IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 274

Suit No 822 of 2014

Between

(1) AAHG, LLC

… Plaintiff

And

(1) Hong Hin Kay Albert

… Defendant

GROUNDS OF DECISION

[Tort] — [Conversion] — [Conversion of shares]

[Tort] — [Reversionary damage]

[Restitution] — [Unjust enrichment]

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v
Hong Hin Kay Albert

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Chua Lee Ming JC:

Introduction

1 In this case, I found the defendant, Albert Hong Hin Kay, liable to the plaintiff, AAHG, LLC, in the amount of $2,496,222.07 being damages for conversion of 10,000 shares ("the Shares") in Universal Medicare Pte Ltd ("Universal"). I awarded the plaintiff interest on this amount at 5.33% pa from 25 January 2008 until judgment and costs. The defendant has appealed against the whole of my decision.

The undisputed facts

2 The defendant readily admitted, when he was on the stand, that he had little personal knowledge of the matters in this claim as he had left it to his brother, Hong Hin Kit ("Edward Hong"), to manage these matters on his

behalf. Actions taken by the defendant were based on Edward Hong's instructions. Edward Hong gave evidence on behalf of the defendant.

3 The defendant incorporated Universal on 22 November 2000.[1] In 2002, Universal sought a loan of US$12m ("the MEC Loan") from a financing company, Medical Equipment Credit Pte Ltd ("MEC").[2] Under the terms of MEC's letter of offer dated 25 June 2002 ("the MEC Offer Letter"), 10% of the shares in Universal (*ie,* 10,000 shares) were to be transferred to MEC or its nominee upon completion of the loan transaction.[3] The defendant accepted the terms of the MEC Offer Letter on behalf of Universal on 26 June 2002.[4]

4 On the same day, 26 June 2002, Universal entered into a loan agreement with MEC ("the MEC Loan Agreement") in respect of the MEC Loan.[5] The defendant guaranteed the payment of the MEC Loan. On 28 June 2002, 10,000 shares in Universal (*ie*, the Shares) were registered in the name of MEC's parent company, DVI Inc ("DVI") under share certificate no. 8.[6] The Shares were transferred to DVI by the defendant.[7] The defendant, Edward Hong and one Boelio Muliadi ("Muliadi") together held the remaining 90% of the shares in Universal.[8]

5 On 28 June 2002, the defendant, Edward Hong and Muliadi signed the following:

(a) a Deed of Subordination under which they subordinated all payment obligations owing by Universal to each of them to the MEC Loan;[9] and

(b) a Share Mortgage Agreement under which their shares in Universal (amounting to 90% of the issued share capital) were charged to MEC as security for the MEC Loan ("the Share Mortgage").[10]

6 On 25 August 2003, DVI filed a petition for reorganisation under Chapter 11 of the United States Bankruptcy Code (Title 11 of the United States Code) in the United States Bankruptcy Court, District of Delaware ("the Delaware Bankruptcy Court").[11]

7 On 7 July 2004, DVI obtained an order from the Delaware Bankruptcy Court authorising it to sell certain *de minimis* assets, including the Shares ("the Sale Order").[12]

8 In early September 2004, DVI signed a term sheet with Goldman Sachs (Asia) Finance ("GS Asia") under which GS Asia was to buy the rights to the contracts owned by MEC, including the MEC Loan Agreement.[13] DVI also wanted to sell the Shares to GS Asia. On 10 September 2004, a Notice of Sale of *De Minimis* Shares of Stock was issued pursuant to the Sale Order and filed with the Delaware Bankruptcy Court ("the Notice of Sale").[14] The Notice of Sale stated that DVI wished to sell the Shares to GS Asia for US$1,000 and that pursuant to the Sale Order, any objection to the sale was to be filed within 10 calendar days. The Notice of Sale was served on Universal.

9 On 14 September 2004, the defendant, through his solicitors, Wee Swee Teow & Co, wrote to DVI's solicitors objecting to the sale of the Shares to GS Asia ("the WST Letter").[15] The letter also stated as follows:

> Under Article 29 of the Articles of Association of Universal Medicare (copy enclosed), "no share shall be transferred to a person who is not a member so long as any member … is willing to purchase the same at fair value."
>
> [The defendant] is prepared to purchase the 10,000 shares of Universal Medicare owned by DIV, Inc.
>
> As such, kindly confirm that an offer to sell the said shares for US$1,000.00 will be made to [the defendant].

10 On 16 September 2004, one Eddie Foo Kwok Fee ("Eddie Foo") sent a copy of Universal's Memorandum and Articles of Association ("the Articles") to DVI at the latter's request.[16] Eddie Foo was employed by one of Edward Hong's companies and assisted Edward Hong in managing Universal.

11 On 20 September 2004, DVI filed a Notice of Withdrawal of the Notice of Sale.[17] On 22 September 2004, DVI informed Eddie Foo that DVI "has decided that it will not sell its equity interest in [Universal] to [GS Asia] at this time" and that the Notice of Sale had been removed from the Delaware Bankruptcy Court website ("the DVI Email").[18]

12 Pursuant to a Sale & Purchase Agreement dated 30 September 2004 ("the GS SPA"), GS Asia bought the rights to contracts owned by MEC, including the MEC Loan Agreement.[19] Universal and the defendant were notified of the sale to GS Asia by way of Notices of Assignment dated 3 November 2004.[20]

13 In 2005, Universal defaulted on the MEC Loan Agreement. On 19 August 2005, GS Asia commenced proceedings in Suit No 593 of 2005 ("S593/2005").[21] One of the claims in S593/2005 was against Universal and the defendant (as guarantor) to recover the amount outstanding on the MEC Loan. In September 2005, GS Asia obtained judgments in default of appearance against five of the six defendants in S593/2005. These included judgments against Universal and the defendant in respect of claim on the MEC Loan.

14 By letter dated 27 October 2007 addressed to Edward Hong, International Columbia US LLC ("Columbia US") offered to buy all the shares in Universal.[22] Columbia US reserved the right to have the purchase

made by any of its subsidiary companies. In the event, the purchase was made by a company called Columbia Asia Healthcare Sdn Bhd ("Columbia Asia").

15 At this time, the Shares were still registered in DVI's name. In an email dated 29 November 2007, Eddie Foo informed the managing director of the Columbia Asia Group that legal advice had been obtained and that the defendant was entitled to "now complete the purchase of [the Shares] for US$1,000".[23]

16 On 1 December 2007, Edward Hong agreed, on behalf of the defendant, Muliadi and himself, to sell 99% of the shares in Universal to Columbia Asia.[24] Although the Shares were still registered in DVI's name, Edward Hong represented on behalf of the defendant, Muliadi and himself that *all* of the shares in Universal were owned by them. It was also envisaged that a formal agreement would be entered into subsequently.

17 On 14 December 2007, the defendant wrote to Universal stating as follows:[25]

> Pursuant to Article 30 of [the Articles], I hereby give notice that I wish to purchase the 10,000 shares in the company from DVI Inc for US$1,000.00 as offered by them to Goldman Sachs.

A cheque for US$1,000 was purportedly enclosed with the letter although in fact payment was made by way of a cash deposit on the same day into Universal's account.[26]

18 On the same day, the defendant and Edward Hong convened a board meeting of Universal and passed resolutions purporting to cancel the Shares held by DVI and to register the defendant as the holder of the Shares.[27] A new

share certificate for the Shares dated 14 December 2007 (share certificate no. 9) was issued in the defendant's name.[28]

19 On 21 December 2007, Universal and the defendant (among others) entered into a Deed of Settlement and Discharge with GS Asia ("the GS Settlement Deed").[29] Under the GS Settlement Deed:

(a) GS Asia was to be paid $25.5m ("the Settlement Sum") in full and final settlement of all the judgment debts in S593/2005, including the judgment debts owed by Universal and the defendant in respect of the MEC Loan; and

(b) upon receipt of the Settlement Sum, GS Asia was to, among other things, release the assets pledged to it under the Share Mortgage and deliver up the Universal share certificates that were in its possession.[30]

20 On 24 December 2007, the defendant, Edward Hong and Muliadi entered into a Share Sale Agreement to sell 99% of the shares in Universal to Columbia Asia ("the Columbia Asia SSA").[31] Pursuant to the Columbia Asia SSA, Columbia Asia paid GS Asia the Settlement Sum directly.[32]

21 On 8 January 2008, GS Asia's solicitors, Allen & Gledhill ("A&G"), sent certain documents to Michael Khoo & Partners ("MK&P") who acted for, among others, Universal and the defendant in respect of the GS Settlement Deed.[33] One of the documents sent by A&G was share certificate no. 8 for the Shares in DVI's name.

Plaintiff's case

22 The plaintiff's case was that the defendant had wrongfully converted the Shares by transferring and/or procuring the transfer of the Shares from DVI to himself, and thereafter transferring and/or causing the transfer of the Shares to Columbia Asia. In the alternative, the plaintiff claimed that it was entitled to recover for the damage caused to its reversionary interest in the Shares ("reversionary damage") and/or in unjust enrichment.

23 The defendant abandoned two of his pleaded defences before the trial started. The first concerned the plaintiff's rights to pursue the present claim. On 10 December 2004, DVI's assets (including the Shares) were conveyed to the DVI Liquidating Trust ("the Trust") pursuant to an order of the Delaware Bankruptcy Court.[34] On 31 October 2006, the plaintiff entered into an Asset and Stock Purchase Agreement with the Trust pursuant to which the plaintiff acquired, among other things, the beneficial interest in the Shares.[35] On 6 May 2015, the rights in respect of the Shares, including the right to pursue the present claim, were assigned to the plaintiff pursuant to a Deed of Assignment.[36] In his defence, the defendant had disputed that the plaintiff had acquired the rights of the Trust pursuant to the Asset and Stock Purchase Agreement and the Deed of Assignment. After the defendant abandoned this defence, it became common ground that the plaintiff succeeded to DVI's rights against the defendant.

24 The second defence that the defendant abandoned was that of limitation. The defence of limitation should not have been pleaded in the first place. In 2014, the defendant and Edward Hong obtained an anti-suit injunction restraining the plaintiff and the Trust from suing them in the United States of America for misappropriating the Shares (see *Hong Hin Kay Albert*

and another v AAHG, LLC and another [2014] SGHC 206). The anti-suit injunction was granted on the basis of undertakings by the defendant and Edward Hong that they would not rely on the limitation defence in the event the plaintiff commenced legal proceedings in Singapore within two weeks from the date of the order. The present action was commenced within two weeks of the anti-suit injunction order. The defendant was bound by his undertaking not to rely on the limitation defence in the present case.

Conversion claim

25 It was not disputed that the defendant had procured the transfer of the Shares to himself. The defendant raised three defences to the claim in conversion:

(a) The Shares were lawfully transferred to the defendant pursuant to his exercise of his right of pre-emption under the Articles.

(b) DVI (and consequently, the plaintiff) was estopped from challenging the defendant's exercise of his right of pre-emption under the Articles.

(c) DVI (and consequently, the plaintiff) did not have the right to immediate possession of the Shares required to sustain a claim in conversion at the relevant time as the Shares had been pledged to GS Asia.

Whether the Shares were transferred to the defendant pursuant to the defendant's exercise of a right of pre-emption

26 The defendant argued that the Shares were transferred to him pursuant to his exercise of his right of pre-emption under the Articles because:

(a) the Notice of Sale given by DVI in September 2004 constituted a transfer notice under the Articles and triggered his right of pre-emption under the same; and

(b) he had exercised his right of pre-emption through the WST Letter.

27 It would be useful to first consider the relevant provisions in the Articles which read as follows:[37]

> 29. Shares may be freely transferred by a member … to any existing member … but save as aforesaid, and save as provided by Article 34 hereof, no share shall be transferred to a person who is not a member so long as any member or any person selected by the directors … is willing to purchase the same at the fair value.
>
> 30. Except where the transfer is made pursuant to Article 29 hereof the person proposing to transfer any share (hereinafter called "the proposing Transferor") shall give notice in writing (hereinafter called "the transfer notice") to the Company that he desires to transfer the same. Such notice shall specify the sum he fixes as the fair value, and shall constitute the Company his agent for the sale of the shares to any member of the Company or person selected as aforesaid at the price so fixed or fixed by the Auditor in accordance with these articles. A transfer notice may include several shares, and in such case shall operate as if it were a separate notice in respect of each share. A transfer notice shall not be revocable except with the sanction of the directors.
>
> 31. If the Company shall, within the space of twenty-eight days after being served with such notice, find a member or person selected as aforesaid willing to purchase the share (hereinafter called "the purchasing member") and shall give notice thereof to the proposing Transferor, he shall be bound, upon payment of the fair value, to transfer the share to the purchasing member. …
>
> 32. …
>
> 33. If in any case the proposing Transferor, after having become bound as aforesaid, makes default in transferring the shares, the Company may receive the purchase

> money, and shall thereupon cause the name of the purchasing member to be entered in the register as the holder of the shares and shall hold the purchase money in trust for the proposing Transferor. The receipt of the Company for the purchase money shall be a good discharge to the purchasing member, and after his name has been entered in the register in purported exercise of the aforesaid power the validity of the proceedings shall not be questioned by any person.
>
> 34. If the Company shall not, within the space of twenty-eight days after being served with a transfer notice, find a member or person selected as aforesaid willing to purchase the shares, and give notice in manner aforesaid, the proposing Transferor shall at any time within three calendar months afterwards be at liberty to sell and transfer the shares or those not placed to any person at any price, provided that the number of members shall not thereby be increased to more than fifty.

28 Article 29 permits a member of the company to freely transfer his shares to another member of his choice. On the other hand, it prohibits him from transferring his shares to non-members if a member or a person selected by the directors ("selected person") is willing to purchase the shares at fair value. Article 29 does *not* give another member a right to buy the proposing transferor's shares unless the proposing transferor has offered to sell his shares to that member.

29 A member of the company who wishes to sell his shares to a non-member can trigger the process set out in Articles 30 to 34 by issuing a transfer notice (Article 30). The company is constituted as the proposing transferor's agent for the sale of the shares to another member or selected person. Once given, the transfer notice cannot be revoked except with the directors' approval. If, within 28 days, the company finds a member or selected person who is willing to buy the shares , the proposing transferor is *bound* to transfer the shares to the purchaser upon payment of the fair value by the purchaser (Article 31). If no such purchaser is found, the proposing

transferor then becomes free to sell his shares to any person at any price within three calendar months (Article 34).

30 However, the process in Articles 30 to 34 is triggered only if the proposing transferor has given a transfer notice under Article 30, *ie* a notice in writing to the company that he desires to transfer his shares.

Whether the Notice of Sale constituted a transfer notice

31 The defendant first submitted that the Notice of Sale constituted a transfer notice under Article 30 of the Articles.[38] I rejected the submission.

32 A transfer notice under Article 30 is in essence an offer by the proposing transferor to sell his shares to any member or selected person in accordance with the process set out in the Articles. If the offer is accepted, the proposing transferor becomes bound to sell the shares to the purchaser. There can be no transfer notice for purposes of Article 30 unless it was given with such intent. Otherwise, it cannot be said that there was any offer to sell.

33 In my view, the Notice of Sale was not a transfer notice for purposes of Article 30 because it was clearly never intended to operate as such. The Notice of Sale had nothing to do with Article 30. In fact, it was not disputed that DVI had no knowledge of Article 30 when it issued the Notice of Sale. There was clearly no intention in the Notice of Sale to sell the Shares to any shareholder of Universal or to any selected person. It did not constitute Universal as DVI's agent for the sale of the Shares. Instead the Notice of Sale clearly stated that the proposed sale was to GS Asia, that the proposed sale was pursuant to the order made by the Delaware Bankruptcy Court on 7 July 2004 and that the Notice of Sale was given in accordance with procedures set out in that order. It gave interested parties an opportunity to file objections if they so wished.

34 It was evident that the defendant himself did not treat the Notice of Sale as a transfer notice under the Articles. Nothing in the WST Letter suggested that the defendant was treating the Notice of Sale as a transfer notice. In addition, in response to the WST Letter, DVI informed Universal that it had withdrawn the Notice of Sale. A transfer notice under Article 30 cannot be withdrawn unilaterally. The defendant must have known of the withdrawal of the Notice of Sale yet he did not protest against the withdrawal. Neither did he inform DVI that he had already exercised his right of pre-emption.

35 The defendant next referred me to *Lyle & Scott Ltd v Scott's Trustees* [1959] AC 763 ("*Lyle & Scott*"). In *Lyle & Scott*, article 9 of the articles of association provided that any "ordinary shareholder who is desirous of transferring his ordinary shares shall inform the secretary in writing of the number of ordinary shares which he desires to transfer…". The court held that shareholders who had entered into a binding agreement to sell their shares to a third party, and who had received the purchase price, must be deemed to be desirous of transferring them and were therefore bound to implement article 9 by issuing a transfer notice.

36 The defendant made two different submissions relying on *Lyle & Scott*. First, the defendant submitted that DVI's proposal (in the Notice of Sale) to transfer the Shares to GS Asia showed a desire to sell the Shares and that this was sufficient to trigger the defendant's right of pre-emption.[39] Second, the defendant submitted that the same proposal to transfer the Shares to GS Asia triggered its obligation under Article 30 to issue a transfer notice to Universal.[40] I disagreed with both submissions.

37 In my judgment, the defendant's right of pre-emption could not arise unless there was a transfer notice given pursuant to Article 30. The language in Article 30 was clear. A mere desire to sell the Shares on the part of DVI could not and did not trigger the defendant's right of pre-emption. *Lyle & Scott* did not support the defendant's submission in this regard. The decision there was that the shareholders' conduct showed they were desirous of selling their shares and that this fact triggered *their obligation to issue a transfer notice*.

38 As for the defendant's second submission, in my opinion, *Lyle & Scott* did not help the defendant's case either. In the present case, the defendant did not seek an order requiring DVI to issue a transfer notice. More importantly, even if he had sought such an order, it would not have changed the fact that no transfer notice had been given and the defendant could not therefore have exercised any right of pre-emption whether in 2004 or 2007. This meant that the defendant would still have wrongfully converted the Shares when he caused them to be transferred to him in December 2007 and subsequently to Columbia Asia.

39 In any event, I disagreed with the defendant's submission that based on *Lyle & Scott*, DVI became bound, as a result of the Notice of Sale, to issue a transfer notice to Universal. As already mentioned, the question in *Lyle & Scott* was whether the shareholders' conduct in accepting the third party's offer showed that they were desirous of transferring their shares thereby triggering the obligation to issue transfer notices. The fact that they had agreed to sell their shares and had received payment was the decisive factor in the court's decision that their obligation to issue transfer notices had been triggered. Viscount Simonds was of the opinion (at 774) that "it is not open to a shareholder, *who has agreed to do a certain thing and is bound to do it*, to

deny that he is desirous of doing it" [emphasis added]. Lord Reid drew a distinction between a shareholder who "merely says that he wishes to sell or does something which shows that that is his intention" and a shareholder "who has agreed to sell" (at 779). The obligation to issue a transfer notice would be triggered in the latter case but not in the former. Lord Reid went further to say (at 781) that:

> Under article 9 the [shareholders] are bound to give notices so long as they are desirous of selling their shares, and they must be held to be desirous of selling their shares so long as they maintain and do not annul their contracts with [the third party]. It is in their power to do that, and, once they have done so, they will be entitled to say that they are no longer desirous of transferring their shares.

40 Applying *Lyle & Scott* to the present case, the question would be whether by issuing the Notice of Sale, DVI became a "person proposing to transfer" its shares within the meaning of Article 30 such that it became obliged to issue a transfer notice. In my view, the obligation to issue a transfer notice under Article 30 was not triggered because DVI was then clearly not bound to transfer the Shares to GS Asia. DVI was merely expressing an intention to sell to GS Asia and even then, this was subject to any objections that may be raised and to the Delaware Bankruptcy Court's approval in any event.

Whether the WST Letter was an exercise of the right of pre-emption

41 In any event, in my view, the WST Letter did not constitute an exercise by the defendant of his rights of pre-emption under the Articles. An exercise of a right of pre-emption is an acceptance of the offer made by way of a transfer notice. Such an acceptance must be unequivocal. As seen earlier (at [9]), the WST Letter merely:

(a) pointed out that Article 29 of the Articles prohibited DVI from selling to GS Asia (a non-member) because the defendant (a member) was prepared to buy the Shares; and

(b) sought confirmation that DVI would offer to sell the Shares to the defendant.

42 The WST Letter could not be construed as an unequivocal acceptance by the defendant. The WST Letter did not even treat the Notice of Sale as a transfer notice under Article 30. Neither did it refer to Articles 30 to 33 nor mention any exercise of a right of pre-emption. The WST Letter treated the situation as one which fell entirely within Article 29 alone; hence the request in the letter for confirmation that DVI would offer to sell the shares to the defendant.

43 It was also clear that the defendant did not treat the WST Letter as an exercise of his right of pre-emption. First, if there was an exercise of the right of pre-emption, DVI would have been bound to transfer the Shares to the defendant. Article 33 of Universal's Articles allowed Universal to receive and hold the purchase money from the defendant for DVI and to register the Shares in the defendant's name if DVI defaulted in transferring the Shares. Yet, neither the defendant nor Universal asked DVI to transfer the Shares to the defendant. Neither was DVI informed of the registration of the Shares in the defendant's name or of the fact that Universal was holding the payment for the Shares for DVI. Instead, what took place at the Universal board meeting on 14 December 2007 were hurried steps taken to transfer the Shares to the defendant without informing DVI.

44 Second, on 14 December 2007, the defendant gave written notice to Universal, pursuant to Article 30, that he wished to purchase the Shares (see [17] above). If the defendant had (as he claimed) exercised his right of pre-emption through the WST Letter in 2004, there would have been no need for his written notice on 14 December 2007. Evidently, the defendant did not treat the WST Letter as an exercise of his right of pre-emption. In my view, the defendant's assertion that he had exercised his right of pre-emption through the WST Letter was nothing more than an afterthought. I would add, for completeness, that the defendant could not rely on the notice given on 14 December 2007 as his exercise of his right of pre-emption because clearly (assuming the Notice of Sale was a transfer notice), the defendant's notice on 14 December 2007 was given long after the 28-day period under Article 31 for Universal to find a buyer had expired.

Whether the plaintiff was estopped

45 The defendant submitted that estoppel by representation can arise where one party keeps silent despite knowing that the other party is acting or proceeding with its course of conduct on the basis of a mistaken belief which the former is said to have acquiesced in: *The "Bunga Melati 5"* [2016] 2 SLR 1114 at [17]. The defendant also relied on *Tradax Export S.A. v Dorada Compania Naviera S.A. (The "Lutetian")* [1982] 2 Lloyd's Rep 140 at 158 for the proposition that if one party to a contract knows that the other party mistakenly believes he has validly complied with a contractual term, the first party cannot simply keep silent and let the mistaken party continue to labour under the mistake.

46 The defendant argued that:

(a) it was clear to DVI from the WST Letter that the defendant was exercising his right of pre-emption;

(b) DVI was therefore under a duty to inform the defendant if DVI felt that the Notice of Sale did not trigger Article 29 and/or that the requirements under the Articles were not complied with; and

(c) the DVI Email did not raise any such objections and was instead an acknowledgement that the defendant had exercised his right of pre-emption through the WST Letter.

47 I rejected the defendant's submissions. In my view, the evidence did not support any estoppel by representation. As explained earlier, the WST Letter did not constitute an exercise of any right of pre-emption by the defendant. The WST Letter did not give DVI any reason to suspect, much less believe, that the defendant was purporting to exercise his right of pre-emption. In the circumstances, no estoppel by representation could possibly have arisen.

Whether DVI had the right to immediate possession of the Shares

Burden of proof

48 It was common ground that as DVI did not have actual possession of share certificate no. 8 at the time when the conversion took place, the plaintiff had to prove that DVI had the right to immediate possession of the Shares. The plaintiff relied on the fact that DVI was the registered holder of the Shares and submitted that this gave it the requisite right to immediate possession.

49 The defendant's case was that the Shares had been pledged to MEC pursuant to the MEC Loan Agreement and consequently, GS Asia had taken over the pledge when it bought MEC's rights under the MEC Loan

Agreement. It was not disputed that DVI would not have had the right to immediate possession of the Shares on 14 December 2007 (when the Shares were transferred to and registered in the defendant's name) if the Shares had in fact been pledged as security for the MEC Loan. However, the plaintiff disputed the pledge of the Shares to MEC.

50 The defendant accepted that the burden was on him to prove that the Shares were pledged to MEC. However, he also submitted that for the plaintiff to prove its right to immediate possession of the Shares, the plaintiff could not just rely on its legal title but had to be able to explain why share certificate no. 8 was not in its possession.

51 I disagreed with the defendant. It is true that having title to a property does not necessarily mean having the right to immediate possession of the same. However, a plaintiff in a claim for conversion is *prima facie* entitled to rely on his title to prove his right to immediate possession. In the present case, it was undisputed that DVI was the registered holder of the Shares at the material time. As the registered holder of the Shares, *prima facie* DVI was entitled to immediate possession of the Shares as against GS Asia. Since the defendant was the one alleging that DVI had lost its right to possession because the Shares were pledged to MEC/GS Asia, in my view, the burden fell squarely on the defendant to prove that the Shares were pledged to MEC/GS Asia.

Whether the Shares were pledged to MEC

52 Michael O'Hanlon ("O'Hanlon") gave evidence for the defendant. O'Hanlon was the President and Chief Executive Officer of DVI in 2002. O'Hanlon was also the former Chairman of MEC. In his affidavit of evidence-

in-chief ("AEIC"), O'Hanlon claimed that he had "insisted that a pledge of the [Shares] be executed in favour of MEC and held by them" until the MEC Loan was fully repaid. He also alleged that he was asked to sign the share mortgage on behalf of DVI and that share certificate no. 8 was placed in MEC's custody as security under the MEC Loan Agreement.[41] However, no such share mortgage was in evidence. O'Hanlon said in his AEIC that he did not have the document as he had left DVI.[42]

53 Under cross-examination, O'Hanlon could not explain why DVI was not made a party to the Share Mortgage signed by the defendant, Edward Hong and Muliadi on 28 June 2002 (see [5(b)] above) if the intention was for DVI to pledge the Shares to MEC.[43] More importantly, O'Hanlon could not explain why it was necessary for DVI to pledge the Shares to MEC when DVI was MEC's parent company. O'Hanlon kept changing his explanation and gave answers that contradicted his own testimony. His reasons for the pledge by DVI changed from exercising control in the event of default of the MEC Loan, to having all the shares in Universal located in Singapore, to assigning the Shares to MEC so that MEC, not DVI, held the Shares, and finally to facilitating the sale of the MEC Loan to a third party.[44]

54 O'Hanlon also said that the registration of the Shares in DVI's name was a mistake as he meant to put the Shares in MEC's name. He then changed his testimony to say that he had always wanted the Shares to be in DVI's name, before changing his testimony yet again to say that the mistake was not in the registration of the Shares but in the pledge being in the name of DVI not MEC.[45] O'Hanlon could not explain what the mistake in the pledge document was or how the mistake came about.

55 I rejected O'Hanlon's testimony on the pledge of the Shares as I was driven to the conclusion that his evidence was simply not reliable.

56 The defendant also relied on the fact that share certificate no. 8 was among the documents returned by A&G (as solicitors for GS Asia) to MK&P after GS Asia received payment under the GS Settlement Deed (see [21] above). There was no evidence as to when, how or why GS came to be in possession of share certificate no. 8. The defendant argued that GS Asia must have obtained possession of share certificate no. 8 because the Shares were pledged to MEC. The question was whether such an inference should be drawn.

57 In my view, the mere fact that A&G was able to return share certificate no. 8 to the defendant's solicitors, when viewed against the totality of the evidence, was insufficient to support an inference that the Shares had been pledged to MEC.

58 First, it was undisputed that the Shares were given to MEC to enhance MEC's yield in giving the MEC Loan to Universal. It did not make any sense whatsoever for the Shares to be pledged to MEC as security for the MEC Loan. The fact that the Shares were registered in DVI's name did not make any difference. DVI was, after all, MEC's parent company.

59 Second, under the MEC Loan Agreement, the execution of the Share Mortgage Agreement was a condition precedent to the disbursement of the MEC Loan. The MEC Offer Letter, on the other hand, clearly envisaged transferring the Shares to MEC or its nominee only after the loan had been disbursed. Therefore, it could not have been intended that the Shares were to be mortgaged to MEC as part of the Share Mortgage.

60 Third, the GS SPA set out the assets acquired by GS Asia. These assets included the Share Mortgage executed by the defendant, Edward Hong and Muliadi. The Share Mortgage was expressly named in the list of security documents. However, there was no mention of any pledge of the Shares anywhere in the GS SPA. If the Shares had been pledged to MEC, that fact would surely have been reflected in the GS SPA. The evidence showed that GS Asia did not consider DVI to be a security provider.

61 Fourth, the fact that the Notice of Sale envisaged the Shares being sold by DVI to GS Asia *unencumbered* was consistent with the fact that the Shares had not been pledged to MEC. There was also no mention of any such pledge in the draft sale agreement with GS Asia.[46]

62 In my view, the defendant had failed to prove that the Shares were pledged to MEC and consequently to GS Asia. I concluded therefore that plaintiff had the requisite standing to bring this claim in conversion.

63 I would add that in his closing submissions, the defendant had made the further submission that a pledge in favour of GS Asia was created when share certificate no. 8 was given to *GS Asia* as security for the MEC Loan *in connection with the GS SPA*.[47] The defendant was not entitled to make this argument as it was not his pleaded case in his defence. In any event, there was no evidence of any agreement or intention to create a pledge of the Shares to GS Asia in connection with the GS SPA.

Conclusion on conversion claim

64 In my judgment:

(a) There was no valid exercise of a right of pre-emption by the defendant. DVI had not issued any transfer notice pursuant to Article 30 of the Articles. In any event, the WST Letter did not constitute a valid exercise of a right of pre-emption. Accordingly, the defendant had converted the Shares by wrongfully procuring the transfer of the Shares to himself.

(b) The plaintiff had the right to immediate possession of the Shares and was therefore entitled to bring the claim against the defendant for conversion. The Shares had not been pledged to MEC and consequently, GS Asia did not acquire any pledge over the Shares.

65 My decision on the plaintiff's claim for conversion meant that the plaintiff did not have to rely on its alternative claims for reversionary damage and unjust enrichment. For completeness however, I deal with both alternative claims below.

Reversionary damage claim

66 The plaintiff referred me to *Clerk & Lindsell on Torts* (Anthony Dugdal gen ed) (Sweet & Maxwell, 19th Ed, 2006), at paras 17-138 to 17-139, for the proposition that an owner of goods who lacks standing to sue in conversion (because he had neither possession nor an immediate right to possession of the goods) can bring an action for reversionary injury provided that the wrongful act deprived him either temporarily or permanently of the benefit of his reversionary interest. Actual damage is necessary; the goods must have been destroyed or seriously damaged or wrongfully disposed in a way that destroyed the owner's title or at the very least reduced his chances of recovering his goods

67 I agreed with the plaintiff's submission that even if DVI lacked the standing to sue in conversion because the Shares had somehow been pledged to GS Asia, it was nevertheless entitled to relief because the defendant's acts of conversion had deprived it of its reversionary interest in the Shares. In my view, the plaintiff suffered actual damage as, at the very least, its chances of recovering the Shares from Columbia Asia were significantly reduced. The evidence showed that Columbia Asia bought the Shares from the defendant as a *bona fide* purchase for value without notice of the defendant's lack of title. The defendant had confirmed (through Eddie Foo) that he was entitled to complete his purchase of the Shares from DVI and subsequently, the Shares were registered in the defendant's name. There was no allegation or evidence that Columbia had notice that the defendant's title to the Shares was defective. In any event, there was no dispute that the plaintiff had suffered actual damage or that the elements of a claim for reversionary damage were made out in this case.

68 The defendant's sole objection to the plaintiff's claim for reversionary damage was that it was a separate cause of action from the claim for conversion and had not been specifically pleaded.[48] However, the defendant did not identify specifically what was required to be, but had not been, pleaded. I agreed with the defendant that the claim for reversionary damage was a separate "cause of action" in the historical sense as it was a distinct tort from conversion (see *Multi-Pak Singapore Pte Ltd (in receivership) v Intraco Ltd and others* [1992] 2 SLR(R) 382 at [30]–[31]). However, I concluded that it had been sufficiently pleaded as all the essential factual material necessary to support the claim had been pleaded (see *Multistar Holdings Ltd v Geocon Piling & Engineering Pte Ltd* [2016] 2 SLR 1at [34]).

69 In my view, the plaintiff would have been entitled to recover the value of the Shares as damages for its reversionary damage claim.

Unjust enrichment claim

70 The plaintiff's second alternative claim was that even if the plaintiff could not claim in conversion because it did not have the right to immediate possession of the Shares, it could still recover in unjust enrichment. It was common ground that the elements required to succeed in a claim in unjust enrichment are as follows:

(a) Has the defendant had benefitted or been enriched?

(b) Was the enrichment at the plaintiff's expense?

(c) Was the enrichment unjust?

(d) Are there any defences?

See *Wee Chiew Sek Anna v Ng Li-Ann Genevieve and others* [2013] 3 SLR 801 ("*Anna Wee*") at [98].

71 On the facts as I have found them, there was no question that the defendant had been enriched at the plaintiff's expense. The transfer of the Shares to the defendant (a) deprived DVI of the Shares that it owned and (b) clearly benefitted the defendant. DVI did not consent to the transfer to the defendant. The only question was whether the enrichment of the defendant was unjust.

72 As the Court of Appeal reiterated in *Anna Wee* (at [134]), there is no freestanding claim in unjust enrichment on the abstract basis that it is "unjust"

for the defendant to retain the benefit – there must be a particular recognised unjust factor or event which gives rise to a claim. The defendant referred to the list of "unjust factors" summarised in Prof Burrows, *The Law of Restitution* (Oxford University Press, 3rd Ed, 2011) ("*Burrows*") and in *Goff & Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 8th Ed, 2011) ("*Goff & Jones*"), as set out in *Anna Wee* at [132] and [133]. The defendant submitted that (a) the plaintiff's claim did not fall within any of the recognised classes of unjust factors and (b) the plaintiff had not pleaded a recognised unjust factor.

73 One of the unjust factors listed in *Goff & Jones* is "lack of consent". Prof Burrows refers to "ignorance". The Court of Appeal noted in *Anna Wee* (at [139]) that there is no authority that has expressly acknowledged the unjust factor of ignorance or lack of consent. However, as it did not have to decide on this point in *Anna Wee*, the Court of Appeal did not express any conclusive opinion as to whether ignorance or lack of consent fell within the present catalogue of unjust factors.

74 There is much force in the argument (which the Court of Appeal noted in *Anna Wee* at [139]) that if mistake (vitiation of consent) or failure of consideration (qualification of consent) can constitute unjust factors, the same conceptual justification must apply *a fortiori* where there is no consent. In my view, lack of consent ought to be recognised as an unjust factor.

75 In the present case, the unjust factor was the lack of DVI's consent when the defendant procured the transfer of the Shares to himself.

76 As for the defendant's submission that the plaintiff failed to plead the unjust factor, in my view, the material facts had been sufficiently pleaded.

77 In my view, the plaintiff would have succeeded in its claim in unjust enrichment and would have been entitled to recover the value of the Shares from the defendant.

Computation of damages

78 In conversion, the measure of damages is the value of the goods at the time of conversion. The plaintiff relied on the consideration paid by Columbia Asia for 99% of the shares in Universal as evidence of the value of the Shares. The plaintiff computed the value of the Shares as follows:

(a) Under the Columbia SSA,[49] Columbia Asia paid the defendant a total amount of $43,730,550 for 99% of the shares in Universal, comprising the "Goldman Sachs Indebtedness" of $25.5m[50] and the "Purchase Price" of $18,230,550.[51] This translated to a value of $44,172,272.72 for 100% of the shares in Universal.

(b) The debt owing by Universal to GS Asia as at 31 December 2007 was $19,210,052.[52]

(c) The value of equity in Universal was $24,962,220.72 (*ie*, $44,172,272.72 less $19,210,052).

(d) The value of the Shares was therefore $2,496,222.07 (*ie*, 10% of the value of equity in Universal).

79 The plaintiff explained that the Goldman Sachs Indebtedness of $25.5m comprised debts owed to GS Asia by Universal and some other companies. As Universal was not liable for the debts owed by the other companies, the value of the shares in Universal should take into account only the debt of $19,210,052 that was owed by Universal to GS Asia.

80 I accepted the plaintiff's computations. The sale to Columbia Asia was the best available evidence of the value of the Shares as it was a negotiated arms-length transaction that took place at around the time that the conversion took place.

Conclusion

81 The wrongful transfer of the Shares to the defendant constituted conversion. Accordingly, I ordered the defendant to pay the plaintiff $2,496,222.07 being the value of the Shares. I awarded interest at 5.33% pa from 25 January 2008 (*ie*, the date on which the defendant received payment from Columbia Asia) to the date of judgment.

82 I also awarded costs to the plaintiff fixed at $160,000 plus disbursements to be fixed by me if not agreed.

Chua Lee Ming
Judicial Commissioner

Siraj Omar and Premalatha Silwaraju (Premier Law LLC) for the plaintiff;
Daniel Chia Hsiung Wen, Ker Yanguang, Kenneth Kong and Annette Liu (Morgan Lewis Stamford LLC) for the defendant.

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1 Edward Hong's AEIC at para 4.
2 Edward Hong's AEIC at para 13.
3 1AB134-137, at 136.

[4] Edward Hong's AEIC at para 16.
[5] 1AB138-172.
[6] 1AB222.
[7] 1AB221.
[8] Edward Hong's AEIC at para 23.
[9] 1AB228-239.
[10] 1AB240-258.
[11] 1AB293-302.
[12] 2AB814-818.
[13] Edward Hong's AEIC at para 26.
[14] 3AB1338-1496.
[15] 4AB1497-1498.
[16] 4AB1499.
[17] 4AB1500-1501.
[18] 4AB1520.
[19] 4AB1251.
[20] 4AB1892-1893.
[21] 5AB2015-2039.
[22] 6AB2726-2727.
[23] 6AB2757.
[24] 6AB2760-2762.
[25] 6AB2804.
[26] 6AB2805.
[27] 6AB2802-2803.
[28] 6AB2806.
[29] 6AB2866-2884.
[30] Clause 4.2 of the GS Settlement Deed at 6AB2872-2873.
[31] 6AB2885-3033.
[32] Clause 7.1.1.4 of the Columbia SSA at 6AB2902.
[33] 6AB3034-3035.
[34] Kevin D Padrick's AIEC at para 9.
[35] Plaintiff's Bundle of Documents, pp 13-81.
[36] Plaintiff's Bundle of Documents, pp 82-83.
[37] 1AB66-91.
[38] NE 28 September 2016, at 30:12-14.
[39] Defendant's Skeletal Closing Submissions, at para 14(a) on p 10.
[40] Defendant's Skeletal Closing Submissions, at para 14(a) on pp 11-12.
[41] O'Hanlon's AEIC at paras 18–19.
[42] O'Hanlon's AEIC at para 22.
[43] NE 20 September 2016, at 7:25–21:23.
[44] NE 20 September 2016, at 23:12–18, 23:24–24:15, 24:25–25:3, and 33:21–34:19.
[45] NE 20 September 2016, at 25:11–15, 31:1–9 and 29:9–16.
[46] 3AB1357–1496.
[47] Defendant's Skeletal Closing Submissions, para7(c).
[48] NE 28 September 2016, at 54:9-16.
[49] 6AB2885–3033.
[50] Clause 2.1.15 of the Columbia SSA at 6AB2891.
[51] Clause 2.1.29 of the Columbia SSA at 6AB2893.

[52] "Loan due to a financial institution" in Universal's Balance Sheet at 6AB3096.