although it led to nothing. Nevertheless, the period of indulgence given by the respondent may have to be factored into determining the relevant date for the respondent to go into the market to purchase the shares (see *McGregor* at para 24-005).

Conclusion

44 In the circumstances, we dismiss the appeal with costs here and below, and with the usual consequential orders. We also direct that damages be assessed before the Registrar.

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