Indulge Food Pte Ltd *v* Torabi Marashi Bahram
[2010] SGHC 22

Case Number : Suit No 717 of 2007

Decision Date : 19 January 2010

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Sugidha Nithi and Renu Menon (Tan Rajah & Cheah) for the plaintiffs; Harish Kumar and Goh Seow Hui (Rajah & Tann LLP) for the defendants.

Parties : Indulge Food Pte Ltd — Torabi Marashi Bahram

Contract

Civil Procedure

19 January 2010

Belinda Ang Saw Ean J:

Introduction

1 This case concerned the recovery of sums already paid under a contract, and a counterclaim to recover further sums due under the same contract. On 10 December 2009, I delivered oral judgment dismissing both the main action and the defendant's counterclaim. This written judgment sets out the detailed reasons for my decision. It will also revisit the legal principles governing an action for an agreed sum.

2 The plaintiff, Indulge Food Pte Ltd ("Indulge"), is a holding company. The defendant, Torabi Marashi Bahram ("Marashi"), a businessman, was the founder and managing director of Euoro International Pte Ltd ("Euoro"), a company that was, at the material time, in the business of selling herbal products and fruit and floral teas. On 2 November 2006, Indulge, Marashi and Euoro entered into a tripartite share subscription agreement ("the Subscription Agreement"). In the Subscription Agreement, Indulge agreed to invest $1m in Euoro in return for 50% of Euoro's shares plus one share. The investment was to be made in four tranches of $250,000 each. Notably, the business aspect of the agreement envisaged joint efforts by Indulge, Marashi and Euoro to expand Euoro's business, both within and outside Singapore.

3 Indulge paid the first two tranches totalling $500,000 to Euoro but did not pay the third and fourth tranches. Both before litigation and during the trial, Indulge justified its refusal to pay on the ground of Marashi and Euoro's non-compliance with the conditions precedent to the payment of the third tranche set out in cl 3.4 of the Subscription Agreement. A failure to satisfy the conditions precedent in cl 3.4 would not only entitle Indulge to refuse to pay the third and fourth tranches to Euoro, it would also allow Indulge to terminate the Subscription Agreement and recover from Marashi the first two tranches already paid out to Euoro. Marashi denied that he was in breach of cl 3.4 of the Subscription Agreement, and in further response, Marashi brought a counterclaim against Indulge for payment to Euoro of the third and fourth tranches totalling $500,000.

4 In the course of the trial, it became apparent that Indulge's true grievance was with Marashi's

management of Euoro. It was alleged, amongst other things, that Marashi was contractually obliged to apply Indulge's cash injection towards the opening of new herbal stores and stores-in-stores, but had instead wrongly used the first and second tranches to pay Euoro's existing creditors. It was obvious from the management accounts for the financial year 2007 that not much of the $500,000 paid to Euoro was left by end April 2007. It was not surprising that Indulge attempted to negotiate a Supplemental Deed with Marashi and Euoro to, *inter alia*, protect the second half a million dollars of its investment. The Supplemental Deed was never signed.

5 In the witness box, Marashi confirmed that Euoro had, in fact, ceased business in August 2008, less than two years after the conclusion of the Subscription Agreement. [note: 1] After closing submissions were tendered, both sides were directed to submit on the relevance of Euoro's cessation of business on the counterclaim and Euoro's consequent inability to implement (through Marashi) its obligation under cl 7.2 to, *inter alia*, use its best endeavours to grow its revenues by implementing the business plan in Annex A of the Subscription Agreement (which principally entailed the opening of more stores). In the same correspondence, the parties were also directed to explain the absence of Euoro as a party in the present proceedings. Essentially, counsel for Marashi, Mr Harish Kumar, submitted that Euoro was entitled to recover the third and fourth tranches upon the satisfaction of the conditions precedent to payment of the third tranche and then the fourth tranche which would follow from the payment of the third tranche. Euoro's cessation of the business, Mr Kumar argued, was attributed to Indulge's failure to pay the third and fourth tranches. In response, counsel for Indulge, Ms Sugidha Nithi, submitted that since Euoro had ceased business, and there was nothing left to invest in, the appropriate remedy should be damages, and not the specific recovery of the third and fourth tranches.

Indulge's claim for the return of the first and second tranches

6 I begin with cl 3.4 of the Subscription Agreement which was central to Indulge's case. Clause 3.4 is a long paragraph. [note: 2] For ease of reading and expediency, the material portions are set out in three separate parts as follows:

> Nate Corporation Inc is a company incorporated in California, United States of America with Marashi holding 70% of the shares thereof and Sutti Corporation holding 30% of the shares thereof…Marashi…shall transfer all his shares in Nate Corporation…to [Euoro] by or before 10 Business Days prior to the Third Payment Date.
>
> …
>
> [Euoro] and Marashi shall give the [Indulge] evidence of the fulfilment of the condition as set out in this Clause and Clause 3.1(g), such evidence to be to the satisfaction of the [Indulge], no later than 10 Business Days prior to the Third Payment Date.
>
> …
>
> If [Euoro] and/or Marashi fail to satisfy this Clause and Clause 3.1(g), [Indulge] has the option, upon giving written notice of the exercise thereof to [Euoro] and Marashi, to terminate this Agreement whereupon [Indulge] shall transfer all the Subscription Shares to Marashi and Marashi shall pay $500,000 to [Indulge]…

The first part of cl 3.4 concerns Marashi's obligations to transfer certain shares in a Californian corporation known as Nate Corporation ("Nate Corp") to Euoro. The second part concerns Marashi's obligation to provide satisfactory evidence of the transfer. The third part concerns Indulge's power to

terminate the Subscription Agreement. Notably, Indulge is entitled under the termination provision in cl 3.4 to refuse to pay the third and fourth tranches; it also enables Indulge to recover the first and second tranches (totalling $500,000) already paid, from Marashi (as opposed to Euoro, who had, as mentioned, ceased business). It is therefore not difficult to see why Indulge founded its claim on cl 3.4.

7 Ms Nithi argued in her closing submissions that the termination provision in cl 3.4 was triggered because of three alternative reasons, *viz*:

(a) Marashi had not transferred his Nate Corp shares to Euoro;

(b) Marashi had not provided satisfactory evidence of the share transfer; and

(c) There was a failure of an implied condition that Sutti Corporation ("Sutti Corp") was to remain a 30% shareholder of Nate Corp.

Her arguments were addressed and rejected on 10 December 2009 for the reasons stated below.

The transfer of Marashi's Nate Corp shares to Euoro

8 It was not disputed that (i) Marashi and Sutti Corp's shares in Nate Corp were cancelled, and (ii) new Nate Corp shares were issued to Euoro, with the result that Euoro was, at the relevant time, the owner of 100% of Nate Corp's shares. I must mention here that Sutti Corp had voluntarily returned for cancellation its shares in Nate Corp before the third tranche fell due. Indulge's objection was that the issue of Nate shares to Euoro in the manner described was not tantamount to compliance with Marashi's obligation under cl 3.4. Ms Nithi argued, in essence, that Marashi was not only legally obliged to put Euoro in ownership of the requisite percentage of Nate Corp's shares; he was, in addition, bound contractually to achieve that by way of a share transfer, and not through the issuance of new shares to Euoro and the cancellation of his own shares. The position adopted by Indulge was the result of its strict and literal reading of Marashi's obligation under cl 3.4 to "transfer all his shares in Nate Corp" to Euoro.

9 Undeniably the literal terms of cl 3.4 provided for the "transfer" of Nate Corp shares. However, such a literal reading of cl 3.4 was incompatible with the commercial purpose underlying cl 3.4 itself and the Subscription Agreement as a whole (see generally *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*") at [131]). The plain purpose of cl 3.4 was to place Euoro in control of Nate Corp. Accordingly, it would not be an abuse of language to construe Marashi's obligation to "transfer all his shares" to Euoro as requiring Marashi to put Euoro in the position of control it would be in if Marashi were to transfer all his shares to Euoro. By contrast, an interpretation that insisted on a direct transfer of shares would mean that the Subscription Agreement could be terminated even though Euoro was put in the same position of control by other means. Such a result would be implausible since the obvious purpose of the share transfer was, I repeat, simply to make Euoro the controlling shareholder of Nate Corp which, incidentally, was a shell company at all material times.

10 In my judgment, the use of the words "transfer of all his shares" in cl 3.4 was not, when read in context, meant to prescribe the method of making Euoro the controlling shareholder of Nate Corp. Clause 3.4 required Marashi to put Euoro in ownership of Nate Corp shares, and was indifferent to whether Marashi did so through a direct transfer, or through the issuance of Nate Corp shares to Euoro and the cancellation of his own shares. Accordingly, and since Euoro was in fact put in ownership of 100% of Nate Corp's shares (Sutti Corp had as mentioned in [8] exited the company), I

held that Marashi was not in breach of his obligation to transfer shares to Euoro. As an aside, I noted that while Ms Nithi highlighted the different procedures involved in a direct transfer of share and an issuance of new shares, she rightly did not argue that the procedural differences resulted in any material difference in Euoro's acquiring control of Nate Corp.

11 In order to avoid any misimpression, I must emphasise that my conclusion rested on the true construction of cl 3.4, and not because it was sufficient for parties to broadly achieve the essence of the underlying purpose of their contractual obligations. In that connection, I rejected any suggestion by Mr Kumar, if that was his intention, that such a rule existed. Contractual clauses must be construed with their underlying purpose in mind, but ultimately parties must comply fully with their contractual obligations as properly construed. Anything less would be a breach.

12 There was some argument over whether cl 3.4 wrongly described Marashi's shareholding, and whether Marashi was required to transfer all his Nate Corp shareholding to Euoro even after Euoro had become a 70% shareholder of Nate Corp. It was not necessary for me to make a finding on those matters, since the parties did not ask for rectification, and there was equally no disagreement that Euoro was in fact a 100% shareholder of Nate Corp by the relevant time.

Satisfactory evidence of the share transfer

13 Ms Nithi next argued that Marashi did not provide evidence of the share transfer "to the satisfaction of Indulge", and that default constituted an independent ground triggering the termination provision in cl 3.4. Before addressing the argument, I pause to make two preliminary observations. First, in light of my finding on the first ground in favour of Marashi, the latter need only provide satisfactory evidence of the share cancellation and issuance which was carried out, and not of a share transfer which never occurred. Second, I discerned some confusion in the arguments on the evidential burden of proof. It must be remembered that Marashi's contractual obligation to provide satisfactory evidence was entirely distinct from the legal burden of proof which in this case fell on Indulge, who asserted and therefore had to prove that Marashi was in breach of cl 3.4.

14 I began the discussion in my oral judgment with the scope of Indulge's alleged discretion to reject the evidence that Marashi provided to prove the occurrence of the transfer of Nate Corp shares. By requiring Marashi to provide evidence "to the satisfaction of Indulge", cl 3.4 clearly conferred a discretion on Indulge's part in deciding whether or not to accept Marashi's evidence. At the same time, it was also clear that Indulge's discretion was not so unfettered as to allow it to arbitrarily change or determine the parties' contractual relations at will by the mere expedient of rejecting Marashi's evidence, and in the absence of explicit language to that effect, I was reluctant to find that the parties intended to create such an outcome. The contractual discretion in cl 3.4 was conferred for a specific purpose, *viz* to satisfy Indulge that the transfer of Nate Corp shares had taken place, and in the absence of any contrary language it must be the parties' intention, and I so held, that the discretion ought to be exercised in *good faith* for this purpose and this purpose only (see *Straits Advisors Pte Ltd v Behringer Holdings (Pte) Ltd* [2009] SGCA 55 at [18]).

15 In addition, as the contractual discretion was *ancillary to a defined and objective purpose*, it must also be exercised *reasonably*. Accordingly, Indulge's discretion to reject Marashi's evidence of the share transfer, which was ancillary to the objective purpose of making Euoro the controlling shareholder of Nate Corp, must be exercised *in good faith* and *reasonably*.

16 I turn now to Ms Nithi's criticisms of the evidence provided by Marashi. The bulk of her arguments focussed on the documentary evidence provided by Marashi to Indulge, which included copies of documents purporting to be Nate Corp's share certificates, minutes of Nate Corp's board

meetings, and a record of shares issued by Nate Corp. I agreed with Ms Nithi that the quality of those documents was sloppy. Key information, such as parties' names, was recorded in almost illegible handwriting. Furthermore, the quality of photocopying was poor, and it was impossible to say with any degree of confidence that the documents were what they purported to be. However, besides objecting to the quality of the documents and their reproductions, Ms Nithi did not explain what other documents could Marashi have provided to show that the relevant transactions had taken place. Her omission was not surprising since the same question was earlier asked by Marashi's then solicitors.

17 In any case, I was of the view that, on the facts, it was neither necessary nor sufficient for Marashi to provide the documentary evidence in question. This was because the matter sought to be proven under cl 3.4 was the legal efficacy of a transaction, *viz* the share transfer, which was obviously governed by Californian law. The production of documentary evidence itself without a legal opinion would not be sufficient assurance that the documents provided were legally efficacious. What was needed was a legal opinion on the matter by a qualified person. In that connection, the material evidence produced were two emails from one Robert L Shepard, which Marashi forwarded to Indulge. In the first email, Mr Shepard wrote, in response to an email query by Panchatsharam Elumalai ("Panju"), who was appointed by Indulge to deal with matters of finance and administration in Euoro, that:

> The United States, loving to be different from the rest of the world, does not really have an equivalent to a Registry of Companies. Unless a US company is publicly traded on a stock exchange, who the shareholders are is private information. *So there is no government official record of who owns any number of outstanding shares, etc*. With the corporate records is kept a stock ledger. Mr. Marashi should have the one for Nate Corporation, it was in a large binder with a hard cardboard sleeve. That ledger is maintained by the corporate chief financial officer to track the shares, etc. If this document is lost it is something I can recreate… [note: 3] [emphasis added]

The second email did not include any history. In that email, Mr Shepard wrote:

> Mr. Marashi, I received your faxed signature, so yes, that completes the transaction [*ie* the cancellation of Marashi's Nate Corp shares] and *as of this moment all outstanding shares of Nate Corporation are owned by EUORO International*. You as an individual no longer have any direct ownership of Nate. You are still their sole board member, but now EUORO can elect a new board member or increase the size of the board at any time. You indicated to me that you needed a statement that the transfer was complete, *so you or any third party may rely on my statement that under California law Nate Corporation is wholly owned by EUORO International*. Should you require anything further, please do not hesitate to call or email. [note: 4] [emphasis added]

The signature line in both emails included the phrase "The Law Office of Robert L. Shepard", a Californian address, and a website. The website stated that Mr Shepard was licensed to practise before the Californian Supreme Court, among other jurisdictions, and that his areas of practice included, among other things, business entities.

18 Read together, Mr Shepard's emails confirmed that (i) there were no official records of Nate Corp's shareholding, and (ii) Euoro was the sole shareholder of Nate Corp. In my judgment, in the absence of any contrary evidence, Mr Shepard's emails represented reliable legal opinions and, as such, obviated the need to depend on the primary documents as effecting and evidencing the share transactions. In my view, Mr Shepard's two emails formed the crucial part of the evidence provided by Marashi, and consequently Indulge's reasons for being dissatisfied with Mr Shepard's emails must now be examined. As an aside, Mr Shepard was also the company secretary of Nate Corp and he was

someone Panju on behalf of Euoro had communicated with.

19 First, Ms Nithi argued that the emails were hearsay evidence. That contention was misconceived. On the facts, the hearsay rule would operate if Mr Shepard's emails were adduced as evidence of the share transactions; but they were not. The issue was not whether the share transactions occurred but whether the documents provided by Marashi, including Mr Shepard's emails, were sufficient to meet Marashi's contractual obligation to provide satisfactory evidence of the share transactions.

20 Second, Indulge further complained that the emails were sent from a Yahoo email account and the website in the signature line appeared to be that of an estate planner. I did not think the objection could be taken seriously. There was no reason why legal opinions or advice could not be rendered by email if the author chose that mode of communication. The domain of the email account was clearly irrelevant. What was relevant was the language used by Mr Shepard and the fact that he signed off in his professional capacity as a qualified lawyer, both of which left no doubt as to the seriousness with which he communicated the advice. The objection based on the name of the webpage was clearly frivolous – a quick perusal of the webpage disclosed Mr Shepard's legal qualifications. In fact, I regarded as telling the fact that Indulge did not make any sustained attack as to the existence or professional qualifications of Mr Shepard. Indeed, I did not think that it could have credibly done so – there were emails showing that Panju, who as mentioned was installed by Indulge in Euoro, dealt with Mr Shepard in his professional capacity as a lawyer on the Nate Corp shares. [note: 5]

21 Third, Indulge argued that the emails did not confirm that the issuance of new shares to Euoro and/or the cancellation of Marashi's shares were validly carried out. The objection was misconceived since the second email did confirm that Euoro was the *sole* shareholder of Nate Corp, which by any measure achieved the result required by cl 3.4 on its true construction.

22 Four, Indulge made the point that the emails did not constitute legal opinion or advice directed to it. There was no merit in the contention. Either Euoro was the sole shareholder of Nate Corp, or it was not – the answer could not be dependent on the intended recipient. In any case, Mr Shepard's second email made clear that he gave his opinion intending that a third party such as Indulge could rely on it.

23 Five, Indulge took issue with Mr Shepard's statement that he would be able to recreate the stock ledger and other corporate documents, arguing that this proposed course of action threw doubts on the authenticity of the Nate Corp documents. Since I did not take into account the documentary evidence provided by Marashi, the objection was irrelevant. In the absence of cogent evidence on the impropriety of Mr Shepard's proposed course of action it was also inappropriate to entertain any discussion of Mr Shepard's *bona fides*.

24 Finally, Indulge did not provide Marashi with any indication of what evidence would satisfy it that the relevant share transactions were carried out. As far as I could see, Indulge's objections, discussed above, were nothing more than *ex post facto* justifications advanced for the purposes of litigation. There was no contemporaneous evidence that the objections were contemplated, let alone communicated to Marashi at the time the evidence was tendered to it.

25 For the reasons stated, I concluded that Indulge's grounds for rejecting Mr. Shepard's emails were unreasonable and hence invalid for the purposes of cl 3.4. Separately, and although it was not raised by Mr Kumar, it was also arguable, as a matter of construction, that Marashi's failure to provide satisfactory evidence of the share transfer would not have triggered the termination provision in

cl 3.4. To recapitulate, Marashi was obligated to provide satisfactory evidence of "the fulfilment of the condition as set out in this Clause and Clause 3.1(g)", where "the condition as set out in this Clause" must necessarily refer to the obligation to transfer shares. The trigger for the termination provision was similarly worded – the provision was triggered if Euoro and/or Marashi "fail to satisfy this Clause and Clause 3.1(g)". Reference to "this Clause" in the termination provision ought to be read *ejusdem generis* with the further reference to "Clause 3.1(g)", which was a purely substantive condition that Euoro, amongst other things, was to own 70% of Nate Corp's shares. The obligation to provide satisfactory evidence of the fulfilment of cl 3.1(g) was separately set out in cl 3.2, which was not referred to in the termination provision. In addition, the share transfer was not an urgent or otherwise time-sensitive transaction, a fact which might have supported an interpretation requiring the timely provision of evidence on pain of termination. In fact, cl 7.2 made it clear that the global expansion plans of the parties, for which foreign subsidiaries such as Nate Corp, a shell company, would be needed, would only kick in later in the process. At the very least, the text of cl 3.4 was sufficiently ambiguous and ought therefore to be construed *contra proferentum* which in this case meant against Indulge since its own solicitors prepared the draft on which the final form of the Subscription Agreement was based.

26 Before moving on, I should comment on Ms Nithi's cross-examination of Marashi on various allegations of mismanagement by Marashi, in an apparent attempt to show that Indulge was not acting in bad faith when it raised these allegations with him in the course of the parties' dealings and, by an apparently logical extension, that Indulge was also acting in good faith when it rejected Marashi's evidence of the share transfer. I did not think that that line of cross-examination was relevant at all – Indulge could not reject Marashi's evidence of the share transfer for extraneous reasons, and that included even legitimate concerns about Marashi's management of the business, which would give rise to separate causes of action.

Sutti Corp's cancellation of its Nate Corp shares

27 I now turn to Ms Nithi's third argument that there was a failure of an implied condition that Sutti Corp was to remain as a 30% shareholder of Nate Corp, and that failure entitled Indulge to terminate the Subscription Agreement pursuant to the termination provision in cl 3.4. As mentioned, it was not disputed that Sutti Corp had voluntarily returned for cancellation its shares in Nate Corp before the third tranche fell due.

28 The test for implying a term in fact was rationalised in *Forefront Medical Technology (Pte) Ltd v Modern Pak Pte Ltd* [2006] 1 SLR(R) 927. In that case, Andrew Phang Boon Leong J (as he then was) concluded after a review of the authorities that a term would be implied in fact if it satisfied the business efficacy test, applied through the mode of the officious bystander test. Phang J's rationalisation was approved by the Court of Appeal in Ng Giap Hon v Westcomb Securities Pte Ltd [2009] 3 SLR(R) 518.

29 Indulge had not persuaded me, on the evidence, that Sutti's continued involvement as a shareholder in Nate Corp was so obviously necessary for the business efficacy of the Subscription Agreement that such a term would be implied as a fact. From a textual point of view, the Subscription Agreement referred to and imposed obligations in relation to the existing and desired shareholding in Nate Corp at several points (see *eg* cll 3.1(g), 3.4, and 5.2(a)). That indicated that the issue of Nate Corp's shareholding was consciously within the parties' contemplation when they entered into the Subscription Agreement, and that the parties considered it necessary to express their intentions in that regard. In the circumstances, it was difficult to imagine that the parties would fail to expressly provide for Sutti Corp's continued involvement as a shareholder in Nate Corp, if indeed they felt that such involvement was necessary for the business efficacy of the Subscription Agreement. This was

Mr Kumar's point which I accepted.

30 The textual analysis of the parties' intention was fortified by a consideration of the parties' commercial objectives and the role Sutti Corp could have played in achieving these objectives. From the evidence, it seemed that Sutti Corp, with its extensive health food distribution network in the United States of America ("USA"), was viewed as playing an important role in the contemplated introduction of Euoro's products into the USA. However, while it was arguably *desirable* and *convenient* for Euoro to have a USA partner such as Sutti Corp in the future, that argument did not show that Sutti Corp's continued involvement in a shell company was a *necessary* term of the investment, and there was no contemporaneous evidence of that. It must be remembered that Nate Corp was a shell company and the indefinite involvement of Sutti Corp in a dormant shell company was something that ought to have been (but was not) discussed and agreed upon if it was important to the investment for Euoro to break into the USA market (or any subset thereof) with Sutti Corp's involvement.

31 There was one other point. Clause 3.4 expressly provided for the termination of the tripartite agreement in specific situations. Any other situation that could have triggered the termination provision that was not expressly spelled out by the parties must, as a matter of construction, fall outside of the scope of the right to terminate. Even if the failure of Sutti Corp to remain a 30% shareholder of Nate Corp was an implied term, it could not trigger the *express* termination provision in cl 3.4.

32 In conclusion, for the reasons given, I found and held that Marashi was not in breach of the conditions precedent to the payment of the third tranche. Accordingly, I dismissed Indulge's claim against Marashi as pleaded in the Statement of Claim.

Marashi's counterclaim for the payment of the third and fourth tranches

33 I now come to Marashi's counterclaim for the third and fourth tranches. It was pointed out in my oral judgment that a dismissal of Indulge's claim did not automatically lead to judgment in Marashi's favour on his counterclaim. It would have been evident from the various issues raised by this court after the trial that there were pertinent and difficult obstacles to overcome, both in procedural and substantive law.

34 The most immediate procedural problem faced by Marashi in his counterclaim was that Euoro, to whom the third and fourth tranches were to be paid, was not made a party to the present proceedings. Euoro was a party to the Subscription Agreement and would have *locus standi* to sue to enforce its own rights. I noticed that there was an early application by Marashi to join Euoro, pursuant to directions given by the Assistant Registrar. The application to join Euoro was heard together with applications filed by both parties for summary judgment. The Assistant Registrar hearing the applications allowed Indulge's application for summary judgment, dismissed Marashi's application for summary judgment, and made no order on Marashi's application to join Euoro. Marashi appealed to Choo Han Teck J and successfully obtained unconditional leave to defend Indulge's action. However, Marashi did not appeal against the "no order" made on its earlier application to join Euoro. In short, there was no subsequent attempt to join Euoro. Mr Kumar did not provide any explanation as to that state of affairs when I directed parties to explain and submit on the absence of Euoro in these proceedings. Mr Kumar's stance was that there was no need to join Euoro and, if anything, it was for Indulge to take the initiative to do so. That last contention was misplaced: it was Marashi and not Euoro who had to return the first $500,000 to Indulge under cl 3.4, while the next $500,000 was to be paid to Euoro and not Marashi. Mr Kumar also argued that:

(i) Marashi had the standing to claim against Indulge for the payment of the third and fourth tranches;

(ii) the court could revive Marashi's original application to join Euoro, and

(iii) the court could exercise its discretion under O 15 r 6(2)(b) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) to join Euoro.

His arguments were addressed and rejected on 10 December 2009 for the reasons stated below.

Specific performance in favour of third party

35 Mr Kumar's first argument that Marashi could claim specific performance for a third party like Euoro was a short point that could be dealt with quickly. Marashi confirmed that he had not suffered any loss from the non-payment of the third and fourth tranches and he was not seeking any damages from Indulge on the usual principles. It was therefore necessary for him to proceed on other bases. Mr Kumar's argument that Marashi had the proper standing to claim specific performance against Indulge for Euoro's benefit was based on cases such as *Beswick v Beswick* [1968] AC 58 and *Family Food Court v Seah Boon Lock* [2008] 4 SLR(R) 272 at [34] ("*Family Food Court*"), which operated to alleviate the difficulties caused by the doctrine of privity of contract. Those decisions were plainly distinguishable from the present case, where Euoro was privy to the Subscription Agreement and could sue in its own right, and was unable to do so only because of Marashi's procedural omission to join it as a party to the proceedings. I was therefore of the opinion that Marashi's counterclaim for specific performance which was made *on behalf of Euoro* was legally unsustainable and must fail. If Euoro were to recover, it must claim *in its own right*. I would add, for completeness, that the same reasons would also apply to a claim by Marashi for substantial damages on the "board ground" based on *Family Food Court* and *Chia Kok Leong v Prosperland Pte Ltd* [2005] 2 SLR(R) 484 ("*Chia Kok Leong v Prosperland*").

36 In addition, for the reasons that I will elaborate when discussing the result of a claim brought directly by Euoro, Marashi's claim for specific performance must also fail because the requirement of reciprocity needed for such an order was not met (see below, [74]). In determining this requirement of reciprocity, I considered and concluded that the commercial purpose of the $1m investment was to expand the business by opening more stores and that Marashi, as the party seeking specific performance, was himself unable to perform the terms of the contract on his part – principally his obligation to use his best endeavours to achieve the business plan of opening more stores agreed to by the parties- because of the cessation of the floral and herbal tea business in August 2008. It followed that since Marashi was not able to perform his part of the contract, he would not be able to obtain specific performance of it.

Non-joinder of Euoro

37 In relation to Mr Kumar's second argument, I was in entire agreement with Ms Nithi that Marashi's original application to join Euoro was determined when the Assistant Registrar made no order upon it: see *Ho Kian Cheong v Ho Kian Guan* [2004] SGHC 104 at [7]. It was for Marashi to raise the issue on appeal, which he failed to do.

38 In relation to Mr Kumar's third argument, I was not persuaded that the court's discretion to join Euoro should be exercised. First, this case was not one where no attempt at all to join Euoro was made. Marashi was aware of the need to join Euoro and indeed an application was filed on his behalf. Second, there was no appeal against the Assistant Registrar's "no order" on the joinder application.

Third, Mr Kumar did not explain, even though he was specifically asked, why nothing was done after the Assistant Registrar made no order upon Marashi's application to join Euoro and following Choo J's order granting Marashi unconditional leave to defend Indulge's claim. Without any explanation, despite being specifically asked to explain, the court was left with the impression that the absence of an appeal on joinder was by choice or an oversight. In the premises, nothing of an extenuating nature and circumstance was proffered to enable the court to assess whether this was a proper case to exercise its discretion. I noted Indulge's objection to the late joinder for the reason that the conduct of Indulge's litigation would have been different with Euoro in the proceedings. Indulge would have pursued separate claims against Euoro. It would be prejudiced if Euoro were to be joined at this late stage as Indulge would not have the opportunity to include and prosecute its separate claims against Euoro.

39 For the reasons stated on the non-joinder as well as the ruling on the claim for specific performance for a third party like Euoro, the counterclaim was not sustainable and it was accordingly dismissed.

The action for an agreed sum

40 Even if Euoro had been joined in the proceedings before me, the outcome would still have been the same in that Euoro would have been unable to recover the third and fourth tranches. If Euoro were to sue, the claim would be brought in an action for an agreed sum, and not for specific performance. As mentioned, the parties were directed to submit on the relevance of Euoro's cessation of business and its consequent inability to perform its obligations to expand the business as required under the Subscription Agreement. The parties' submissions were outlined at the beginning of this judgment (see [5] above).

41 Mr Kumar submitted that a party could always recover a contractually agreed sum once the condition precedent for its payment had been met. I noted in my oral judgment that this proposition was incongruent with the more principled position for the specific performance of non-monetary obligations, and also with the concept of the performance interest, as applied to the interest of the party liable to pay coupled with his reasonable expectation of the counterparty's performance. I also alluded to the fact that the historical bases for the action for an agreed sum were not entirely satisfactory, and further doubted that, on the facts, the parties intended the $1m to be payable independent of the rest of the obligations in the Subscription Agreement. I now elaborate on those reasons. For the avoidance of doubt, the modern formulation is referred to in this judgment as an action for an agreed sum to distinguish it, for the purposes of discussion, from the ancient action of debt.

The modern formulation

42 The clearest judicial statement of the action for an agreed sum in modern times is that of Millett LJ in *Jervis v Harris* [1996] 1 Ch 195 at 202–203:

> … a debt is a definite sum of money fixed by the agreement of the parties as payable by one party to the other in return for the performance of a specified obligation by the other party or *on the occurrence of some specified event or condition*; whereas damages may be claimed from a party who has broken his primary contractual obligation in some way other than by failure to pay such a debt.
>
> *The plaintiff who claims payment of a debt need not prove anything beyond the occurrence of the event or condition on the occurrence of which the debt became due. He need prove no loss;*

the rules as to remoteness of damage and mitigation of loss are irrelevant; and unless the event on which the payment is due is a breach of some other contractual obligation owed by the one party to the other the law on penalties does not apply to the agreed sum. It is not necessary that the amount of the debt should be ascertained at the date of the contract; it is sufficient if it is ascertainable when payment is due.

[emphasis added]

43 Millett LJ did not cite any case law (he cited the learned authors of *Chitty on Contracts*, Vol 1 (Sweet & Maxwell, 27th Ed, 1994), at para 21-031), and the quoted passage was strictly speaking *obiter dicta*. However, the essence of the *general* formulation is well recognised (see *Chitty on Contracts*, Vol 1 (Sweet & Maxwell, 30th Ed, 2008), at paras 21-040 and 26-009 ("*Chitty*"); *Halsbury's Laws of England*, Vol 9(1) (Butterworths, 4th Ed Reissue, 1998) at para 942 ("*Halsbury's*"); JW Carter & DJ Harland, *Contract Law in Australia*, (LexisNexis Butterworths, 4th Ed, 2002) at paras 2201–2206 ("*Contract Law in Australia*")).

44 In any case a direct authority is to be found in *Mattock, Executor of Southwood v Kinglake* (1839) 10 Ad & E 50. In that case, K agreed to pay S on a fixed day, and in exchange S agreed to convey certain properties to K. In the event, S did not convey and K did not pay, and S's executor M brought an action of debt to recover the payment. All four judges of the Queen's Bench allowed the action. The judgment of Littledale J (at 56) is particularly relevant for present purposes. The learned judge held:

A time being fixed for payment, and none for doing that which was the consideration for the payment, an action lies for the purchase-money without averring performance of the consideration. An action for not executing a conveyance of the premises might have been maintained by the defendant before the day of payment and in such action no allegation of payment would have been necessary. The covenants are independent, and each party has relied upon his remedy by action against the other.

Mattock v Kinglake was cited with approval by Lord Alverstone CJ in *Workman, Clark & Co. Limited v Lloyd Barzileno* [1908] 1 KB 968 at 976–977. The dispute in the latter case is not material for present purposes.

45 Furthermore, if the payment has fallen due, it is an accrued right which survives a termination of the contract as a result of an accepted repudiation (see *Chitty*, [43] above at para 24-051; *Halsbury's*, [43], above, vol 9(1) at para 1003; *Contract Law in Australia*, [43] above at paras 2225–2226.)

The historical bases of the action

46 From a necessarily rough survey of the histories and historical sources, set out below, it seems that the present form of the action for an agreed sum is most clearly correlated with three historical doctrines: (i) the proprietary conceptions underlying the ancient action of debt; (ii) the juristic basis of the *indebitatus assumpsit* action as an action on a separate undertaking; and (iii) the doctrine of independent promises.

47 I begin with the action of debt. The wrong complained of in an action of debt was the defendant's misfeasance of wrongfully detaining something which he owed to the plaintiff (*debet et detinet*), and not, as we would nowadays think of it, the nonfeasance of breaching an obligation to

do something. In other words, the action was tied to quasi-proprietary concepts. It was not restricted to moneys owed, or to contractual obligations; it could be brought for chattels wrongfully detained, and for non-contractual obligations to pay money. In time, debt for chattels evolved into the separate action of detinue, while debt for non-contractual obligations to pay money continued to be available even today, where we speak of debts created by deed, by statute, by judgment, and so on. For the history of the action of debt, see generally, Oliver Wendell Holmes, *The Common Law* (Little, Brown and Company, 51st Ed, 1881) (Lecture VII, "Contract") at pp 251–252; JB Ames, "Parol Contracts Prior to Assumpsit" (1894) 8 Harv L Rev 252 at p 260; Sir Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I*, (Reissue) Vol 2 (Cambridge University Press, 2nd Ed, 1968), at pp 204–205; AWB Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press, 1987) at pp 76–77 and 79–80.

48 The notion of an action of debt as involving the recovery of something owed by the defendant to the plaintiff explains several characteristics of the action. It explains why debt laid only for a sum certain. It explains why a debt is recoverable in full without the need to prove and quantify loss. It explains why an accrued debt is recoverable notwithstanding the termination of the contract. As Dixon and Evatt JJ explained in *Westralian Farmers Ltd v Commonwealth Agricultural Service Engineers Ltd* (1936) 54 CLR 361 at 379–80, the action is brought upon "a debt, a distinct chose in action which for many purposes is conceived as possessing proprietary characteristics."

49 In time, the action of *assumpsit*, specifically *indebitatus assumpsit* came to overshadow the action of debt. The expansion of *indebitatus assumpsit* culminated in *Slade's Case* (1602) 4 Co Rep 92b, where it was resolved by all the Justices of England and the Barons of the Exchequer that *indebitatus assumpsit* laid concurrently with debt (with a few exceptions that are immaterial for present purposes). That resolution, together with other developments, established a general promissory action which was eventually to give rise to the modern law of contract. It was also resolved in the same case (at 94b) that:

> the plaintiff in [an] action on the case on assumpsit should not recover only damages for the special loss (if any be) which he had, but also *for the whole debt, so that a recovery in this action should be a good bar in an action of debt brought upon the same contract. So vice versa* .. [emphasis added]

The passage above made clear that a debt continued to be recoverable as such, notwithstanding that the action was brought in *assumpsit*, which generally sounded in damages to be assessed (see Simpson, above [47] at p 309; and DJ Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press, 1999) at pp 132–133, 147–149, and 151).

50 A claim in *indebitatus assumpsit* basically alleged that the defendant, being indebted (*indebitatus*), undertook to pay (*assumpsit solvere*) (see Simpson, above [47] at p 309). The action was thus based on an undertaking separate from the promise which created the debt, and this remained so even after *Slade's Case* – the third resolution in that case (at 94a–94b) was that "that every contract executory imports in itself an *assumpsit*", a formulation which made clear that the *assumpsit* was distinct from the contract. Consequently, the *assumpsit* or undertaking could be sued upon separately from the rest of the agreement. Thus, in *Turner v Bladin* (1951) 82 CLR 463 ("*Turner v Bladin*") at [14], the High Court of Australia held that an action to recover sums due under an agreement to sell land was not an action on the agreement but an action of *indebitatus assumpsit*, and was therefore not caught by the New South Wales equivalent of s 4 of the Statute of Frauds 1677 (c 3) (our equivalent is contained in s 5(d) of the Civil Law Act (Cap 43, 1999 Rev Ed)). In this connection, the *assumpsit* regime was diametrically different from an action of debt on a simple contract (as opposed to a specialty contract), which laid only upon a *quid pro quo*, *viz* an agreed

benefit actually conferred by the plaintiff (see SJ Stoljar, *A History of Contract at Common Law* (Australian National University Press, 1975) at p 11; *Young v Queensland Trustees Ltd* (1956) 99 CLR 560 at [11]).

51 I come finally to the doctrine of independent promises. It is unnecessary to trace the development of the doctrine here (for an account see SJ Stoljar, "Dependent and Independent Promises: A Study in the History of Contract" (1956–1958) 2(2) Syd L Rev 217). The doctrine was distilled into five separate rules by Sergeant-at-law John Williams in his notes to *Pordage v Cole* (1669) 85 ER 449 ("*Pordage v Cole*") at 450–454, which were in turn treated extensively by Sir Thomas Willes Chitty KC, Alfred Thompson Denning (as he then was) and Cyril Pearce Harvey, the editors of *Smith, A Selection of Leading Cases on Various Branches of the Law* (Sweet & Maxwell, 13th Ed, 1929) at p 10. For present purposes it is sufficient to set out Professor Stoljar's summary (at pp 245–246) of the Sergeant's five rules:

> (1) if the date of payment is to, or may, happen before the other's performance, the payor's promise is independent, i.e. [the] actor can claim payment without having to aver performance; (2) if such payment is appointed after performance, the payor's promise is subject to a condition whose fulfilment [the] actor has to aver; (3) if a covenant goes only to part of the consideration, it is independent so that [the] plaintiff may maintain an action without, averring performance, but (4) if mutual covenants go to the whole consideration, they are mutual conditions and must be averred, and (5) if two acts are to be done at the same time, neither party can maintain an action without showing performance or an offer to perform.

It is readily apparent that a strict application of Sergeant Williams' rule (1) will yield the result that obligations which arise at different times or on different conditions will be actionable independently of each other. *Pordage v Cole*, on which rule (1) is based, is still regarded as good law by *Chitty*, above, [43] at paras 24-035 to 24-037.

Rationalising the action

52 It is plain that these historical doctrines cannot stand today as convincing rationales for the action for an agreed sum. An action for an agreed sum is an action to directly enforce a contractual promise. It is not an action to assert or protect property in a thing. It is not an action on a fictional undertaking subsequent to, or otherwise distinct from, the contract which contains the promise to pay. And while the doctrine of independent promises as restated in Sergeant Williams' rule (1) may have, in its time, played an important role in expanding the scope of *assumpsit* into executory contracts (which were not actionable in debt because of the requirement for *quid pro quo*), it is an anachronistic exception to the modern law of contract, which no longer views a contractual term literally and in isolation, but rather approaches it in light of the contract as a whole and the underlying commercial and business purpose of the parties in entering into the contract (see *Zurich Insurance* (above [9]) at [131], followed in *Tiger Airways Pte Ltd v Swissport Singapore Pte Ltd* [2009] 4 SLR(R) 992 at [25]). As *Chitty* remarked (above, [43] at para 24-036), cases involving independent promises are "exceptional". I agree, and add that Sergeant Williams' rule (1), if it continues to be a rule at all, cannot be immutable, but must instead yield to an approach which better reflects the parties' commercial intentions and expectations as objectively expressed or ascertained in the contract.

53 Specifically, it is far from obvious to me that a contractual promise to pay money is necessarily enforceable once its conditions precedent have been met, without regard to the rest of the contract. Certainly, such an approach would not be congruent with the position in relation to the grant of specific performance of non-monetary obligations, which is subject to the condition described as

follows in G R Northcote, *Fry on Specific Performance*, (Stevan & Sons, 6th Ed, 1921), Chapter XX at p 435, §922:

> With regard to the matters to be done by the plaintiff according to the terms of the contract, it is, from obvious principles of justice, incumbent on him, when he seeks the performance of the contract, to show, first, that he has performed or been ready and willing to perform, the terms of the contract on his part to be then performed; and secondly, that he is ready and willing to do all matters and things on his part thereafter to be done; and a default on his part in either of these respects furnishes a ground upon which the action may be resisted.

Sir Edward Fry refers to this requirement by the unwieldy name of "default on the part of the plaintiff"; I prefer the label "reciprocity", which more aptly captures the mutual and dependent nature of the several obligations which constitutes a contract.

54 The requirement as stated by Sir Edward Fry is commonly viewed as a specific expression of the related equitable doctrines that he who comes to equity must come with clean hands, and must also do equity. But it seems to me that the requirement of reciprocity can – and should – be divorced from the equitable concepts of conscience and discretion and rationalised in accordance with the principles of contract. Specifically, the requirement of reciprocity as a principle of contract law recognises that, when the several obligations of a contract are *on their true construction* part of one indivisible bargain, a party cannot expect to enforce his counterparty's obligations when he himself did not, cannot, or is unwilling or able to, perform his own obligations. In other words, it prevents the plaintiff from recovering the covenanted benefit free from the covenanted burden. It ensures that the whole bargain is recovered, the good with the bad, no less, and certainly no more. This is certainly a principle that applies with equal force to the enforcement of monetary as well as non-monetary primary obligations.

55 In my view, the requirement of reciprocity can also be said to be consistent with, and in fact to flow from, the modern and developing concept of the performance interest. As recently defined by the Court of Appeal in *Family Food Court* (above, [35] at [34] of the report), the performance interest is "the plaintiff/promisee's interest in the contract being performed and (consequently) his receiving the benefit which he had contracted for".

56 The concept of the performance interest has been applied to found the "broad ground" on which a party can recover substantial damages for a breach of contract notwithstanding the fact that he has not thereby suffered actual loss (see *Chia Kok Leong v Prosperland* (above, [35]) and the English authorities reviewed there). While this application of the concept is not pertinent to the present case, it must be borne in mind that the *concept* of the performance interest is a wide one: the Court of Appeal in *Family Food Court* (above, [35] at [34] and [48]) described it as "*an integral part of the common law of contract*" (emphasis added).

57 In my judgment, the most fundamental sense in which a party is interested in the performance of his counterparty is that such performance constitutes the *quid* in return for which he undertook to render the *quo*. To enforce the *quo* when the *quid* has not or will not be rendered is to ignore the *quid pro quo* basis on which the parties assumed their mutual obligations. Therefore, in order for the performance interest to be fully protected, it cannot only operate as a sword to found a claim for specific performance or substantial damages against a party in breach – it must be capable of operating as a shield for a party to resist performance when the counterparty did not, cannot, or will not, render performance, *ie* when there is a lack of reciprocity. Once again, this applies equally to the enforcement of non-monetary primary obligations, where reciprocity already applies, as well as to monetary primary obligations, where reciprocity should also be applicable.

58 Put in another way, the rationale underlying the requirement of reciprocity can be met by two possible remedial responses. Where there exists an effective and adequate counterclaim, it is for the party to bring a counterclaim against his counterparty for the appropriate remedy. Such a counterclaim may take the form of specific performance, which is, provided that any loss caused by the delayed performance is adequately remediable by damages, a perfect substitute for the counterparty's failure to perform in the past or unwillingness or inability to perform in the future. It may also take the form of substantive damages, if such damages are an adequate substitute for the counterparty's performance. The requirement to bring a counterclaim in such situations strikes an appropriate balance between the performance interests of the party and the counterparty – the party will not be deprived of the counterparty's performance if he (the party) is susceptible to a counterclaim that will adequately meet the counterparty's performance interest. This is, to my mind, the better justification for the result in *Mattock v Kinglake* (above, [44]) – K, who was liable to pay, could bring an action against S for the conveyance which was promised in return. However, it is not in every case that a party's performance interest can be adequately vindicated by a counterclaim, and in such cases the law ought to afford him a full defence against performing. This defence recognises that a party should not be liable to perform when he has not received what he has bargained for or an adequate substitute. The converse result – requiring a party to perform when he has not received what he has bargained for or an adequate substitute – would be entirely inconsistent with the parties' reasonable commercial expectations.

59 Here it is apposite to note that the concept that a party can refuse to perform on the grounds that the other party has not performed, or is unwilling or unable to perform, is hardly novel to the law of contract. It is the basis of the related common law doctrines of repudiatory breach and anticipatory breach, the origins of which can be traced back to Lord Mansfield's judgment in *Boone v Eyre* (1789) 1 H Bl 273 (see the references to that case in *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, which is the modern point of departure) and Lord Campbell CJ's judgment in *Hochster v De La Tour* (1853) 118 ER 922 respectively. The requirement of reciprocity as it applies to specific performance in equity is equally venerable (see the authorities collected in *Fry on Specific Performance*, above, [53] at §922ff). While each doctrine has its distinct scope of application, they all spring from the commonsensical recognition, mentioned earlier at [54] and [57], that when the several obligations of a contract are *on their true construction* part of one indivisible bargain, it is inconsistent both with principle and with the parties' intentions to insist that one party perform when the other did not, cannot or will not do so.

60 I now come to the scope of, and the exceptions to, the reciprocity requirement. No question of reciprocity will arise in cases where the contract has been fully executed on one side – the requirement is necessarily satisfied in such cases. An example is a simple credit relationship where the creditor has fully executed his obligation to extend the credit, with the debtor's obligation to repay being the only obligation outstanding in the contract. The requirement of reciprocity is in practice concerned with situations where each side has breached the contract and/or has obligations to perform in the future.

61 There are two commonsensical exceptions to the requirement of reciprocity. The first exception is that a defendant cannot insist on reciprocity to the extent that the lack of it is caused by him (see *Fry on Specific Performance*, above, [53] at p 442, §941). In other words, a defendant cannot insist on his performance interest when he has himself defeated it. The second exception is that a breach which does not go to the root of the contract *may* not constitute sufficient grounds for resisting performance or payment. This is consistent with the position for the specific performance of non-monetary remedies (see Spry, *The Principles of Equitable Remedies* (Sweet & Maxwell, 7th Ed, 2007) at 213–214). The second exception essentially balances the gravity of the performance interests at

stake.

62 Before turning to the facts, I must add, for the avoidance of doubt, that everything I have said above is directed at the direct enforcement, at common law, of primary contractual obligations to pay money. It is not directed at non-contractual obligations to pay money, secondary obligations to pay damages, and statutes such as the Sale of Goods Act (Cap 393, 1999 Rev Ed). In those cases it might well be appropriate for the action of debt to apply strictly. In the case of statutory provisions, it should also be borne in mind that they might have been enacted with reference to the common law as it stood at the time of enactment, and might need to be interpreted in like manner (see *eg* the interpretation of the New South Wales equivalent of the Statute of Frauds in *Turner v Bladin*, discussed at above, [50]). Separately, given my view of the facts, I have not found it necessary to decide whether the right to sue on a primary obligation to pay an agreed sum survives a termination of the contract. Suffice it to say that the juridical basis of that rule merits serious reconsideration in an appropriate case in the future.

Application to the facts

63 I turn now to the facts in evidence. Indulge's attempt to terminate the Subscription Agreement was held to be without justification. It was a view which Marashi and Euoro correctly maintained in their solicitors' letter of 4 May 2007 which expressly held Indulge to its (Indulge's) obligations under the Subscription Agreement. [note: 6] At all material times, the Subscription Agreement remained fully in force.

64 The relevant provision is cl 7.2 of the Subscription Agreement and the material part of cl 7.2 provides as follows:

> The parties agree that each of them will use their best endeavours to ensure the continued growth of revenues of [Euoro] in Singapore in the first phase in accordance with the business plan in Annex A ...

The Marketing Plan in Annex A contained a projected schedule for the opening of new stores and stores-in-stores. [note: 7] One store-in-store and four herbal stores were to be opened in the second half of 2006; three stores-in-stores and five herbal stores in 2007; and four stores-in-stores and ten herbal stores in 2008. As cl 7.2 was a "best endeavours" clause, Marashi had to show that he had taken all reasonable steps which a prudent and determined person acting in his own interests and anxious to perform cl 7.2 would have taken (see *Travista Development Pte Ltd v Tan Kim Swee Augustine and others* [2008] 2 SLR(R) 474 at [22]). Notably Marashi admitted during cross-examination that Euoro and he were bound to open new herbal stores and stores-in-stores under the Subscription Agreement. [note: 8] There was also the unchallenged evidence of Sajen G Aswani, a director of Indulge, who was also appointed to Euoro's board pursuant to cl 8(b), that the money invested in Euoro was to be used to fund its expansion to create sales. [note: 9] The parties thus accepted that the $1m was earmarked for the envisaged expansion and specifically that Euoro through Marashi had to take reasonable steps to open within the time frame the number of stores that were to be opened.

65 There was no evidence to show that Euoro through Marashi had used its best endeavours. In fact, it was clear on the evidence that the first two tranches were not being applied towards the opening of new stores. In fact, no new stores were opened – Marashi contended that two or three stores-in-stores were in fact opened, [note: 10] but that contention was contradicted by Marashi's admission that there was one store and five stores-in-stores when the Subscription Agreement was

signed read with a sales report dated 2 April 2007 that referred also to one store and five stores-in-stores. [note: 11] This evidence was corroborated by the accounts in evidence, [note: 12] which only showed sales for one herbal store and five stores-in-stores. A profit and loss statement dated 7 May 2007 had entries for three new outlets, [note: 13] but the sales figures for each of those outlets was zero, and in the absence of any further evidence, it was questionable whether those outlets were in fact opened and operational. In any case, even if Marashi was right Euoro would still have fallen far short of the targets set in Annex A. It particularly failed to open any new stores, which would have been of a bigger scale and required more capital than stores-in-stores. Certainly, with Euoro's cessation of business, Euoro and Marashi would no longer be able to meaningfully fulfil their continuing obligation under cl 7.2 to expand the business in accordance with the Marketing Plan in Annex A. That constituted a clear failure of reciprocity.

66 In addition, Euoro's inability to expand the business in accordance with cl 7.2 certainly went to the root of the Subscription Agreement. I also rejected the plea in the Defence that Indulge's non-payment had caused Euoro to suffer loss and damage, [note: 14] and more specifically the allegation in Marashi's affidavit of evidence-in-chief that Euoro's financial difficulties (and by implication its inability to perform cl 7.2) were partially caused by Indulge's non-payment. [note: 15] In reality, it was obvious that Euoro could not, even with Indulge's investment, fund its existing business, let alone at the same time expand the business as required under the Subscription Agreement. The evidence pointed to Euoro's inability to continue to perform cl 7.2 and its other obligations under the Subscription Agreement was not attributable to Indulge's non-payment of the third and fourth tranches, but were instead a result of Euoro's inherent business and financial weaknesses.

67 Euoro's audited accounts for the financial year 2006 showed that the company suffered a net loss for the year of $392,703 as compared to a smaller loss of $20,095 in 2005. [note: 16] From the financial year 2006 Cash Flow Statement, net cash used in operating activities rose sharply to $180,429 from a mere $6,622 in the previous year. [note: 17] That was significant as it meant that Euoro's existing operations were not cash generative enough to cover its own operating expenses but instead was consuming cash at an alarming rate. The financial year 2005 comparatives also showed a smaller cash consumption of $6,622 by Euoro's operations. [note: 18] Even with the injection of $250,000 by Indulge in 2006, the company was in a serious cashflow problem – the financial year 2006 balance sheet [note: 19] showed that Euoro's current assets of $192,616 were insufficient to meet current liabilities of $234,319, indicating that the company was technically insolvent.

68 The situation continued to worsen in the following first quarter of 2007 to 31 March 2007 as reflected in Euoro's management accounts. [note: 20] Sales, which were already in a declining trend since 2006, fell sharply further to $298,493 as compared to a budgeted sales of $531,000 for the first quarter of 2007. [note: 21] That had the effect of exacerbating the already strained cashflow position as could be gleaned from the first quarter 2007 Cash Flow Statement with cash used up in operating activities amounting to $174,924 [note: 22]. If not for the injection of the second tranche of $250,000 in February 2007, Euoro's state of affairs would have been worse.

69 A reasonable observation of the events during the above period from the financial year 2006 to 31 March 2007, was that Euoro's operations were not generating sufficient sales to cover its expenses even as far back as 2005. This was exacerbated by its inability to collect previous debts, resulting in a bad debt write-off of $271,368 in 2006. [note: 23] In the three-month period to 31 March 2007, the downward trend deteriorated further with actual sales significantly below its target sales in order for the operation to survive. In other words, Euoro's operations were not able to sustain its own

existence let alone expand in accordance with the Subscription Agreement. The trend evinced in the events from the financial year 2006 to 31 March 2007 here is reinforced in Euoro's April 2007 management accounts, where actual sales of $102,337 were down 58.4% compared to the month's budgeted sales of $246,000, resulting in a loss of $62,464 when a profit of $23,000 was expected. [note: 24] Instead of generating cash, Euoro's April 2007 operations consumed $27,682, and that further depleted its cash balance from $28,611 in the previous month to $929 at the end of April 2007. [note: 25] Here it will be recalled that there was no reliable evidence that new stores were in fact opened. There were pressing creditors to be paid, and the funds were used to meet current expenses and pay Euoro's creditors.

70 Euoro's finances were plainly such that, had the third and fourth tranches been paid and used to keep the business afloat, it still would not have the resources needed to fulfil the business plan. Marashi testified that Euoro did not close any of the outlets (meaning to trim expenses) as the company was obliged to expand under the business plan. [note: 26] That evidence would exacerbate the company's financial position as explained above. I also did not think that Euoro could validly claim that it would have expended money from the third and fourth tranches on opening new stores and fulfilling its obligations under the Subscription Agreement. From Euoro's past conduct in its utilisation of the funds from the first and second tranches, and bearing in mind the state of the business as explained earlier, Euoro would probably have used the moneys from the third and fourth tranches to repay the demands of creditors instead of opening new stores to maintain its existing operations. There was nothing in the evidence to suggest that it would change its approach in respect of the third and fourth tranches.

71 On a related point, I also rejected Ms Nithi's submission that Indulge did not have a chance to lead evidence to challenge the allegation made in Mr Kumar's further submissions that Indulge's non-payment caused Euoro's cessation of business. That allegation was clearly encompassed in the pleading in the Defence and the allegation made in Marashi's evidence which I have referred to (at [66] above), and Indulge was fully able, if it had so wished, to challenge them in the course of the trial. In any case, since I have concluded that the allegation has not been proven, the issue is academic.

72 Indulge would not have a counterclaim that could adequately remedy Euoro's breach. It would be unable to obtain specific performance of Euoro's cl 7.2 obligation to expand the business for any number of reasons, including the impossibility of performance now that Euoro had ceased business. Indulge would also be unable to obtain substantive damages – the success of Euoro's business was at best a matter of speculation. *Yet, and this must be emphasised, it could not be denied that Indulge's bargain with Euoro involved Euoro performing its obligations to take reasonable steps to implement the agreed business plan, and that Euoro would not be able to do so*. Here I must reject Mr Kumar's contention that Indulge's obligation to pay the investment sum, including the third and fourth tranches, related only to the issuance and purchase of shares in Euoro, and that that exchange was severable from the rest of the Subscription Agreement. Indulge plainly did not agree to invest $1m just for the sake of being issued shares in Euoro. It did so in the overall context of an agreement with Euoro and Marashi to expand and develop the business of Euoro. It was entirely inconsistent with the parties' commercial purposes to treat the investment sum as payment for Euoro's shares alone, divorced from the parties' agreement to expand the business using the investment money.

73 Given the circumstances – a failure of reciprocity by Euoro which cannot be adequately remedied by a counterclaim, which went to the root of the Subscription Agreement, and which was not caused by Indulge's failure to pay the third and fourth tranches – I was of the opinion that an action for an agreed sum to recover the third and fourth tranches, if brought by Euoro, would not be

sustainable. I would add, for the avoidance of doubt, that it was not Euoro's cessation of business *per se* which precluded its recovery of the third and fourth tranches. By the same token, Indulge was not relieved of payment simply because it entered into what seems like a bad bargain. Quite the contrary. Euoro was precluded from recovery, and Indulge was relieved from paying, because of Euoro's inability to fulfil its continuing obligations under the Subscription Agreement. If, hypothetically, Euoro had fully executed all its obligations under the Subscription Agreement, the fact that it had *subsequently* ceased business would not be a bar at all to its recovery of the third and fourth tranches. The requirement of reciprocity protected the sanctity of the exchange agreed to by the parties; it does not allow a party to escape from a bad bargain.

74 Since cl 7.2 applied equally to Marashi and he would similarly be unable to fulfil it, he would also be prevented, as I had earlier mentioned at [36] above, from directly enforcing Indulge's obligation to pay the third and fourth tranches. Separately, Indulge would also be able to set up Euoro's non-performance as a defence against Marashi's counterclaim for payment to Euoro.

75 Consequently, if Euoro had brought a claim, it would be reduced to its remedy in damages. The quantum of damages would be assessed in order to put Euoro in the position it would be in had the Subscription Agreement been fully performed by all sides, *ie* the position Euoro would be in had Indulge paid the third and fourth tranches and Euoro performed its obligation to open new herbal stores and stores-in-stores as set out in Annex A to the Subscription Agreement. In my judgment, since the original chain of stores had failed without the third and fourth tranches, the infusion of the third and fourth tranches for the purpose of opening new stores would in all likelihood have also ended in failure. In other words, Euoro would be in the same position it was in at the time of the trial had the third and fourth tranches been paid. It would therefore only be entitled to nominal damages, had it been a party to the current proceedings.

Conclusion

76 For the reasons stated, both Indulge's claim against Marashi and Marashi's counterclaim against Indulge on behalf of Euoro were dismissed. Since both parties had failed in their respective claims, I made no order as to costs on the main action and the counterclaim.

[note: 1] Transcript, 2 April 2009, at p 174

[note: 2] 1 AB 235

[note: 3] 2 AB 402–3

[note: 4] 2 AB 427

[note: 5] 2 AB 367-369, 399-405

[note: 6] 2 AB 433

[note: 7] 1 AB 266

[note: 8] Transcript, 2 April 2009, at pp 124 and 144

[note: 9] Transcript, 23 March 2009, at p 102

[note: 10] Transcript, 2 April 2009, at pp 128, 130 and 150

[note: 11] SAB 24

[note: 12] 2 AB 485; SAB 43

[note: 13] SAB 81

[note: 14] Defence & Counterclaim at para 19

[note: 15] Marashi's AEIC at paras 57 and 58

[note: 16] 2 AB 299

[note: 17] 2 AB 301

[note: 18] *Id*.

[note: 19] 2 AB 298

[note: 20] SAB 62

[note: 21] SAB 63

[note: 22] SAB 67

[note: 23] 2 AB 301

[note: 24] 2 AB 479

[note: 25] 2 AB 484

[note: 26] Transcript, 2 April 2008 at p 128