IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 87

Suit No 72 of 2016

Between

The Enterprise Fund II Ltd

… Plaintiff

And

Jong Hee Sen

… Defendant

JUDGMENT

[Contract] — [Contractual terms] — [Express terms]
[Contract] — [Contractual terms] — [Admissibility of evidence]
[Contract] — [Remedies] — [Mitigation of damage]
[Contract] — [Illegality and public policy] — [Statutory illegality]
[Financial and Securities Markets] — [Regulatory requirements] — [Licensing]

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v
Jong Hee Sen

[2019] SGHC 87

High Court — Suit No 72 of 2016
Hoo Sheau Peng J
4–7 September 2018; 9 November 2018

29 March 2019 Judgment reserved.

Hoo Sheau Peng J:

Introduction

1 This suit involves a claim by The Enterprise Fund II Ltd ("EFII") against Jong Hee Sen ("Jong") for breaching his obligation as a warrantor under a deed of undertaking ("DOU"). The DOU was executed concurrently with a sale and purchase agreement ("SPA") for EFII to purchase shares in International Healthway Corporation Limited ("IHC"). As loss and damage, EFII claims a sum of $3,338,281.95 from Jong.

2 In response, Jong denies the claim. He counterclaims against EFII for wrongful conversion of shares in Healthway Medical Corporation Limited ("HMC") which he had assigned to EFII as security under two deeds of assignment ("the Deeds of Assignments"). He prays for damages to be assessed. EFII disputes the counterclaim.

3 Having heard the trial, and having considered the closing submissions and reply submissions from EFII and Jong, this is my decision.

Background

The parties and related entities

4 EFII is a public company limited by shares, incorporated in Singapore. It is in the business of fund management, providing investment or fund management and advisory services.[1] Tan Yang Hwee ("Tan"), also known as Glendon, was a director of EFII.[2] He acted for EFII in the relevant dealings, and was EFII's sole witness at the trial.

5 HMC was incorporated on 16 May 2007, and was listed on the Singapore Exchange Limited ("SGX") on 4 July 2008.[3] It is in the business of providing healthcare services and facilities in Singapore. It was set up by Jong and his two business partners – Fan Kow Hin ("Fan") and Aathar Ah Kong Andrew ("Aathar").[4] Jong was a non-executive director and non-independent director of HMC from 1 September 2011 to 8 July 2013.[5] Jong resigned from the board of HMC to focus on the management of IHC.[6]

6 IHC, now known as OUE Lippo Healthcare Limited, was incorporated on 18 February 2013, and was listed on the SGX on 8 July 2013.[7] Jong was formerly its director from 18 February 2013 to 22 December 2016.[8] Fan and

1 Statement of Claim ("SOC") at para 1; Agreed Bundle Vol 2 ("AB2") at p 461.

2 Tan's 1st affidavit ("TYH-1") at para 1.

3 Jong's 1st affidavit ("JHS-1") at paras 31 and 36.

4 JHS-1 at paras 12, 30–32.

5 Exhibit P2.

6 Exhibit P2.

7 JHS-1 at paras 38–40.

Aathar were also involved in IHC. While HMC operated locally, IHC was meant to develop and manage healthcare facilities internationally.[9] Prior to the listing of IHC, HMC was a shareholder of IHC, but it gradually divested its stake in IHC following IHC's listing.[10]

7 I should also mention Healthway Medical Development (Private) Limited ("HMD"). This entity was what Jong termed the "predecessor" of IHC. As part of the listing process, IHC was the vehicle listed in place of HMD following an asset restructuring exercise.[11] Fan, Aathar and Jong were shareholders of HMD.[12]

8 As for Jong, apart from his involvement in the various companies mentioned above, he was employed as a Chief Executive Officer of an unrelated company at the time of making his affidavit for the trial.[13] Jong also described himself as an executive with over 25 years' experience in various technical and managerial roles.[14]

The relevant transaction

9 The relevant transaction at the centre of this action is documented by the SPA and the DOU, with reference to the Deeds of Assignments. The details are as follows.

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8 JHS-1 at paras 175–177.

9 JHS-1 at paras 39–40.

10 Exhibit P4.

11 Exhibit P4; Notes of Evidence ("NEs") (6 September 2018) p 78, ln 21–25.

12 NEs (6 September 2018) p 108, ln 11–14.

13 JHS-1 at para 2.

14 AB2 at p 259.

Sale of International Healthway Corporation Limited shares, and undertaking by the Warrantors

10 On 6 July 2013, shortly prior to the listing of IHC, EFII agreed to purchase 20,833,000 ordinary shares of IHC from HMC. I shall refer to these shares as the "Sale Shares". The sale and purchase was documented in the SPA, which provided for a consideration of $0.48 per share for a total sum of $9,999,840 to be paid by EFII to HMC.[15]

11 On the same day, Jong, Fan, Aathar, HMD and One Organisation Limited ("OOL") (collectively known as "the Warrantors") executed the DOU, *on a joint and several basis*, in favour of EFII.[16] The DOU is the key document of concern, and these are its material terms.

12 By cl 2.1(a) of the DOU, the Warrantors undertook to EFII that during a period of nine months beginning from the completion date of the SPA ("Sale Period"), they would "use reasonable endeavours to source for and procure purchasers for the Sale Shares from [EFII], at a purchase price per Share of no less [*sic*] S$0.576 or the last traded price of Shares on the SGX-ST, whichever is the higher (the "**Minimum Sale Price**") …" [emphasis in original in bold].

13 However, should the sale of Sale Shares during the Sale Period be insufficient to raise the sum of $11,999,808 (also known as the "Sale Proceeds Target"), by cl 2.1(b) of the DOU, the Warrantors undertook to effect the purchase of the remaining Sale Shares such that EFII receives, in aggregate, the Sale Proceeds Target. Since much of the present dispute relates to when such liability arises, which turns on the exact words used in cl 2.1(b) of the DOU, I set out the relevant provision here:[17]

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15 TYH-1 at para 17, p 105; JHS-1 at para 10.

16 TYH-1 at p 20; JHS-1 at para 12, p 76.

> (b) in so far as the *aggregate consideration* received by [EFII] pursuant to the sale of *any* Sale Shares effected during the Sale Period (the "**Aggregate Consideration**") pursuant to **Clause 2.1(a)** above or **Clause 2.2** below is *less than the Sale Proceeds Target*, [the Warrantors] shall, within no later than seven (7) Business Days of the expiry of the Sale Period, either purchase or procure the purchase from [EFII] of such portion of the remaining Sale Shares held by [EFII] (the "**Balance Sale Shares**") at … no less than the Minimum Sale Price, *such that* [EFII] *receives, in aggregate, the full amount of the Sale Proceeds Target* …
>
> [emphasis in original in bold; emphasis added in italics]

14 By cl 2.2, EFII was not precluded from "at any time sourcing for and procuring purchasers for all or any part of the Sale Shares at a price per Share which is no less than the Minimum Sale Price".

15 To round off, by cl 3.1, it was provided that "[t]he obligations of the Warrantors … shall terminate on the date on which [EFII receives], in aggregate, [proceeds] that are equivalent to the Sale Proceeds Target".

Extension of Deeds of Assignments

16 To secure the Warrantors' obligations, by cl 2.3 of the DOU, an undertaking was provided by Jong and OOL to the effect that the Deeds of Assignments would be extended in favour of EFII.

17 To explain, on or around 15 June 2011, EFII provided a loan to HMD.[18] To secure HMD's obligations to EFII under the loan transaction, Jong and OOL entered into the Deeds of Assignment. Under these deeds, Jong assigned 40,500,000 ordinary shares in HMC to EFII. As for OOL, a company controlled by Fan and/or his wife,[19] it assigned a total of 135,802,000 ordinary shares in

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17 Agreed Bundle Vol 1 ("AB1") at pp 70–71.

18 TYH-1 at para 7.

HMC to EFII.[20] I shall refer to these shares as "the Security Shares". In other words, by cl 2.3 of the DOU, Jong agreed to continue with the existing assignments of his portion of the Security Shares to secure the Warrantors' obligations under the DOU. It is not disputed that eventually, the loan to HMD was fully repaid.[21]

Events leading up to the action

18 The Sale Period ran for nine months from the SPA's completion date of 8 July 2013 to 7 April 2014. Should obligations arise under cl 2.1(b) of the DOU, the Warrantors should perform the obligations no later than 16 April 2014, *ie*, seven business days after 7 April 2014.

19 During the Sale Period, the actual traded prices of IHC shares on the SGX fell significantly lower than the Minimum Sale Price. Eventually, no Sale Shares were sold during the Sale Period. Thereafter, none of the Warrantors purchased or procured the purchase of any of the Sale Shares from EFII, and EFII did not receive the Sale Proceeds Target.[22] In this regard, I should add that the parties are not in dispute that any sale could have been conducted in the market or off the market (through private arrangements).

20 As the Warrantors did not satisfy EFII's claim for the Sale Proceeds Target, EFII claims that it engaged in discussions with Aathar and Fan on repayment by the Warrantors. EFII also claims that on 30 September 2014, a sum of $2,000,000 was repaid through Golden Cliff International Limited

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19 NEs (6 September 2018) p 13, ln 16–20.

20 AB1 at pp 23, 50.

21 JHS-1 at para 56.

22 TYH-1 at para 20.

("Golden Cliff"), a company purportedly owned by Fan, towards the outstanding sum. Jong disagrees with these assertions.

21 Quite some time later, EFII took steps to sell the Sale Shares and the Security Shares. According to EFII, and undisputed by Jong,[23] EFII only began to find buyers starting from around December 2015.[24] Eventually, EFII recovered the sum of $6,661,526.04 through sales effected from March 2016 to April 2016.[25]

22 With these background facts in mind, I turn to the parties' cases.

The parties' cases

EFII's claim

23 By EFII's case, Jong, as one of the Warrantors, had an obligation to purchase or procure the purchase of the Sale Shares, and such obligation will only be discharged when the Sale Proceeds Target is met.[26]

24 Jong has accordingly failed to perform his obligations under cl 2.1(b) of the DOU, because there was no sale of the Sale Shares and EFII did not receive the Sale Proceeds Target of $11,999,808 by 16 April 2014.[27]

25 In support of its case, EFII relied on pre-contractual correspondence,[28] and post-contractual acknowledgments of liability by the Warrantors.[29]

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23 Defendant's Closing Submissions ("DCS") at paras 339–340.

24 NEs (6 September 2018), p 34 ln 11 – p 35 ln 16.

25 SOC at para 6A.

26 SOC at paras 3C(f)–(g).

27 SOC at para 4.

28 SOC at para 3(C) – Particulars.

26 EFII managed to mitigate its losses by selling the Sale Shares and the Security Shares, and recovered $6,661,526.04. It had also received part payment of $2,000,000 through Golden Cliff.[30]

27 EFII's claim is therefore for the sum of $3,338,281.95 or alternatively, for damages to be assessed, in addition to interest.[31] The claimed sum is the balance of the Sale Proceeds Target left unrecovered.

Jong's defence and counterclaim

28 Jong's primary case is that the Warrantors' obligations under cl 2.1(b) of the DOU do not arise if there was no sale of any Sale Shares during the Sale Period.[32] Jong pleaded that this is the plain and unambiguous meaning of the words of cl 2.1(b) of the DOU.[33]

29 Further, Jong was not privy to any negotiations between Fan, Aathar and EFII, and neither acquiesced nor consented to Fan and Aathar negotiating on his behalf. Accordingly, their conduct should not affect his obligations under the DOU.[34] Similarly, any admission of liability by Fan or Aathar post-contract was not made on Jong's behalf.[35]

30 In the alternative, the transaction, comprising the SPA and the DOU, is void for illegality. Under the Securities and Futures Act (Cap 289, 2006 Rev

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29 SOC at paras 4A and 6B.

30 SOC at paras 6A and 6B.

31 SOC at para 6C and the prayers.

32 Defence (Amendment No 4) ("Defence") and Counterclaim (Amendment No 2) ("Counterclaim") at para 7(b); DCS at para 71.

33 Defence at para 6D; DCS at paras 72–78.

34 Defence at para 6D; DCS at para 199.

35 Defence at para 6D, 6D(e).

Ed) ("SFA") applicable at the time, entities which engaged in the business of "dealing in securities" either had to hold or be exempted from holding a capital markets services licence. The transaction consisted of agreements to acquire securities (via the SPA) and to dispose of securities (via the DOU). Since EFII neither held such a licence nor was so exempted, EFII was in contravention of the SFA. The DOU is therefore void for illegality.[36]

31 Further, in the event that Jong is found to be liable, EFII has breached its duty to act reasonably to mitigate its damages, as it had unreasonably delayed taking steps to sell the Sale Shares or Security Shares until December 2015.[37]

32 Turning to the counterclaim, Jong alleges that EFII wrongfully converted the Security Shares belonging to him. Upon expiry of the Sale Period, EFII ought to have returned his Security Shares as there was no longer any outstanding obligation under the DOU. Instead, EFII sold the Security Shares. EFII has therefore breached the DOU and the Deeds of Assignment. In the alternative, as the DOU is void for illegality, EFII was not entitled to have recourse to the security in the Security Shares.[38]

EFII's reply and defence to counterclaim

33 In response to Jong's interpretation of cl 2.1(b) of the DOU, EFII claims the following:

(a) Jong was aware of the negotiations between the Warrantors and EFII. Jong was a signatory and was copied in the parties' correspondence.[39]

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36 Defence at paras 7B–7G.

37 Defence at para 9A.

38 Counterclaim at paras 12–15.

(b) Jong had consented to and/or authorised Fan, Aathar or both to represent him in negotiations with EFII.[40]

34 On its duty to mitigate, EFII argues that it had acted reasonably in delaying the sale of the Sale Shares and Security Shares, mainly because it was still engaged in negotiations with the Warrantors.[41]

35 On the illegality argument, EFII was not carrying on business in dealing in securities. Hence, it did not need a licence under s 82 of the SFA.[42]

36 As for Jong's counterclaim, it fails because the transaction is not illegal. Jong was not entitled to the return of his portion of the Security Shares because he had not discharged his obligations under the DOU.[43]

Issues to be determined

37 Based on the parties' pleaded cases, these issues fall for determination:

(a) Whether cl 2.1(b) was engaged, thus imposing obligations on the Warrantors. Subsumed within this issue is the matter of the interpretation of cl 2.1(b);

(b) If the above is answered in the positive, whether Jong is liable under cl 2.1(b);

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39 Reply and Defence to Counterclaim at para 4AB(a).

40 Reply and Defence to Counterclaim at para 4AB(b).

41 Reply and Defence to Counterclaim at paras 6C–6D.

42 Reply and Defence to Counterclaim at para 4E.

43 Reply and Defence to Counterclaim at paras 7–9.

(c) Whether the transaction is in contravention of the SFA, and therefore void or unenforceable;

(d) Should Jong's liability be established, whether EFII breached its duty to mitigate its losses; and

(e) Whether EFII wrongfully converted the Security Shares belonging to Jong.

Issue 1: Whether cl 2.1(b) was engaged, thus imposing obligations on the Warrantors

38 Turning to the first issue, it centres on the interpretation of cl 2.1(b). In aid of its interpretation of cl 2.1(b), EFII seeks specifically to rely on four pre-contractual emails. Jong objects to the admissibility of the first email for this purpose, but not the other three emails. Therefore, the admissibility of extrinsic evidence falls to be considered before applying contextual contractual interpretation to cl 2.1(b).

The admissibility of extrinsic evidence

39 In the interpretation of contract, extrinsic evidence is only admissible if it satisfies the three requirements of being relevant, reasonably available to all contracting parties, and if it relates to a clear and obvious context: *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*") at [132(d)].

40 Jong contests the admissibility of an email sent on 26 June 2013 by Aathar, which was addressed to Tan with Fan copied as a recipient ("the 26 June email"), which discussed the nature of the transaction.[44] Jong relies on the

[44] AB1ok at pp 149–150.

ground that the 26 June email fails to fulfil the requirement of being reasonably available to him. This is because he was not copied in it and he lacked knowledge of it.[45]

41 EFII, in support of its submission that the 26 June email fulfilled the requirement of reasonable availability, cites the case of *The "Star Quest" and other matters* [2016] 3 SLR 1280. In that case, an underlying sale contract between the appellant and a third party buyer was the extrinsic evidence sought to be relied on in interpreting a bill of lading. Even though the respondent, the owner of the vessels, was not a party to the underlying sale contract, the court applied the *Zurich Insurance* requirements and held the extrinsic evidence to be reasonably available, on the ground that due to the respondent's "ongoing commercial relationships" with the appellant and the third party, the respondents "were not complete strangers to the commercial dealings" involved in the underlying sale contracts, and had a "working knowledge of the essential features" of the extrinsic evidence, even though it may not have known its exact terms.

42 I note that the inquiry of "reasonable availability" is an objective one. Here, it is not disputed that at the material time, Jong had a close working relationship with Aathar and Fan. By his own evidence, since becoming acquainted with Aathar and Fan in or around 2000,[46] the trio would go in search of investment opportunities together. Generally, Jong described that their relationship was such that Fan was regarded amongst the three as "the first among equals", Aathar was second and Jong was third in rank.[47] This was reflected in how the trio collectively made decisions and split profits.[48]

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45 DCS at paras 87–95.

46 JHS-1 at para 15.

47 JHS-1 at paras 25–26, 28.

43 In the context of managing HMC, Fan and Andrew would handle the fundraising aspects of the business while Jong was responsible for the operational aspects.[49] Fan and Aathar would go out in search of investment opportunities, negotiating the parameters and terms of the transaction on Jong's behalf.[50] Jong would thereafter learn of these proposed transactions through discussions with Fan and Aathar, review the terms of the contract, and decide if such terms are acceptable on the basis of the trio's discussions and his reading of the contract.[51] Should Jong accept the proposal from Fan and Aathar, he will sign on the contractual document without personally speaking to the other contracting party.[52]

44 In my view, as a result of this close relationship between Jong on the one hand and Fan and Aathar on the other, Jong had a working knowledge of the essential features of the transaction and its purpose. Indeed, Jong was informed by Fan and Aathar of the details of the transaction, at the very least between 26 June 2013 to 1 July 2013.[53] It was clear that Jong was aware that the transaction was being negotiated between Fan, Aathar and EFII. However, Jong was "tied down with administrative work involved in the listing of [IHC]" during months preceding the execution of the transaction.[54] Thus, Jong was content to let Fan and Aathar negotiate in his absence with EFII, which was indeed "consistent with the way Fan, [Aathar] and [himself] allocated work amongst [themselves]".[55]

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48 JHS-1 at paras 25–29.

49 JHS-1 at para 34.

50 NEs (6 September 2018) p 88, ln 16–19.

51 NEs (6 September 2018) p 86, ln 4–14.

52 NEs (6 September 2018) p 86. ln 16–24.

53 NEs (6 September 2018) p 121, ln 6–9.

54 JHS-1 at para 72.

45 Given these facts and circumstances, I am of the view that it is not open to Jong to now allege that the 26 July email was not reasonably available to him.

The contents of the emails

46 With that, I set out the contents of the four emails.

47 The 26 June email summarised the proposed transaction as "a secured investment with an attractive minimum investment return of 20% in 9 months … [t]he investment is also *guaranteed*" [emphasis added]. Further, in breaking down the various steps of the transaction, the 26 June email stated:[56]

> 4. HMD and the 3 Promoters (Fan Kow Hin, Dr Jong, Andrew Aathar) guarantee that in the event the shares are not sold within the 9 months period [*sic*], the balance shares will be purchased at a price so that the Target Sale Price of S$12 million will be achieved.

48 The second email was sent on 5 July 2013 ("the 5 July Marc email") from Marc Tan of Shook Lin & Bok LLP, the Warrantors' lawyers, to Stephen Soh of EFII's previous lawyers, Colin Ng & Partners LLP ("CNP"), copying Fan, Aathar, Jong and Tan. This involved a discussion of the draft SPA as follows:[57]

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55 JHS-1 at para 73.

56 AB1 at p 149.

57 AB1 at pp 159–160.

> We note that you have included a put option in clause 8 of the SPA, which changes the parties' understanding of the deal. The obligation to procure purchasers for the Sale Shares is discharged as soon as S$12m is achieved. The unsold Sale Shares should not be put back to HMC for sale.

49 The third piece of correspondence is an email sent on 5 July 2013 from Aathar, addressed to Tan and copied to Jong, Fan, and the lawyers and employees of both EFII and the Warrantors ("the 5 July Aathar email").[58] In this email, Aathar described the transaction as follows:

> … To recap the commercial position is :- so long as we procure the sale of the shares at no less than $0.576 per share and the sale amount reaches $12 million, our obligation ends. For example, say after selling 15 mil shares [out] of the 20.8mil shares and the sale price reaches $12 mil, we have no further obligations. [EFII] can then decide how it wishes to deal with the balance shares – sell or hold.

50 The fourth piece of correspondence is an email sent on 6 July 2013 ("the 6 July email"), from Marc Tan to Aathar, Fan, Jong and EFII's previous lawyers, which highlighted the following about the DOU:[59]

> 2. [I]n the event that the Sale Proceeds Target is not met, the Warrantors shall procure within a period of 7 Business Days, purchase the remaining shares or procure a buyer. We have amended this to 28 days allowing more time for the Warrantors to do so (Clause 2.1(b)).

51 Considering the contents of the emails, I am of the view that they would constitute admissible extrinsic evidence for the interpretation of the DOU, as they fulfil the three requirements for admissibility. I now turn to the interpretation of the DOU.

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58 AB1 at p 153.

59 AB1 at pp 163–164.

Contextual interpretation of the DOU

52 Jong argues that the usage of particular words suggests that at least one Sale Share must be sold during the Sale Period before the Warrantors' obligations under cl 2.1(b) arise. Specifically, cl 2.1(b) stipulates that the *aggregate* consideration received by EFII pursuant to the sale of *any* Sale Shares during the Sale Period must be less than the Sale Proceeds Target, only then are the Warrantors obliged to either purchase or procure the purchase of the *remaining* Sale Shares, referred to as the "*Balance* Sale Shares" to allow EFII to achieve the Sale Proceeds Target. Jong argues that the words emphasised above indicate that a situation where no Sale Share is sold is not contemplated by cl 2.1(b). Some sale has to be effected before there can be any remaining, *ie* leftover, Sale Shares.

53 EFII contends the contrary, pointing out, *inter alia*, that cl 2.1(b) does not contain any qualifier to the obligation that EFII must receive the Sale Proceeds Target if it has not received it during the Sale Period. The obligation arose regardless of whether there was any transacted sale of any of the Sale Shares during the Sales Period. It operates as an absolute obligation on the Warrantors to procure this outcome.[60]

54 Contractual interpretation should be both objective and contextual (*Zurich Insurance* at [125], [122]). Pursuant to this approach, the court will first consider the plain language of the contract together with the extrinsic evidence admitted. Should the language of the contract become ambiguous or absurd in light of its context, then the court will be entitled to ascribe a meaning to the contractual language which is different from its plain meaning (*Zurich Insurance* at [130]).

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60 Plaintiff's Closing Submissions ("PCS") at paras 92–94.

55 Applying the above approach to the present case, I reject Jong's interpretation. Examining the plain language of the text in cl 2.1(b) in the relevant context, I find that the unambiguous meaning of cl 2.1(b) is that the Warrantors' obligations arise, upon the expiry of the Sale Period, to do the necessary for EFII to receive the Sale Proceeds Target. The total consideration received during the Sale Period could well be *zero* under cl 2.1(b), as the only express requirement is that the aggregate consideration received is less than the Sale Proceeds Target. The obligation on the Warrantors would be for the Warrantors to purchase or procure the purchase of however many Sale Shares were left unsold. The remaining Sale Shares may well be (as it transpired eventually) *all* the Sale Shares.

56 In this regard, I agree with EFII that this meaning of cl 2.1(b) is also consistent with reading the DOU as a whole, especially cl 3.1.[61] As set out above at [15], cl 3.1 clearly provides that the Warrantors' obligations shall terminate only when EFII receives an amount equivalent to the Sale Proceeds Target.

57 This interpretation is buttressed by the extrinsic evidence admitted, which shows that the meaning of cl 2.1(b) is unambiguous, for the following reasons:

(a) First, none of the pre-contractual negotiations make reference to a need for at least one share to be sold during the Sale Period before the obligations of the Warrantors arise. This is the most striking in the 26 June email, where Aathar summarised the structure of the transaction with no mention that the guarantee was conditional on at least one share being sold. Therefore, I accept EFII's argument that "the balance shares"

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61 PCS at para 97.

in the 26 June email simply refers to the shares that were not sold within the Sale Period.[62]

(b) Second, the correspondence repeats the concept that the transaction would provide EFII with a guaranteed profit of approximately $2,000,000 on their investment. Particularly, the 5 July Marc email, the 5 July Aathar email and the 6 July email confirm that the parties' intention was that the Warrantors' obligations to purchase or procure purchasers for the Sale Shares will continue as long as the Sale Proceeds Target is not achieved.

58 I should also add that to my mind, Jong's interpretation gave rise to a commercially absurd result. If Jong were to be right, the Warrantors would be able to wholly escape liability by *not* effecting any sale of shares at all, whereas the obligations would apply in full force if they were to sell so much as one share. Jong argued that this would not be commercially absurd because pursuant to cl 2.2, EFII could have triggered the obligations by arranging for an off-market sale of one or more shares on its own, even if the traded price on the SGX was less than $0.576 during the Sale Period.[63]

59 In my view, this argument has no merit. It ignores the fact that cl 2.2 merely makes it clear that EFII is not precluded from arranging to sell the shares. That said, the primary obligations fall on the Warrantors, as set out in cl 2.1(a), to effect the sale of the Sale Shares to reach the Sale Proceeds Target, and cl 2.1(b) deals with the consequences in the event that the primary obligations are not discharged. It would be perverse to construe the parties to have intended that, in the scenario when the Warrantors fail completely to discharge their

62 PCS at paras 53–54.

63 DCS at paras 113–116.

obligations by not achieving any sale at all, be it on the market or off-market, they would be let off the hook.

60 For completeness, I deal with Jong's contention that EFII's argument on the commercial absurdity of his interpretation stems from its understanding with Aathar and Fan that EFII was to support the share price of IHC by buying and thereafter holding the Sale Shares, in exchange for a fee or guaranteed profit of around $2,000,000.[64] To elaborate, according to Tan, the broad commercial objective of the transaction was for EFII to invest into IHC to support the share price of IHC during the period after IHC's listing,[65] and also for the Warrantors to retain control of the block of Sale Shares.[66] However, Jong claims that he did not know about this private arrangement.[67] Without the backdrop of such a private arrangement, his interpretation of cl 2.1(b) would not be commercially absurd – it would be open to EFII to arrange for a sale of at least one of the Sale Shares off-market during the Sale Period in order to trigger the Warrantors' obligations.[68]

61 At [64] below, I return to the point on the broad commercial objective of the transaction. For now, it suffices for me to state that whether or not there is any such broad commercial objective behind the transaction, the objective intent of the DOU is clear – that the Warrantors would ensure the outcome that EFII would receive the Sale Proceeds Target. Jong's interpretation of cl 2.1(b) is not saved from being commercially absurd, even if no consideration were to be given to any broad commercial objective.

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64 DCS at para 120.

65 NEs (4 September 2018) p 45, ln 7–25; PCS at para 60.

66 NEs (4 September 2018) p 37, ln 23 to p 38, ln 10.

67 DCS at paras 150–151.

68 DCS at paras 112–119.

Conclusion

62 In sum, I am of the view that the proper interpretation of cl 2.1(b) of the DOU is that should EFII fail to obtain the Sale Proceeds Target by the end of the Sale Period, the Warrantors would be obliged to purchase or procure the purchase of any Sale Shares that remained. This is engaged even if no sale of any shares was effected during the Sale Period. Given that there was no sale of any shares within the Sale Period, and EFII did not receive the Sale Proceeds Target, the provision was triggered. The obligations were imposed on the Warrantors. Given my finding, it is unnecessary for me to consider the parties' arguments regarding their respective post-contractual conduct so as to throw light on the meaning of cl 2.1(b) of the DOU.

Issue 2: Whether Jong is liable under cl 2.1(b)

63 Under this second issue, I deal with Jong's argument that Fan and Aathar lacked the authority to represent him for the pre-contractual negotiations. As such, he only had knowledge of the express words of the DOU which he signed, and not any agreement to provide price support of IHC shares or to retain control of the block of Sale Shares.[69] Jong contends that if the transaction was meant to preserve Fan and Aathar's control of the block of Sale Shares, it was really a private arrangement between Fan, Aathar and Tan.[70] It had nothing to do with him. Therefore, he should not be held liable under the DOU.

64 At the outset, I should state that I am uncertain how Jong's argument affords a legal defence. At the end of the day, EFII's claim is based on the DOU, and not on any other arrangement made with Aathar and Fan. Jong has not clearly articulated any particular vitiating factor arising from the facts and

69 Defendant's Reply Submissions ("DRS") at paras 165–184.

70 DRS at para 120; DCS at paras 126–129.

circumstances of the transaction which would absolve him of liability under the DOU.

65 In any event, I reject the contention. From the background facts mentioned at [8] above, Jong is an experienced businessman. He had voluntarily signed the DOU, after having examined his obligations in the DOU and being informed throughout via discussions with Aathar and Fan and emails which he was copied in. While it is unnecessary to make a finding on the broad commercial objective of the transaction, I hardly think that Jong was kept in the dark on any aspects of the transaction.

66 As I found at [62] above, cl 2.1(b) had been engaged. Even Jong conceded that he would be bound by the express terms of the DOU which he signed.[71] On the facts, this was sufficient to determine that Jong should be bound by cl 2.1(b) of the DOU, which imposed on him the obligation on a joint and several basis with the other warrantors. He has not discharged this liability.

Issue 3: Whether the transaction is in contravention of the SFA

67 I go to the question of the validity of the transaction. Jong argues that the transaction contravened s 82 of the SFA, and the DOU is void for illegality. In entering into the transaction, and by making agreements with a view to acquiring and disposing of securities, EFII was carrying on business for which a licence or exemption is required, neither of which EFII possessed. It is not disputed that EFII does not hold a capital markets services licence for dealing in securities.[72]

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71 NEs (6 September 2018) p 106, ln 7–8.

72 JHS-1 at para 134.

68 Jong relies on the case of *Yolarno Pty Ltd v Transglobal Capital Pty Ltd & Ors (No 2)* [2003] NSWSC 1004 ("*Yolarno*"), decided by the Supreme Court of New South Wales.[73] This case addressed the interpretation of s 780 of Australia's Corporations Law (Cth) as applicable then, which was a similarly-worded provision regarding securities regulations. Under s 780, a person must not carry on a securities business or hold out that the person carried on a securities business unless the person held a dealer's licence or was an exempt dealer. In holding that Transglobal was not in breach of s 780, it was crucial that Transglobal's inducing of persons to make agreements for underwriting securities was merely "an incident of its business"; its business "did not include approaching underwriters at all" (*Yolarno* at [105]). However, *Yolarno* at [99] contained *dicta* that because all businesses start at some point, even "a single transaction may constitute a business if there was an intention to repeat the transactions", citing *Fairway Estates Pty Ltd v Federal Commissioner of Taxation* (1970) 123 CLR 153 at 163–164. Jong relies on this to argue that EFII's entering of the transaction, though once-off, constitutes a business because it had an intention to repeat such transactions in dealing of securities.

69 In response, EFII's case is that there is no such illegality, as the transaction did not constitute a "business" of dealing in securities. In the alternative, EFII contends that it falls within the exemptions set out in Schedule 2 of the Securities and Futures (Licensing and Conduct of Business) Regulations (Cap 289, 2018 Rev Ed).[74] I note that the version in force at the material time was in fact the Securities and Futures (Licensing and Conduct of Business) Regulations (Cap 289, Rg 10, 2004).

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73 DCS at paras 318–320; DRS at para 200.

74 PCS at para 134.

The applicable law

70 A contract is void for illegality where the statutory prohibition is intended to prohibit the contract (and not merely the conduct) (*Ting Siew May v Boon Lay Choo and another* [2014] 3 SLR 609 at [106]; affirmed in *Ochroid Trading Ltd and another v Chua Siok Lui (trading as VIE Import & Export) and another* [2018] 1 SLR 363 at [21]–[31]).

71 Under s 82(1) read with s 82(3) of the SFA, it is an offence for any person:

> … whether as a principal or an agent, to *carry on business* in any regulated activity or *hold himself out as carrying on such business* unless he is the holder of a capital markets services licence for that regulated activity. [emphasis added]

72 At the time the transaction was entered into, Part I of the Second Schedule of the SFA identified "dealing in securities" as a regulated activity, defined in Part II of the Second Schedule as follows:

> "dealing in securities" means (whether as principal or agent) making or offering to make with any person … any agreement for or with a view to acquiring, disposing of, subscribing for, or underwriting securities.

73 The term "carrying on business" is left undefined by the SFA, with a lack of reported decisions on the issue under the SFA. However, there is a test established at common law, albeit employed thus far in relation to other statutes which use similar language.

74 The case of *Subramaniam Dhanapakiam v Ghaanthimathi* [1991] 1 SLR(R) 164 ("*Subramaniam*") at [10], relied on by EFII, sets out the test to be employed in the context of the prohibition of the business of moneylending in the Moneylenders Act (Cap 188, 1985 Rev Ed). More recently, the same test

was employed in the case of *Sheagar s/o T M Veloo v Belfield International (Hong Kong)* Ltd [2014] 3 SLR 524 ("*Sheagar*") at [38], in the context of the revised Moneylenders Act 2008 (Act 31 of 2008). Both *Subramaniam* and *Sheagar* are cited with approval in *Chinpo Shipping Co (Pte) Ltd v Public Prosecutor* [2017] 4 SLR 983 ("*Chinpo*"), which affirms the test in the context of s 6 of the Money-changing and Remittance Business Act (Cap 187, 2008 Rev Ed) ("MCRBA"), which prohibited a person from carrying on "remittance business" without a valid remittance licence. The test in *Subramaniam* is summed up in *Chinpo*, at [102], as follows:

> At common law, the test for the carrying on of a business is that of the undertaking of the relevant transactions with "some degree of system and continuity" (*Sheagar* at [38] …). Where the transactions are undertaken only incidentally to the provision of other services, the requisite degree of system and continuity to constitute a "business" would generally not be established ([*Subramaniam*] at [10] citing *Litchfield v Dreyfus* [1906] 1 KB 584 at 590).

75 I accept that the line of cases relating to what it means to be "carrying on business" is applicable to s 82(1) of the SFA. In *Chinpo*, the rationale behind the court's adoption of the *Subramaniam* test in the context of the MCRBA was because "the intent of Parliament [was] to regulate the *remittance industry* … rather than [persons who offered remittances] as an incident to their core businesses" [emphasis in original] (*Chinpo* at [101]). Similarly, the general aim of the SFA is to "provide a single comprehensive legislative framework for regulating the activities and institutions in the securities and futures industry" (*Singapore Parliamentary Debates, Official Report* (19 January 2009 vol 85 at col 1084 (Lim Hng Kiang, Minister for Trade and Industry)), with Part IV of the SFA specifically geared towards providing "a single modular licensing framework for securities and futures market intermediaries" (*Singapore*

Parliamentary Debates, *Official Report* (5 October 2001) vol 73 at cols 2128, 2130–2131 (Lee Hsien Loong, Deputy Prime Minister)).

76 Further, in one of the leading texts on securities regulation in Singapore, *Principles and Practice of Securities Regulation in Singapore* (LexisNexis, 2nd Ed, 2011) at pp 460, 474, the *Subramaniam* test is viewed to be appropriate in the context of s 82(1) of the SFA. The relevant extract states that:

> Licensing is only required when the person is carrying on a business, and this requires some form of regularity in its operations and an organisational framework. This is stated most clearly in the context of the Moneylenders Act by Chan Sek Keong J (as he then was) in [*Subramaniam*]. …

77 Therefore, just as how the act of lending money does not fall within the prohibition of carrying on the business of moneylending under the MLA, the mere act of dealing in securities, without more, would not fall foul of the prohibition under s 82(1) of the SFA. To come within the prohibition's ambit, the regulated activity must have system and continuity to constitute the business of dealing in securities; activity which is simply incident to the person's core business is insufficient. As for the test in *Yolarno*, I note that it has not been accepted in any Singapore court. Without submissions on when an intent to continue can be found, and a lack of such detail in the case itself, I see no reason to accept and apply this test.

Whether EFII was carrying on business in dealing in securities

78 Applying the relevant legal principles to the facts, I reject Jong's allegation that the transaction contravenes s 82(1) of the SFA. I am unable to agree that EFII was "carrying on business" in dealing in securities.

79 I acknowledge Jong's argument that the transaction was a significant undertaking for EFII in terms of its business,[75] and EFII stood to make a sizeable profit from the transaction. However, these facts do not inform the inquiry of whether EFII's dealing in securities had an element of system or continuity; a one-off transaction tangential to one's business could still be a substantial one. Jong has simply not discharged his burden of proof to establish that EFII's dealing in securities had the requisite system or continuity necessary to satisfy the requirement of it having carried on business in such dealings.

80 EFII's website stated that it is part of a series of funds that "seeks to identify and provide micro[-]funding to growing Singapore small and medium-sized enterprises … for enterprise development, expansion projects or regionali[s]ation opportunities".[76] Tan had also stated in his testimony that "[EFII's] normal course of business is loans".[77] Jong has not raised any evidence to dispute this. I therefore accept that the transaction is incidental to EFII's business.

Conclusion

81 To round off, it does not seem to me that the alternate element of the prohibition, being "hold[ing] himself out as carrying on such business" under s 82(1) of the SFA, is made out. Neither was this advanced by Jong, and I accordingly find that EFII was not carrying on business in dealing in securities or holding itself out as carrying on such business. As this element of the prohibition is not made out, there is no requirement for EFII to hold a capital services licence. Thus, I do not have to further consider whether any exemption

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75 NEs (5 September 2018) p 74, ln 3–9.

76 AB2 at p 300.

77 NEs (6 September 2018) p 16, ln 16.

from the requirement applies to EFII. In sum, the transaction does not contravene the SFA, and the DOU is not void for illegality.

Issue 4: Whether EFII breached its duty to mitigate its losses

82 Having established Jong's liability under the DOU, I address the issue of EFII's duty to mitigate its loss. As set out in [18] and [21] above, the Warrantors should have performed the obligations no later than 16 April 2014, whereas EFII only started looking for buyers in December 2015. Thereafter, EFII sold the Sale Shares and Security Shares from March 2016 to April 2016.

83 According to Jong, EFII has breached its duty to act reasonably to mitigate its damages. Jong's submissions are summed up as follows:

(a) EFII had unreasonably delayed taking any steps to sell the Sale Shares or Security Shares until December 2015. This was more than 20 months after Jong was in breach of his obligation under cl 2.1(b) of the DOU. Had EFII sold the Sale Shares and Security Shares between 17 April 2014 to 9 September 2015 ("the 17-Month Period"), Jong's liability under the DOU would have been totally extinguished.[78]

(b) EFII's duty to mitigate would include the disposal of both the Sale Shares and the Security Shares.[79]

(c) It was unreasonable for EFII to stay its hand on mitigating its loss at the request of Fan and Aathar without first obtaining the consent of Jong. Fan and Aathar were not authorised to represent Jong in such negotiations, and EFII knew or ought to have known this.[80]

78 DCS at para 331; DRS at para 230.

79 DCS at para 333(b).

80 DCS at para 333(c).

(d) The real reason why EFII did not sell the Sale Shares and Security Shares during the 17-Month Period was that (i) EFII was still engaging in negotiations with Fan and Aathar and (ii) EFII did not want to diminish the value of the IHC shares held by its affiliates by selling the Sale Shares.[81]

(e) Jong's negotiations with EFII, which were at a late stage, were irrelevant as EFII had many months before that to mitigate its loss.[82]

(f) While EFII expressed concerns about the trading volume of IHC and HMC shares, the 17-Month Period provided ample time for EFII to carry out an orderly disposal of the relevant shares without adversely affecting the share prices.[83]

(g) The traded share prices remained stable enough during the 17-Month Period for EFII to recoup its loss by selling the relevant shares then. The subsequent performance of IHC and HMC shares from 18 March 2016 to August 2016 is irrelevant.[84]

84 At this juncture, I should explain the significance of the date of 9 September 2015. On that day, the SGX issued an advisory warning investors to trade with caution when dealing in IHC shares.[85] This was because the SGX discovered that a handful of seemingly connected individuals were trading IHC shares amongst themselves, and their trades constituted 60% of the total traded volume of IHC shares in April 2015 to 9 September 2015. The traded share

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81 DCS at para 333(d).

82 DCS at para 333(e).

83 DCS at para 333(f).

84 DCS at para 333(g).

85 JHS-1 at para 223; AB2 at pp 297–298.

price of IHC soon plummeted, from $0.315 on 9 September 2015 to an opening price of $0.12 on 21 September 2015 when trading resumed.[86] Therefore, Jong relies on the 17-Month Period, which immediately precedes (and includes) 9 September 2015, in its argument on the duty to mitigate.

85 In response, EFII does not dispute that it had an overarching duty to mitigate its losses. However, it submits that overall, the reasons why it had held back from selling the Sale Shares and the Security Shares were:[87]

(a) due to ongoing negotiations between EFII, Fan, and Aathar, and its receipt of $2,000,000 from Golden Cliff as part repayment; and

(b) the problems of selling associated with the volume traded of the Sale Shares and Security Shares.

The applicable law

86 Several cases cited by the parties are instructive. The Court of Appeal in the case of *The "Asia Star"* [2010] 2 SLR 1154 ("*The 'Asia Star*'") sums up the law in this area (at [23]–[24]). The aggrieved party must take all reasonable steps to mitigate the loss consequent on the defaulting party's breach, and cannot recover damages for any loss which it could have avoided but failed to avoid due to its own unreasonable action or inaction. This is often referred to as the aggrieved party's "duty" to mitigate. While it is not a positive duty, the aggrieved party is prevented from claiming compensation that it could have reasonably avoided. The burden of proving that the aggrieved party has failed to fulfil its duty to mitigate falls on the defaulting party. It is ordinarily one which is not easily discharged.

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86 JHS-1 at para 226; JHS-38.

87 PCS at paras 148–153; Plaintiff's Reply Submissions ("PRS") at para 98k.

87 The standard of reasonableness to be applied to the innocent party is not a high one, because he is not the wrongdoer (*OCBC Securities Pte Ltd v Phang Yul Cher Yeow* [1997] 3 SLR(R) 906 ("*OCBC Securities*") at [86]). As stated in *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452 ("*Banco*") at 506, cited with approval by the Court of Appeal in *China Resources Purchasing Co Ltd v Yue Xiu Enterprises (S) Pte Ltd and another* [1996] 1 SLR(R) 397 at [24]:

> … [T]he measures which [the innocent party] may be driven to adopt in order to extricate himself *ought not to be weighed in nice scales* at the instance of the party whose breach of contract has occasioned the difficulty. … The law is *satisfied if the party placed in a difficult situation by reason of the breach of duty has acted reasonably in the adoption of remedial measures*, and he will not be held disentitled to recover the costs of such measures *merely because the party in breach can suggest that other measures less burdensome to him might have been taken.* [emphasis added]

88 The reasonableness in the adoption of remedial measures should not be assessed "with the full benefit of hindsight" (*OCBC Securities* at [94]). The innocent party "need not take steps which would … risk his commercial reputation or involve him in unreasonable expense" (*OCBC Securities* at [84]). Whether the standard of reasonableness is met is a fact-specific inquiry (*The "Asia Star"* at [47]).

89 As to *when* the duty to mitigate arises, *The "Asia Star"* (at [24]) makes it clear that the evaluation of the aggrieved party's conduct in mitigation ought to start from the date of the defaulting party's breach. The question is whether any delay to commence mitigating steps was reasonable (*Klerk-Elias Liza v K T Chan Clinic Pte Ltd* [1993] 1 SLR(R) 609 at [74] and [76]). However, as *OCBC Securities* cites, and later affirms (at [88], [93]), GH Treitel in *Remedies for Breach of Contract: A Comparative Account* (Clarendon Press, 1988) at p 118 states:

> Even where it is possible for the aggrieved party to make a substitute contract, it may not be reasonable to expect him to do so immediately when that possibility arises. This will be the position *where there is a reasonable possibility that the contract may still be performed*: *eg* because the party in breach has *promised to cure his default but has then failed to do so*; … Damages in all such cases are assessed by reference to the *time when the possibility of securing performance has ceased to exist* … [emphasis added]

90 On the facts of *OCBC Securities*, the court found that when the plaintiff granted the defendant an extension of time to make good its performance, there was still a reasonable possibility that the defendant would pay up, particularly because the defendant had paid up previously in relation to prior transactions with the plaintiff (at [48]–[52], [92]). Hence, the appropriate time to assess damages in such cases would not be immediately upon the defendant's breach, but "by reference to the time when [the probability of the defendant's paying up] ceased to exist" (at [92]).

Whether EFII acted reasonably to mitigate its losses

91 Applying the legal principles to the facts and circumstances before me, I find that Jong has not established that EFII failed to take reasonable steps to mitigate its loss. In relation to EFII's alleged delay in selling the Sale Shares and Security Shares until December 2015, such delay was not unreasonable, because EFII was still in the midst of ongoing discussions with the Warrantors. I reject Jong's argument that EFII should have commenced looking for buyers within the 17-Month Period.

92 In this connection, according to Tan, from April 2014 to February 2015, he met with Fan and Aathar eight times to discuss the Warrantors' repayment.[88] Thereafter from March 2015 to September 2015, he met up with Aathar and Fan

[88] NEs (4 September 2018) p 25, ln 22 to p 26, ln 4.

a total of 14 times.[89] The purpose of these meetings was to discuss the repayment of the outstanding sum and to urge Fan and Aathar to seek buyers for the Sale Shares.[90] Tan stated that, at these meetings, Aathar and Fan repeatedly requested EFII to stay its hand on enforcing its security, because enforcement would potentially jeopardise various corporate exercises planned by IHC.[91] I accept Tan's evidence. The timing of the meetings is supported by evidence in the form of Tan's Outlook calendar and expense claims. Furthermore, their content is corroborated by the email correspondence that followed thereafter which I now set out.

93 From August 2014 to March 2015, the following emails evidenced negotiations between Fan, Aathar and Tan:

(a) On 25 August 2014, Aathar sent an email to Tan, copying Fan, stating that they spoke earlier, and that "[w]e will procure buyers for [the Sale Shares] for 50% by 26 Sep 14 and the balance 50% by 31 Oct 14".[92]

(b) On 24 September 2014, Tan wrote an email to Aathar and Fan[93] requesting for payment of the agreed investment profit of a minimum of $2,000,000 by 30 September 2014, and asking how EFII was to dispose of the Sale Shares.

(c) On 25 September 2014, an email reply was sent by Aathar to Tan, with Fan copied as a recipient,[94] informing Tan that payment of

89 TYH-2 at para 9.

90 TYH-2 at para 9.

91 TYH-2 at para 10.

92 TYH-1 at p 118; TYH-1 at para 22; JHS-1 at para 146.

93 TYH-1 at pp 119–120.

$2,000,000 would be made on 30 September 2014, and that the balance amount would be paid and transferred within the last quarter of 2014 by arranging an off-market deal to effect the transfer with potential investors.

(d) On 30 September 2014,[95] a payment of $2,000,000 was made from Golden Cliff to EFII. However, no further payment was made after this by Fan, Aathar or Jong.[96]

(e) On 5 March 2015, Tan sent an email to Fan, Andrew and Jong, requesting on an urgent basis a firm schedule of repayment of the outstanding amount,[97] as "the deadline of 15 March 2015 is approaching".[98]

94 In essence, the written correspondence was characterised by Fan and Aathar making promises to procure buyers for the Sale Shares and to make payment for the outstanding sum. I should add that Jong disputes that the Golden Cliff payment was made as repayment in relation to this transaction. However, given the contents of the emails, I accept that payment of $2,000,000 was *effected* by Golden Cliff on 30 September 2014 in satisfaction of Tan's request for such payment towards this outstanding obligation. It is not necessary for me to further make a finding on whether Golden Cliff is owned by Fan, as no evidence has been produced on the matter and it is immaterial in any event.

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94 TYH-1 at p 119.

95 TYH-1 at p 121; DCS at para 275.

96 TYH-2 at para 8.

97 NEs (5 September 2018) p 51, ln 15–18.

98 JHS-1 at para 167, p 287.

95 Then, in November 2015, Jong raised the issues of the Security Shares directly with Tan, and the relevant correspondence was as follows:

(a) On 2 November 2015, Jong sent an email to Tan,[99] asking for information on how to effect a release of the Security Shares belonging to him back to him. Jong sent a second email on the same day at 3.52pm,[100] attaching the share pledge for the Security Shares. Tan did not reply to either email.

(b) On 16 November 2015, Jong sent an email to Tan,[101] asking for an update on the release of the Security Shares belonging to him. Tan replied to Jong on the same day at 11.32am, notifying him that his obligations under the DOU and the SPA "has not been settled", and that Jong is now personally liable for the amount outstanding with interest. Jong replied that same day, stating, *inter alia*, that Jong would discuss the matter with Fan and let him negotiate the settlement.[102]

96 On 1 December 2015, EFII's previous lawyers, CNP, sent a letter of demand to Jong and OOL by way of email.[103] The letter of demand requested a written proposal from the recipients to resolve the claim arising from the breach of the DOU within five days from the date of the letter. Thereafter, in December 2015 to January 2016, there was email evidence of ongoing negotiations between Jong, Tan and CNP. I do not propose to set out the contents of these negotiations.

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99 TYH-1 at p 122.

100 TYH-1 at pp 125–126.

101 TYH-1 at p 123.

102 TYH-1 at pp 124–125.

103 TYH-1 at p 127.

97 At the same time, negotiations with Fan and Aathar continued. From 4 to 18 November 2015, there were emails involving EFII, represented by Stephen Soh of CNP, Tan and/or an employee of EFII, Lim Chu Pei,[104] and Aathar and Fan. This culminated in a letter by CNP, on 12 February 2016, to all the Warrantors[105] informing them that if EFII's claim against the Warrantors remains unresolved by 17 February 2016, EFII would be taking steps to sell the Sale Shares with a view to mitigating their loss. Thereafter, EFII sold some of its Sale Shares and Security Shares as stated above at [21].

98 The fact that negotiations were ongoing is a crucial one. The holding in *OCBC Securities* applies squarely here – there was *a reasonable possibility that the contract may still be performed* because during the 17-Month Period, Fan and Aathar had *promised to cure the Warrantors' default*. Fan and Aathar gave the appearance of taking their promises seriously, with their seeming sincerity indicated by the payment of $2,000,000 effected through Golden Cliff, and the repeated requests to EFII to stay its hand on any sale of the relevant shares.

99 Certainly, until November 2015, these negotiations were conducted on behalf of Jong by Aathar and Fan, in accordance with the parties' established course of dealing and the Warrantors' joint and several liability. I note that Jong relies on his emails in November 2015 asking for a return of his portion of the Security Shares, as set out in [95], to contend that he did not know about the ongoing negotiations by Aathar and Fan. However, I note that when Tan replied on 16 November 2015 to say that Jong's liability has not been settled, Jong responded that he would let Fan negotiate the settlement. Therefore, even though Jong also tried to negotiate separately with EFII on the Security Shares, it was clear that the negotiations by Aathar and Fan covered Jong's position. By

104 TYH-2 at p 20.

105 TYH-1 at p 134.

the above, until December 2015, there was a reasonable possibility that the Warrantors would eventually perform their contractual obligations.

100 Separately, Jong argues that the real reason why EFII did not mitigate its loss was that it did not want to diminish the value of the IHC shares held by its affiliates by selling the Sale Shares. Even if the truth of this was accepted by EFII (which it is not),[106] I do not think such a motivation would render EFII's actions unreasonable. As *OCBC Securities* at [84] held, the innocent party "need not take steps which would … risk his commercial reputation or involve him in unreasonable expense". EFII is not expected to risk any expense (or loss) to itself or its affiliates to mitigate the loss which the Warrantors caused; such an expectation would not be a reasonable one to have.

101 I also reject Jong's argument that EFII had ample time to carry out an orderly disposal of the relevant shares without adversely affecting the share prices, or that the share price remained stable enough for EFII to recoup its loss during the 17-Month Period. As EFII contends, Jong's position is based solely on hindsight.

102 In this regard, I note the following additional facts relating to the performance of IHC shares:

(a) At the beginning of the Sale Period on 8 July 2013, the price per share reached a high of $0.475. By the end of the Sale Period on 7 April 2014, the price per share reached a high of $0.315.[107]

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106 TYH-2 at para 20.

107 JHS-1 at para 111, p 166.

(b) After the SGX advisory on 9 September 2015, the traded share price of IHC soon plummeted, from $0.315 on 9 September 2015 to an opening price of $0.12 on 21 September 2015 when trading resumed.[108]

103 After the significant fall in price of the Sale Shares during the Sale Period, it was reasonable for EFII to proceed with caution. For instance, the price of the Sale Shares subsequently fell to $0.22 sometime in July 2014,[109] the lowest share price between 17 April 2014 and 16 January 2015, when the highest during that same period was $0.31 per share.[110]

104 Further, there were concerns that the volume traded of HMC and IHC shares rendered any attempted disposal of the Security Shares and Sale Shares fraught with risk. Tan testified that there was a chance that should EFII sell them, he would not know how the share price would react. The prices might have "tank[ed]", *ie* be significantly and adversely affected.[111] Also, there may not have been buyers for the volume in question. From the evidence of the total volume of IHC shares and HMC shares traded compared to EFII's shareholding in each by virtue of the Sale Shares and Security Shares,[112] I find that the traded volume during the 17-Month Period was sufficiently low such that EFII's refrain from taking steps to sell was reasonable. Coupled with the reassurances from Fan and Aathar of repayment, it was all the more reasonable for EFII to decide against taking this commercial risk.

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108 JHS-1 at para 227; JHS-38.

109 AB2 at p 419.

110 NEs (7 September 2018) p 186, ln 15 to p 187, ln 19.

111 NEs (6 September 2018) p 25, ln 18 to p 26, ln 6.

112 JHS-1 at pp 134–145a.

105 Accordingly, I find that Jong has failed to establish that EFII did not make reasonable efforts to mitigate its loss stemming from the breach.

Issue 5: Whether EFII wrongfully converted Jong's shares

106 Jong's counterclaim is based on the tort of conversion allegedly committed against him by EFII. The basis for the claim is that he was entitled to the return of his Security Shares upon the expiry of the Sale Period on 7 April 2014, as his obligation under cl 2.1(b) of the DOU did not arise or that the transaction was void for illegality. Having rejected both arguments above, I dismiss his counterclaim accordingly.

Miscellaneous

107 Before concluding, I deal with two evidential points. First, Jong argues for adverse inferences to be drawn against EFII for not calling Aathar and Fan to testify on the following disputed issues of fact:[113]

(a) Whether Fan and Aathar were authorised to negotiate on Jong's behalf at the pre-contractual and post-contractual stage;

(b) Fan and Aathar's pre-contractual communications with Tan on the objective of the transactions; and

(c) Whether Fan and Aathar requested that EFII hold its hands from selling the Sale Shares and Security shares, and what transpired at their various meetings and email correspondences with Tan after the expiry of the Sale Period.

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113 DCS at para 293–294.

108 I acknowledge that Tan accepted that EFII could have called Fan and Aathar as witnesses. Tan also explained their absence as an outcome of his lawyers' advice, and because the present case was a "simple" one.[114] However, Fan and Aathar are not EFII's representatives, but Jong's fellow Warrantors. They may take an adverse position to EFII on the various issues. Witnesses possibly having "conflicting interests" has been regarded as a "plausible reason" that a party can fairly decide against calling such witnesses in civil matters (*ARS v ART and another* [2015] SGHC 78 ("*ARS*") at [139]). I have accordingly drawn no adverse inference against EFII on the various issues.

109 Second, in coming to the factual findings, I have considered Jong to be lacking in credibility as a witness, as he evaded relatively simple questions such as those relating to his involvement in IHC and HMC,[115] or the plain wording of the DOU.[116] He was also intent on dissociating himself from Fan and Aathar in support of his argument that they were not his authorised representatives.[117]

Conclusion

110 For all of the foregoing reasons, this is a summary of my decision:

(a) The Warrantors' obligations under cl 2.1(b) did not require at least one Sale Share to be sold during the Sale Period in order to be triggered.

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114 NEs (6 September 2018) at p 15 ln 15–23.

115 NEs (6 September 2018) p 78, ln 7 to p 80, ln 18.

116 NEs (6 September 2018) p 176, ln 22 to p 178, ln 22.

117 NEs (7 September 2018) p 158, ln 12 to p 161, ln 2.

(b) Jong is in breach of his obligation under cl 2.1(b) of the DOU. This obligation is enforceable, as there is no illegality rendering the transaction void. Jong has not discharged this obligation.

(c) EFII did not act in an unreasonable manner in taking steps to mitigate its loss.

111 Accordingly, I allow EFII's claim in the sum of $3,338,281.95, with interest fixed at 5.33% per annum from the date of the writ to the date of judgment. I disallow Jong's counterclaim in conversion.

112 I will hear parties on costs.

Hoo Sheau Peng
Judge

Chng Zi Zhao Joel, Siah Jiayi Vivian and Nigel Teo
(WongPartnership LLP) for the plaintiff;
Aqbal Singh A/L Kuldip Singh and Wong Yiping
(Pinnacle Law LLC) for the defendant.