Chiang Sing Jeong and another *v* Treasure Resort Pte Ltd and others
[2013] SGHC 126

Case Number : Suit No 568 of 2007

Decision Date : 05 July 2013

Tribunal/Court : High Court

Coram : Tan Lee Meng J

Counsel Name(s) : Tan Teng Muan and Loh Li Qin (Mallal & Namazie) for the first plaintiff; Daniel Koh, Joni Tan and June Lim (Eldan Law LLP) for the second plaintiff; Kenneth Pereira and Christopher Anand Daniel (Advocatus Law LLP) for the first defendant; Davinder Singh SC, Bernette Meyer, Vanathi S and Jackson Eng (Drew & Napier LLC) for the second, fourth and fifth defendants; Third defendant in person; N Sreenivasan SC (Straits Law Practice LLC) (instructed), Jimmy Yap (Jimmy Yap & Co), Srinivasan Namasivayam and Rahayu bte Mahzam (Heng, Leong & Srinivasan) for the eighth defendant.

Parties : Chiang Sing Jeong and another — Treasure Resort Pte Ltd and others

Contract – Formation – Certainty of terms

Trusts – Express trusts – Certainties

5 July 2013 Judgment reserved.

Tan Lee Meng J:

1 This case involves a dispute regarding the ownership of 40% of the shareholding of the first defendant, Treasure Resort Pte Ltd ("TR"). It is one of a number of suits filed by various parties against the second defendant, Maxz Universal Development Group Pte Ltd ("MDG"), the majority shareholder of TR, regarding TR shares offered to them by the third defendant, MDG's former managing director and former majority shareholder, Mr Seeto Keong ("Seeto"), under arrangements which MDG's new majority shareholder refused to recognise.

2 The first plaintiff, Mr Chiang Sing Jeong ("Chiang"), filed the present proceedings and claimed TR shares from MDG for himself and as the nominee of the eighth defendant, Mr Lim Chong Poon ("Lim"). Chiang asserted that he and Lim were entitled to 15% and 25% of TR's shareholding respectively. On 10 June 2010, Chiang discontinued his action after settling his dispute with MDG on confidential terms. Despite this, Chiang remained a party in the action as Lim brought third party proceedings against him. Lim claimed that he was entitled to damages from Chiang if the latter's arrangements with MDG are found to have affected his own claim against MDG for TR shares.

3 With the discontinuance of Chiang's action, the remaining claimants were Lim and the second plaintiff, Café Aquarium Pte Ltd ("Café"). Lim, who had initially depended on Chiang to claim TR shares from MDG on his behalf, fell out with Chiang and filed Suit No 548 of 2008 ("Suit 548") against MDG to recover what he claimed was his shareholding in TR. Suit 548 was struck out for duplicity on 13 January 2009. On 2 April 2009, Lim applied to become a party in the present proceedings. He was granted leave to do so and he filed his Statement of Claim ("SOC") against MDG on 15 May 2009.

4 Café, which is presently run by Lim's wife, Mdm Soh Kee Hoon ("Mdm Soh"), claimed TR shares from MDG as Lim's nominee on the basis that the signed Instruments of Transfer for 1,927,999 TR

shares ("Instruments of Transfer") that allegedly belonged to Lim and Chiang were handed over by Seeto in February 2007 to Chiang, who registered the TR shares in question in Café's name. Apart from claiming TR shares, Café also claimed sums allegedly owed to it by MDG under its arrangements with Seeto.

5 The real defendant in these proceedings is MDG. TR is a nominal defendant and no claim was made against the third to sixth defendants, who were MDG's directors at the material time. As for the seventh defendant, Mr Tan Eck Hong ("TEH"), a shareholder of TR who filed two other actions against MDG, he withdrew from the proceedings on the first day of the trial.

Background

6 The dispute between the parties may be traced to the financial problems of Sijori Resorts (Sentosa) Pte Ltd ("Sijori"), which leased a plot of land ("the Sijori Lease") at 23 Beach View, Sentosa, from Sentosa Development Corporation ("SDC") for 81 years in 1994. Sijori developed and operated a hotel resort ("the Sijori Resort") on the said property.

7 Lim was the managing director and majority shareholder of Sijori. Between 2002 and 2004, Sijori faced serious financial problems. By 2004, its debts had increased to $15m, out of which $12m was owed to the Bank of China ("BOC") with respect to a loan to develop the resort. Lim furnished a personal guarantee to BOC for the said loan. In December 2004, SDC sued Sijori to recover more than $1m and to have the Sijori Lease forfeited.

8 In March 2005, Lim had discussions with MDG's managing director, Seeto, about MDG taking over the Sijori Lease and Sijori Resort ("the Project"). He claimed that he and Seeto had concluded an oral joint venture agreement ("JVA") to form a company, TR, to acquire the Project and that it was his task to procure the transfer of the Project to TR. Lim stated that under the oral JVA, he and MDG would hold 30% and 70% of TR's shareholding. Furthermore, while MDG had to contribute towards TR's authorised capital, Lim did not have to do so at this juncture for his shareholding in TR.

9 Lim added that given the history of Sijori's litigation with SDC, it was agreed that his shares in TR would be held on his behalf by his nominee, Chiang, who operated a tourist attraction near the Sijori Resort. Chiang was then interested in taking over SDC's lease of No 11 Siloso Road, Sentosa, to Sentosa Adventure Golf Pte Ltd ("SAG"). Café, of which he was a director, was his vehicle to acquire SAG. As SDC wanted the assignment of the SAG lease and the Sijori Lease to be done at the same time, Café soon became embroiled in TR's affairs.

10 On 28 June 2005, TR was incorporated with an authorised capital of $10m. Chiang was allotted one subscriber share in TR, and he and Seeto were appointed as TR's directors.

11 According to Lim, in July 2005, MDG agreed to reduce its stake in TR to 60% in return for a reduction of its contribution towards TR's capital from $7m to $6m. Consequently, Lim's stake in TR increased from 30% to 40% but he was required to contribute $1m to TR. Lim said that he kept 30% of the shares in TR for himself and gave Chiang the remaining 10% for looking after his interest in TR and for assisting him in the transfer of the Sijori Lease to TR.

12 On 23 July 2005, SDC obtained judgment against Sijori for $1,128,128.65 ("the Judgment Sum"), which had to be paid by 25 August 2005, failing which the Sijori Lease would be forfeited. Seeto, who had agreed that MDG would settle the Judgment Sum, wrote to Mr Rodney Tan Boon Kian ("Rodney") on 4 August 2005 for help in arranging a $10m loan for the acquisition of the Project. In this letter, Seeto informed Rodney that MDG had a 60% stake in TR while the remaining 40% was held by Lim's

proxy. Thus, as early as August 2005, Rodney knew about Lim's stake in TR's shareholding.

13 As Rodney did not lend financial assistance to MDG, the latter was unable to pay the Judgment Sum. To salvage the situation, Seeto and Lim arranged for Café to assist in the payment of the Judgment Sum. Seeto agreed that MDG would raise $587,493.74 and Café undertook to loan MDG the balance required to settle the Judgment Sum on condition that the loan was repaid by 15 September 2005. On 18 August 2005, Seeto issued a cheque for $250,000 but it was dishonoured on presentation.

14 Ultimately, MDG could only raise $30,000 and Café had to loan money to MDG to pay the Judgment Sum ("the Loan"). Lim claimed that he, Chiang, Chiang's wife and a director of Café, Mr Shen Yixuan, put funds into Café to enable the Judgment Sum to be paid. MDG has since repaid the bulk of the Loan.

15 The 40% of TR's shareholding claimed by Lim was not transferred to Lim's nominee, Chiang, even as late as April 2006. Lim claimed that when he queried Seeto about the transfer of TR shares to his nominee shortly after the Judgment Sum was paid, the latter told him that MDG would hold his TR shares on trust for him because it would be easier to arrange financing for the Project if MDG held most of the shares in TR. On numerous occasions thereafter, MDG confirmed that Lim and Chiang were entitled to 40% of TR's shareholding. For instance, on 28 June 2006, in the face of a potential sale of TR to Golden Tulips Management Group ("Golden Tulips") for $65m, MDG, which then held 820,000 of the 820,001 shares issued by TR in its name, entered into an agreement with Lim and Chiang to share the sale proceeds ("the Golden Tulips Agreement"). MDG acknowledged in this agreement that it "is *now* holding" [emphasis added] 30% of TR's shareholding on trust for Lim and 10% on trust for Chiang and it undertook to deliver executed share transfers in blank together with share certificates to Lim and Chiang by 7 July 2006.

16 The proposed sale of TR to Golden Tulips did not materialise. On 14 November 2006, the Sijori Lease was finally transferred to TR with SDC's consent. By a Supplemental Agreement dated 15 November 2006, TR undertook to renovate the hotel and to build a new hotel wing on an adjoining property leased from SDC for this purpose.

17 By February 2007, TR had issued 4,820,001 shares. After taking into account Chiang's one TR share, Lim and Chiang would have been entitled to another 1,927,999 shares if they were the beneficial owners of 40% of TR's shareholding. Significantly, in February 2007, Seeto executed the Instruments of Transfer for this number of shares and handed them over to Chiang.

18 TR did not have funds to fulfil its obligations to SDC. Rodney finally decided to invest in TR through his company, Roscent Group Ltd ("Roscent"). His plan was to gain control of MDG and TR by buying Seeto's majority stake of around 54% of MDG's shareholding for $90,000 and 30% of Roscent's shares. Seeto, who had confirmed time and again that MDG held 40% of TR's shareholding on trust for Lim and Chiang and had handed over to Chiang executed Instruments of Transfer for 1,927,999 TR shares, had the temerity to warrant that MDG "legally and beneficially owned not less than 92% of the issued share capital of [TR]".

19 Despite Seeto's warranty, Rodney was cautious enough to instruct his solicitors, Stamford Law Corporation ("Stamford"), to find out whether MDG really owned all its TR shares. Stamford advised that MDG's legal ownership was affected by two documents. The first was a shareholders' agreement between MDG, Chiang and TEH dated 8 August 2006 ("the Shareholders' Agreement"), which provided that MDG held 74% of the shares in TR and that Chiang would have 25% of TR's shareholding upon paying $2.5m for them within six months of the agreement. The second agreement was a declaration

of trust dated 10 August 2006 ("the First Declaration of Trust"), in which MDG acknowledged that out of the 74% of TR shares in its name, it held 15% of TR shares for Chiang.

20 Stamford was instructed to prepare deeds ("the Stamford Deeds") to terminate the Shareholders' Agreement, which was in fact concluded sometime after 21 November 2006 although it was dated 8 August 2006, and the First Declaration of Trust. A Deed of Termination and Release dated 11 May 2007 ("the DTR") terminated the Shareholders' Agreement while a Deed of Discharge and Release ("the DDR") dated 10 May 2007 revoked the First Declaration of Trust.

21 Although Chiang had signed the Stamford Deeds on 11 May 2007, Rodney continued to act as if Chiang was still the beneficial owner of 40% of TR's shareholding. On 30 May 2007, Rodney, Seeto, Chiang and TEH entered into a handwritten memorandum of understanding ("MOU") for the swapping of shares, under which Chiang was required to transfer back to MDG 40% of TR's shareholding to MDG in return for 6% of Roscent shares held by Seeto. Apparently, the terms of the MOU were not enforced by the parties.

22 On 18 May 2007, Chiang registered the 1,927,999 shares in the Instruments of Transfer handed over to him by Seeto in Café's name with the assistance of a corporate secretarial firm, Akber Ali & Co, after he had failed to persuade TR's corporate secretary, Tristar Management Services Pte Ltd ("Tristar"), to register the said shares because the relevant share certificates were not in Tristar's possession. Lim claimed that Rodney had orchestrated the disappearance of the share certificates. Chiang stated that the consideration for the shares was one dollar.

23 By the time Chiang registered the 1,927,999 TR shares in Café's name, Rodney had gained control of MDG and TR after his company, Roscent, became the majority shareholder of MDG and TR on 11 May 2007. On 27 May 2007, Roscent's shares in MDG were transferred to Cairnhill Treasure Investment (S) Pte Ltd, in which Rodney had an interest. Rodney, who had been appointed a director of TR on 24 May 2007 and of MDG on 1 June 2007, refused to recognise any trust in favour of Lim and Chiang or the Instruments of Transfer executed by Seeto on behalf of MDG. By a circular resolution dated 18 June 2007, TR's board resolved that the transfer of the 1,927,999 TR shares to Café was invalid. Steps were duly taken to cancel the registration and the 1,927,999 TR shares reverted to MDG's hands.

24 Presently, TR's issued and paid-up share capital exceeds $13m. As it was obvious to Chiang and Lim that Rodney was not going to honour the arrangements purportedly made between them and Seeto, the present suit against MDG was commenced in September 2007.

Lim and Café reduce their claim to 25% of TR's shareholding

25 While Lim and Chiang agreed that MDG held 40% of TR's shareholding on trust for them, they did not agree on their respective shares of TR's shareholding. Lim contended that his shareholding in TR was 30% while Chiang's was only 10%. On the other hand, Chiang insisted that he was entitled to 15% and that Lim was only entitled to 25%.

26 Lim admitted that he had agreed to increase Chiang's stake in TR from 10% to 15% in exchange for Chiang's 10% stake in a Malaysian company. However, he contended that he was entitled to take back the additional 5% of TR's shareholding from Chiang because of problems that arose from his agreement with the latter regarding the said exchange of shares.

27 As Chiang claimed that he had settled his suit against MDG for 15% of TR's shareholding, the position would have been more complicated if Lim continued to insist on claiming 30% of TR's

shareholding from MDG. At the start of the trial, Lim informed the court that he would reduce his claim against MDG in the present proceedings from 30% to 25% of TR's shareholding and that whether Chiang is entitled to 10% or 15% of TR's shareholding will be settled between them at another forum. Chiang confirmed this arrangement.

28 Following Lim's decision to claim 25% of TR's shareholding, Café also reduced its claim as Lim's nominee to 25% of TR's shareholding.

MDG's submission of no case to answer

29 After Lim closed his case, MDG submitted that it had no case to answer and did not call witnesses to testify on its behalf. As such, Seeto, who had been named as MDG's witness and could and should have testified on his agreements with Lim and Chiang during his term as MDG's managing director and chief executive officer, was not cross-examined.

30 A submission of no case to answer has important ramifications for the defendant. In *Tan Juay Pah v Kimly Construction Pte Ltd and others* [2012] 2 SLR 549, the Court of Appeal explained (at [37]):

> It is important to note that because [the defendant] made a submission of "no case to answer" in the court below, the threshold against which the above questions are to be assessed is that of whether a *prima facie* case has been established by [the plaintiff] against [the defendant], and not that of whether a case against [the defendant] has been established on a balance of probabilities. This is because a submission of "no case to answer" by a defendant succeeds if: (a) the plaintiff's evidence, at face value, does not establish a case in law; or (b) the evidence led by the plaintiff is so unsatisfactory or unreliable that his burden of proof has not been discharged (see *Bansal Hemant Govindprasad v Central Bank of India* [2003] 2 SLR(R) 33). [emphasis in original omitted]

31 To complete the picture, it may be noted that it does not follow that every assertion of the plaintiff will be accepted merely because the defendant had submitted that it had no case to answer: see *Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart* [2012] 1 SLR 847 (at [35]). In *Relfo Ltd (in liquidation) v Bhimji Velji Jadva Varsani* [2008] 4 SLR(R) 657, Judith Prakash J explained what a court must do as follows (at [20]):

> [T]he test of whether there is no case to answer is whether the plaintiff's evidence at face value establishes a case in law or whether the evidence led by the plaintiff was so unsatisfactory or unreliable that its burden of proof had not been discharged ... In this respect, the plaintiff has only to establish a *prima facie* case. A *prima facie* case is determined *by assuming that the evidence led by the plaintiff is true, unless it is inherently incredible or out of all common sense or reason.* Further, if circumstantial evidence is relied on, it does not have to give rise to an irresistible inference as long as the desired inference is one of the possible inferences. [emphasis added]

32 In the present case, MDG's submission of no case to answer will succeed if the evidence of Lim and Café does not establish a *prima facie* case in law or is so unsatisfactory or unreliable that their burden of proof has not been discharged.

The issues

33 The issues in the present case will be considered in the following order:

(a) whether Lim is entitled to 25% of TR's shareholding under the alleged oral JVA;

(b) whether Lim is entitled to 25% of TR's shareholding on the basis of an express trust created by MDG in his favour;

(c) whether Lim has a valid claim against Chiang in the third party proceedings; and

(d) whether Café's claims against MDG are meritorious.

Lim's claim on the basis of the JVA

34 Much time was spent during the trial on the alleged oral JVA. MDG attacked the enforceability of the JVA on a number of grounds, including uncertainty of terms and non-compliance with s 6(*e*) of the Civil Law Act (Cap 43, 1999 Rev Ed) ("s 6(*e*)"), which concerns the unenforceability of oral contracts that cannot be performed within a year of its making.

35 Lim's case was that he is entitled to the TR shares claimed by him on the basis of the oral JVA as well as under an express trust created in his favour. At the outset, it ought to be noted that this judgment will focus on his claim under the express trust for the simple reason that even if there was an oral JVA between Lim and MDG, it cannot be enforced because of s 6(*e*), which reads as follows:

> No action shall be brought against —
>
> ...
>
> (*e*) any person upon any agreement that is not to be performed within the space of *one year* from the making thereof,
>
> *unless the promise or agreement* upon which such action is brought, or some memorandum or note thereof, *is in writing and signed by the party to be charged therewith or some other person lawfully authorised by him*.
>
> [emphasis added]

36 Lim conceded that the oral JVA could not have been performed within one year and he testified as follows:

> Q: Having regard to everybody's knowledge as at August 2005 with the problems with Bank of China, SDC, the transfer timing, the need for TR to raise money, it was quite clear that the agreement could not be fully performed within 12 months ... of August 2005?...
>
> A: That's right.

37 Lim also accepted that the performance of his obligations under the JVA was completed more than a year after the JVA was allegedly made in August 2005. He testified as follows:

> Q: ... [O]n your own case, you performed the agreement on 16 November 2006; correct?
>
> A: That's right.
>
> Q: In other words, more than one year after August 2005?

A: Yes.

38 Despite his testimony, Lim, relying on *Petrosin Corp Pte Ltd v Clough Engineering Ltd* [2005] SGHC 170 ("*Petrosin*"), asserted that s 6(*e*) only required the contracting parties to *begin* to perform their contractual obligations within one year of the making of the contract and there was no doubt that he had started to perform his obligations under the oral JVA within a year of the making of the alleged oral JVA. However, several English cases concerning the interpretation of s 4 of the Statute of Frauds 1677 (c 3) (UK) ("Statute of Frauds"), on which s 6(*e*) was based, do not support Lim's position. These cases, which were apparently not cited to the court in *Petrosin*, made it clear that what mattered is the *completion* of the performance of contractual obligations under an oral contract within a year and not part performance. In *Boydell v Drummond* (1809) 11 East 142; 103 ER 958 ("*Boydell*"), Bayley J explained (at 159; 965) that the mischief that s 4 of the Statute of Frauds sought to prevent "was the leaving to memory the terms of a contract for longer time than a year". In the same case, Lord Ellenborough CJ stated (at 155–156; 963–964):

> It has been argued that an inchoate performance within a year is sufficient to take the case out of the statute; but the word used in the clause of the statute is performed, which *ex vi termini* must mean the complete performance or consummation of the work: and that is confirmed by another part of the statute, requiring only part-performance of an agreement to supersede the necessity of reducing it to writing; which shews that *when the Legislature used the word performed, they meant a complete and not a partial performance*. [emphasis added]

39 In *Bracegirdle v Heald* (1818) 1 B & Ald 722; 106 ER 266, Lord Ellenborough CJ reiterated (at 726; 267) the view he expressed in *Boydell* in the following emphatic terms:

> [I]f we were to hold that a case which extended one minute beyond the time pointed out by the statute, did not fall within its prohibition, I do not see where we should stop; for in point of reason, an excess of twenty years will equally not be within the Act ... That brings it to the question, what is the meaning of the word performed? *Will an inchoate performance, or a part execution satisfy the terms of the statute? I am of opinion that it will not, and that there must be a full effective and complete performance.* [emphasis added]

40 In *McGregor v McGregor* (1888) 21 QBD 424, Lord Esher MR, who approved of *Boydell*, added (at 429) that the rule to be extracted from that case was that "where the agreement distinctly shews, upon the face of it, that the parties contemplated its performance to extend over a greater space of time than one year, the case is within the statute: but that where the contract is such that the whole may be performed within a year, and there is no express stipulation to the contrary, the statute does not apply".

41 In my view, the English position on the effect of s 4 of the Statute of Frauds on oral contracts should be followed. As such, s 6(*e*) stands in the way of Lim's claim under the oral JVA and it serves no purpose to consider whether the parties reached full and final agreement on all the terms of the said JVA, an issue which was canvassed extensively during the trial. I will thus proceed to consider Lim's claim on the basis of an express trust.

Lim's claim on the basis of a trust

42 In his closing submissions, Lim laid emphasis on his proprietary right to 25% of TR's shareholding under an express trust. He contended that regardless of whether he could enforce the oral JVA, he was entitled to the TR shares claimed by him on the basis of a completely constituted trust, for which he gave value. Lim's counsel explained (at para 47 of the closing submissions) as follows:

> Thus, *the real issue in this action is whether a valid trust has been created.* If so, MDG is under a trust obligation *vis-a-vis* [Lim]. In other words, even if the Joint Venture Agreement was not enforceable due to uncertainty of terms or a lack of contractual consideration, this will not be fatal to the trust claim. [Lim's] claim to the shares is a ***proprietary right*** to the trust assets founded in equity and survives independently of the contractual arrangement between the parties. All that is needed are the three certainties. [emphasis added; emphasis in original in bold italics]

Whether the express trust is dependent on the oral JVA

43 MDG asserted that Lim could not claim TR shares from it on the basis of an express trust because there was no oral JVA that established the existence of the trust. However, Lim retorted that once a trust has been completely constituted, the *cestui que trust* can enforce it. As such, he argued there is no need for the court to determine whether the oral JVA between him and MDG was finalised or enforceable.

44 Evidently, once a trust has been completely constituted, it can be enforced by the *cestui que trust* and this is so even if no consideration was furnished for the trust. In *Milroy v Lord* (1862) 4 De GF & J 264, Turner LJ explained (at 274-275) as follows:

> I take the law of this Court to be well settled, that, in order to render a *voluntary* settlement valid and effectual, the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, *or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol ....* [emphasis added]

45 If a *cestui que trust* of a completely constituted trust can enforce the trust even though he or she has furnished no consideration, it makes no sense to require Lim to prove that he can enforce the alleged oral JVA if he can prove that MDG had created an express trust of TR shares in his favour.

46 To support his contention that there is no role for the law of contract once a trust has been completely constituted, Lim relied on the following excerpt from the judgment of Gopal Sri Ram JCA in *Fawziah Holdings Sdn Bhd v Metramac Corp Sdn Bhd* [2006] 1 MLJ 505 ("*Fawziah*") (at [58]):

> *Once an express trust is created, there is no role for the law of contract.* The real question or target that ought to have been addressed in the submissions of counsel before the High Court should have been whether the trust created ... is certain... [emphasis added]

47 MDG retorted that as the decision of the Court of Appeal in *Fawziah* was overruled by the Malaysian Federal Court in *Metramac Corporation Sdn Bhd v Fawziah Holdings Sdn Bhd* [2007] 5 MLJ 501, Gopal Sri Ram JCA's judgment cannot be relied on. What MDG overlooked was that numerous issues were canvassed before the Federal Court and the decision of the Malaysian Court of Appeal was overruled for a reason which did not undermine Gopal Sri Ram JCA's position on the inapplicability of the law of contract in the circumstances of that case. In fact, the relevant part of Gopal Sri Ram JCA's judgment on this issue was quoted at length without any disapproval in the judgment of Richard Malanjum CJ (Sabah and Sarawak) (at [132]), with whom all the other judges agreed.

48 MDG relied on *Leong Sze Hian v Teo Ai Choo* [1983-1984] SLR(R) 324 ("*Leong*") to support its contention that where it has been alleged that a contract gave rise to a trust, the contract must be proven if the trust is to be enforced. *Leong* does not support MDG's contention. In that case, the plaintiff, Leong, mortgaged his house ("the property") to a financial institution but was unable to meet his financial commitments under the mortgage. His then girlfriend, the defendant, Teo, wanted to ease his financial burden by taking a loan from her employers. For this purpose, she entered into an "agreement" with Leong to purchase the property. Leong paid the legal, stamp and registration fees relating to the "purchase" and continued to live in the property with his parents. He paid the property tax on the property and gave Teo $500 every month. After Leong's relationship with Teo soured, she claimed to be the owner of the property. Leong sought a declaration that Teo held the property on trust for him. The alleged trust was not in writing and the court had to consider whether Leong's application for a declaration was barred by the Statute of Frauds, which required trusts in relation to real property to be in writing. A P Rajah J held that as the Statute of Frauds was not intended to prevent the proof of a fraud and as he had found that there was an express trust in Leong's favour, the fact that there was nothing in writing to prove the trust did not prevent him from entering judgment in Leong's favour. His decision was affirmed by the Court of Appeal: see [1985-1986] SLR(R) 620. MDG relied on the following sentence in the judgment of the Court of Appeal (at [6]):

> In dealing with the first ground of appeal, we think it necessary to say something about the legal principles applicable to a claim such as the respondent's. *The principles involved are those in the law of contract and the law of trusts.* [emphasis added]

49 Teo's first ground of appeal was that the trial judge's finding of a trust was wrong as Leong had in fact sold the property to her. Teo relied on the contract of sale and purchase to prove her title to the property whereas Leong argued that the contract was not intended to enable Teo to purchase the house and had merely been entered into to enable the latter to obtain a loan from her employer. It was in this context that the court stated that Leong's first ground of appeal required the application of the law of contract and the law of trusts. Obviously, principles of contract law were relevant when determining the true nature of the agreement entered into by Leong and Teo, and principles of trust law were applicable to determine whether there had been an oral trust in favour of Leong. Had the contract of sale and purchase been upheld, there would have been no room for an express trust in Leong's favour. There was thus nothing in *Leong* that supported MDG's proposition that Lim had to prove that the oral JVA was enforceable before he could rely on the law of trusts to claim shares from it.

50 MDG also contended that Lim had to prove that the oral JVA was enforceable because the alleged express trust in his favour did not have a life of its own under the latter's pleadings and was dependent on whether the JVA was enforceable. However, Lim retorted that his pleaded case and the evidence before the court showed that his claim on the trust was a standalone claim that was unrelated to the enforceability of the JVA. In my view, Lim had made it plain enough in his pleadings that he based his claim against MDG for TR shares on a trust for value. For instance, in para 8A of his Reply (Amendment No 3), Lim, who stated that MDG had repeatedly acknowledged the existence of the express trust in his favour, pleaded as follows:

> 8A In reply to paragraph 23 of the Defence, [Lim] avers that [MDG] had through its conduct and as set out in the documents referred to below, represented to [Lim] that [Lim and Chiang] had an aggregate total of 40% shares in [TR]. [Lim] will refer to the matter pleaded in para 24 of the Statement of Claim and the following documents in which [MDG] had expressly acknowledged the existence of the trust in favour of [Lim].
>
> (a) A Supplemental Agreement Contract No 3 dated 15 October 2005 involving [Chiang], [TR]

and [Lim] and which was signed by these parties as well as by [Seeto] acting on behalf of [MDG].

(b) An Agreement dated 28 June 2006 involving [MDG], [Chiang] and [Lim].

(c) The Shareholders' Agreement and the Declaration of Trust referred to in paragraph 34 of [MDG's] Defence (Amendment No 2).

(d) An undated Declaration of Trust made by [MDG] concerning the trust of 25% of the share in [TR].

(e) An Agreement between [TR] and Sijori dated 15 November 2006 in which there is a handwritten annotation by [Seeto] confirming that [Lim] is entitled to shares in [TR].

Whether there was a completely constituted trust

51 How a trust is completely constituted was explained in *Parker and Mellows: The Modern Law of Trusts* (A J Oakley) (Sweet & Maxwell, 9th ed, 2008) as follows (at para 5-015):

> By far the most common method of completely constituting a trust is for the settlor to transfer the trust property to trustees in the manner just described. *However, it is equally effective for a settlor to make a declaration of trust that he is from the moment of the declaration a trustee of the property in question for the intended beneficiaries.* Any words which clearly express the intention to create a present and irrevocable trust will give rise to the creation of a completely constituted trust – it is not necessary for an effective declaration of trust that the settlor should say in terms "I hereby declare myself to be a trustee". [emphasis added]

52 Lim asserted that the trust was completely constituted when MDG, the legal owner of the TR shares in question, declared itself a trustee holding 40% of TR's shareholding for him and Chiang. This involves a declaration of self as trustee. Lim claimed that he furnished consideration for the trust by, *inter alia*, agreeing to continue to use his controlling interest in Sijori to procure the transfer of the lease and Sijori's members to TR and by agreeing to have his shares issued to MDG as trustee rather than to Chiang and himself.

53 For Lim to succeed in his claim on the basis of a completely constituted trust, the three certainties, namely certainty of intention, certainty of subject matter and certainty of objects must be satisfied: see *Knight v Knight* (1840) 3 Beav 148; 49 ER 58.

Certainty of intention

54 Even before the trust was created, MDG had recognised that Lim and Chiang were entitled to 40% of TR's shareholding. On 4 August 2005, Seeto confirmed that Lim had a 40% stake in TR's shareholding when he wrote to Rodney for assistance in arranging a loan of $10m for the taking over of the Project. Part of this letter reads as follows:

> *As per our discussion*, we have noted below the following *key matters* for our action;
>
> 1 MDG will proceed to hold the 60% stake in [TR] and the *balance of 40% of which are held by proxy of Mr Lim, current owner of Sijori Resort Sentosa*.
>
> ...
>
> 4 ... The final shareholding in [TR] shall stand as 30% MDG, 30% [Rodney or his nominee] *and*

40% Mr Lim or its nominee.

[emphasis added]

55 On 15 October 2005, a document entitled "Supplemental Agreement Contract No 3", which was signed by Seeto as TR's director, Mr Gary Koh as TR's chief executive officer, Chiang and Lim, stated in cl 1.2 that Chiang was to have 40% of TR's shareholding. MDG contended that it was not involved in this agreement, which was signed by Seeto on behalf of TR. The issue here is not whether MDG was a party to this agreement. Seeto is a director of both MDG and TR and he played a major role in all the negotiations with Lim and Chiang on the shareholdings in TR. Undoubtedly, Supplemental Agreement (Contract No 3) confirmed Seeto's arrangements to give 40% of TR's shareholding to Lim and Chiang.

56 As for why the 40% of TR's shareholding was not transferred to Chiang and Lim at the material time, Lim testified that he asked Seeto about the transfer of his TR shares to his nominee, Chiang, after he learnt that some of MDG's stock of TR shares had been transferred to TEH, and Seeto told him that MDG would hold his TR shares on trust for him because it would be easier to obtain loans to fund the Project if MDG held most of the shares in TR in its name.

57 MDG contended that Seeto's words, as recounted by Lim, did not indicate an intention to create a trust. While words to create a trust must be imperative, Seeto need not have used the word "trust" in his conversations with Lim. *Halsbury's Laws of Singapore* (LexisNexis, 2012 Reissue) vol 9(3) explained (at para 110.488) as follows:

> While the intention to create a trust must be certain, there is no requirement that certain words or that words referring to 'trust', 'in trust' or 'upon trust' must be employed. Where the creator of the trust is to be the trustee, any expression will suffice if it is clear that the person using them considers himself a trustee and adopts that character. The intention is collected first from the words used including the context, and second from the surrounding circumstances at the time the purported trust was created.

58 MDG next contended that Lim's evidence on what Seeto had said about the creation of a trust in his favour was hearsay. However, MDG knew about Lim's case and had listed Seeto as its witness. MDG knew that Seeto's evidence on the alleged trust was crucial because its director, Mr Lim Kwee Wah ("LKW"), deposed in an affidavit dated 18 March 2011 (at para 25) in support of MDG's application for leave to dispense with Seeto's Affidavit of Evidence-in-Chief that MDG intended to call Seeto as a witness to adduce oral evidence on:

> the existence of any agreement(s) or arrangement(s) (oral or written) between himself, [Café], [TR], [MDG], [Seeto], [Lim] and/or [Mdm Soh] regarding the shares in [TR], the terms of any such agreement(s) or arrangement(s), the performance of any such agreement(s) or arrangement(s) and the circumstances surrounding the termination of any such agreement(s) or arrangement(s).

59 It was regrettable that Seeto, who could have shed light on the trust, was not called by MDG to testify. Instead, MDG asked the court to draw an adverse inference against Lim for failing to call Seeto as a witness. This cannot be countenanced. In fact, if any adverse inference was to be drawn in the circumstances, it was that had Seeto been called by MDG to testify, his evidence would not have been favourable to MDG.

60 Regardless of whether or not any adverse inference should be drawn against MDG for not calling

Seeto, Lim's testimony that MDG held TR shares on trust for him was corroborated by a large number of documents created *after* the creation of the express trust. In *Grant v Grant* (1865) 34 Beav 623; 55 ER 776, Sir John Romilly MR, who made it clear that documents post-dating the creation of a trust may be relevant for proving an intention to create the trust, said (at 625; 777):

> Any words that shew that the donor means, at the time he speaks, to divest himself of all beneficial interest in the property are, in my opinion, sufficient for the purpose of creating the trust. *I think it is also sufficient for the purpose of shewing that the trust has been created, if he afterwards states that he has so created the trust*, *though there was no witness except the donee present at the time the trust was created.* [emphasis added]

61 For a start, MDG expressly acknowledged that it held an aggregate of 40% of TR's shareholding on trust for Lim and Chiang in the Golden Tulips Agreement on 28 June 2006. It may be recalled that at the material time, Golden Tulips sought to acquire TR for $65m. Although MDG held all the issued TR shares except for Chiang's one subscriber share, Seeto concluded the Golden Tulips Agreement with Lim and Chiang with respect to the application of the proceeds of sale. This agreement with Lim and Chiang would have been absolutely unnecessary unless they had an interest in some of the TR shares held in MDG's name. Clause 1 of this agreement was entitled "TRUST ARANGEMENT" (*sic*) [caps in original]. Crucially, cl 1.1 of the Golden Tulips Agreement ("cl 1.1") reads as follows:

> 1.1 [MDG] acknowledges that it is now holding 246,000.3 shares (equivalent to 30% of the total issued share capital) of the Company ("LIM'S TRUST SHARES") *on trust in its name as trustee absolutely for the benefit of* Lim. [MDG] shall at the direction of LIM, transfer or assign LIM'S TRUST SHARES to S J CHIANG ... [emphasis added]

62 In similar vein, cl 1.2 of the Golden Tulips Agreement, which concerned shares held on trust for Chiang, provided as follows:

> 1.2 [MDG] further acknowledges that it is also holding 82000.1 shares (equivalent to 10% of the total issued share capital) of the Company ("S J CHIANG'S TRUST SHARES") on trust in its name as trustee absolutely for the benefit of S J CHIANG. [MDG] shall at the direction of S J CHIANG, transfer or assign S J CHIANG's TRUST SHARES to S J CHIANG or to any person designated by him....

63 Notably, cl 1.1 stated that MDG "is *now* holding" [emphasis added] TR shares on trust for Lim. This shows that the trust had already been created by the time the Golden Tulips Agreement was signed.

64 Unfortunately for Lim and Chiang, the proposed sale of TR to Golden Tulips did not materialise. In the meantime, Lim entered into a share swap agreement with Chiang to exchange 5% of his shareholding in TR for a 10% stake in a Malaysian company. Consistent with this arrangement, documents issued after June 2006 concerning the beneficial interest of Lim and Chiang in 40% of TR's shareholding showed their entitlement to be 25% and 15% respectively.

65 In the Shareholders' Agreement, Seeto, Chiang and TEH acknowledged that MDG was to hold 74% of TR's shareholding. In two Declarations of Trust executed shortly thereafter pursuant to the Shareholders' Agreement, the trust in favour of Lim and Chiang was acknowledged. Recital B of the First Declaration of Trust provided that out of the 74% of TR shares acknowledged in the Shareholders' Agreement as MDG's shares in TR, MDG held 15% of TR's shareholding for Chiang. In Recital B of a second undated Declaration of Trust ("the Second Declaration of Trust"), MDG acknowledged that out of the 74% of TR shares acknowledged as its shareholding in TR, it held 25%

of TR's shareholding for Chiang. In the context of the factual matrix, the First Declaration of Trust concerned Chiang's 15% of TR's shareholding while the Second Declaration of Trust concerned Lim's 25% shareholding in TR that was held by his nominee, Chiang. Notably, both the First Declaration of Trust and the Second Declaration of Trust acknowledged that a total of 40% of TR's shareholding was held on trust for Chiang.

66 On 15 November 2006, in an agreement between Sijori and TR on the transfer of the operation of the resort hotel to TR, Seeto again acknowledged that Lim owned 25% of TR's shareholding. In the attestation page of the said agreement, Seeto's handwritten annotation read as follows:

> This is to certify that Mr Lim Chong Poon has ... 25% (Twenty-five percent) shareholding in [TR] with investments capped at TEN MILLIONS DOLLAR [*sic*] (SGD Dollars). [caps in original]

67 It was rather telling that on 5 February 2007, the group financial controller of MDG and TR, Mr Sebastian Wong, emailed Tristar to request that MDG's TR share certificates be split into three certificates, including one for 25% and one for 15%. The 25% and 15% add up to 40%, which is the shareholding in TR claimed by Lim and Chiang. Significantly, in a handwritten note on the third page of the email was a statement to the effect that the breakdown on TR's shareholding was "*given by Mr Chiang on 22/2/07* [*together*] *with Mr Lim*" [emphasis added]. There was no reason for Chiang and Lim to be involved in the splitting of MDG's TR share certificates unless they had an interest in the said shares. On 22 February 2007, TR's board passed a resolution to split MDG's existing share certificates for its 4,465,200 TR shares into three certificates. The first certificate was for 1,205,000 shares, the second was for 722,999 shares and the third was for 2,537,201 shares. Seeto then executed on MDG's behalf two blank share transfer instruments for 1,205,000 shares and 722,999 shares, which constituted 25% and 15% of TR's 4,820,001 issued shares at the material time, and handed them over to Chiang. This corroborated Lim's claim that he and Chiang were then entitled to 40% of TR's shareholding.

68 Rodney knew all along about the trust of TR shares in favour of Lim and Chiang. Despite having acknowledged the existence of the said trust in more ways than one, he unabashedly claimed that he was not aware of the trust because Chiang never told him about this. It may be recalled that as early as 4 August 2005, Seeto had, in a letter asking for Rodney's assistance to raise funds, informed Rodney that Lim held 40% of TR's shareholding in the name of his nominee. Furthermore, when Rodney wanted to invest in MDG and TR in 2007, Stamford had advised him that certain documents, including the Shareholders' Agreement and the First Declaration of Trust, affected MDG's legal ownership of a large portion of its TR shares. Rodney wanted Seeto to have all the trust arrangements undone and that was why the Stamford Deeds had been prepared for the relevant parties to execute in early May 2007.

69 Crucially, on 30 May 2007, Rodney, together with Seeto, Chiang and TEH, signed a handwritten share swap memorandum, which required Chiang to transfer 40% of TR's shareholding to MDG in exchange for 6% of Roscent's shares held by Seeto and 1% of TEH's shareholding in TR. Rodney would not have required Chiang to transfer 40% of TR's shareholding to MDG unless he believed that the latter was entitled to 40% of TR's shareholding. Furthermore, by offering consideration to Chiang for the transfer back to MDG of 40% of TR's shareholding, Rodney recognised that MDG did not own that 40% on 30 May 2007.

70 The fact that MDG did not own all the TR shares registered in its name was also evident in several draft documents concerning an intended share swap agreement which were prepared by TEH's solicitor, Ms Pebble Sia ("Ms Sia"), and forwarded to Rodney on 5 June 2007. By then, Chiang had caused 1,927,999 TR shares to be transferred to Café. The recitals in the said documents

acknowledged that Café held 1,927,999 shares out of 4,820,001 shares in TR and Ms Sia prepared a draft share transfer for Café to transfer the 1,927,999 shares to MDG.

71 I find that the requirement of certainty of intention was satisfied. MDG's contention that the court should be slow to impose a trust where contractual rights were sufficient to fulfil the parties' commercial expectations and obligations cannot hold water in a case such as this, where MDG had explicitly and repeatedly recognised that it held 40% of TR's shareholding on trust for Lim and Chiang.

Certainty of subject matter

72 MDG contended that there was no certainty of subject matter for a number of reasons. To begin with, it pointed out that although Lim claimed 30% of TR's shareholding, he ultimately claimed only 25% in these proceedings. Why Lim claimed only 25% has been explained earlier on (at [25]–[28] above) and Lim had expressly reserved his rights against Chiang on the remaining 5% of TR's shareholding that he claims is rightfully his.

73 MDG also claimed that there was no certainty of subject matter because the trust was not restricted to any paid up capital amount. It added that in Suit 548, Lim did not explain whether his TR shares had a cap or remained constant if new shares were issued in future. Lim asserted in the present proceedings that his and Chiang's entitlement to TR's shareholding was capped at 40% of TR's paid-up capital of up to $10m. TR was incorporated on 28 June 2005 with an authorised share capital of $10m and Lim's testimony that it was planned that TR's authorised capital would be capped at $10m was corroborated by a letter written by Seeto to Rodney on 4 August 2005. In that letter, Seeto stated that MDG and Lim had agreed that their transaction in relation to TR would be capped at $10m. Again, on 15 November 2006, Seeto reiterated in a handwritten note that the investment in TR was to be capped at $10m. It was further envisaged that if the capital of TR should increase to more than $10m, there would be a cap on the number of TR shares held on trust. Thus, in the First Declaration of Trust dated 10 August 2006, MDG acknowledged in Recital B as follows:

> For the avoidance of doubt, the Trust Shares are confined to the 15% of the ordinary shares of the issued and paid up capital of S$10,000,000 only and shall not extend to any increase in the issued and paid up share capital of the Company beyond the said sum of $10,000,000.

74 Recital B of the Second Declaration of Trust regarding Lim's 25% stake in TR was identical save for the percentage of shares held on trust by MDG. I thus accept Lim's evidence that the trust in his favour was for 25% of TR's shareholding, subject to a cap of $10m of TR's paid-up capital. In the rest of this judgment, any reference to Lim's claim for a percentage of TR's shareholding must be read as subject to the stated cap.

75 Finally, MDG claimed that even if there was a trust, Lim is only entitled to 25% of the TR shares issued at the time the trust was created. It contended that TR shares issued *after* the creation of the trust were future property as they were not in existence when the trust was created. It is trite that a voluntary assignment of future property is ineffective although an assignment of future property for value may be enforced as a contract to assign property. However, there is a crucial difference between a trust of future property, which concerns expectancies which might not materialise, and a trust of existing or vested rights to obtain property in the future. In the present case, the question of future property does not arise because the transfer of a share in a limited company involves the transfer of *all* the rights and obligations attached to that share. In *Commissioners of Inland Revenue v Crossman* [1937] 1 AC 26, Lord Russell of Killowen (who dissented but not on this point) explained as follows (at 67) what a transfer of such a share involves:

> [I]f the property in question [sold] is that bundle of rights and obligations known as a share in a limited company, *the entirety to the bundle must surely be the subject matter of the sale and not part only.* [emphasis added]

76 The decision of the English Court of Appeal in *Rooney v Stanton* (1900) 17 TLR 28 sheds some light on what the transfer of a share in a company entails. In that case, the defendant sold the plaintiff shares in Golden Arrow Mine Company (Limited) ("Golden"). Before the shares were registered in the plaintiff's name, Golden was voluntarily wound up and reconstructed. Shares in the new company were offered rateably to Golden's shareholders at 2s per share. The defendant was allotted shares in the new company as he was still the legal owner of the shares in Golden that he had sold to the plaintiff. It was held that the defendant held the shares in the new company on trust for the plaintiff. Rigby LJ explained (at 29) that nothing could be more clear than that upon the sale of the Golden shares to the plaintiff, the defendant immediately became a trustee of those shares for the plaintiff, and consequently incapable, except by arrangement with the plaintiff, of receiving any advantage in respect of them by reason of his being the registered holder. As such, when the defendant applied for shares in the new company, he did that on behalf of the plaintiff though, as part of the law of trusts, he would be entitled to be indemnified for the monies advanced for those new shares.

77 In the present case, when the trust was created by MDG sometime after August 2005, Lim became the beneficial owner of 25% of the TR shares that had been issued on that date ("Lim's original shareholding") *as well as all the rights and obligations attached to those shares* on trust for Lim. Those rights included the right to be offered new shares in accordance with Art 51 of TR's Articles of Association ("Art 51"), which reads as follows:

> Subject to any direction to the contrary that may be given by the company in general meeting, all new shares shall, before issue, be offered to such persons as at the date of the offer are entitled to receive notices from the company of general meetings in proportion, as nearly as the circumstances admit, to the amount of the existing shares to which they are entitled.

78 The right under Art 51 to be offered new TR shares in proportion to a shareholder's current percentage of shareholding in TR was thus an incident of ownership of Lim's original shareholding. As such, each time MDG exercised the right under Art 51 to purchase additional TR shares on the basis of Lim's original shareholding in TR ("Art 51 shares"), it did so as Lim's trustee. These Art 51 shares were impressed with the trust as soon as they were registered in MDG's name. Viewed as such, Art 51 shares cannot be viewed as future property.

79 Significantly, MDG acted on the basis that Lim was entitled to more than the 25% of the TR shares issued at the time the trust was created. As mentioned (at [17] above), on 22 February 2007, Seeto executed the Instruments of Transfer for a total of 1,927,999 TR shares, which represented 40% of TR's shareholding as at February 2007 and not 40% of TR's shareholding at the time the trust was created. I thus find that the argument on future shares did not rest on a firm foundation and should be rejected.

Certainty of objects

80 There was no doubt that the objects of the trust were Lim and Chiang. As for Café, its claim was made solely on the basis that it is Lim's nominee since the latter's shares in TR, as reflected in the Instruments of Transfer, were registered in its name. As such, I find that there was no uncertainty with respect to the objects of the trust.

Conclusion on whether there was a trust

81 I find that Lim has established a *prima facie* case that there was a completely constituted trust for value in his favour, the existence of which was acknowledged by Seeto and Rodney on numerous occasions. Under that trust, he was entitled to 25% of TR's shareholding subject to a cap of $10m on the paid-up capital of TR. As TR's paid-up share capital has now increased to more than $13m, the cap is applicable to the number of TR shares to which Lim is entitled.

Whether illegality and unclean hands barred Lim's claim

82 MDG also sought to rely on a number of defences, including illegality and unclean hands to resist Lim's claim against it. Lim denied that he had done anything illegal.

83 Lim based his claim to 25% of TR's shareholding on a completely constituted trust without having to rely on any illegal act. In *Tinsley v Milligan* [1994] 1 AC 340 ("*Tinsley*"), the House of Lords rejected the broad public conscience test and held, by a majority, that a plaintiff who founds his claim on a legal or equitable title is entitled to recover if he is not forced to plead or rely on any illegality. In that case, T and M used their joint funds to acquire a house, which was registered in T's name so that M could wrongfully claim social security benefits. Subsequently, M sought a declaration that T held the house on trust for both of them in equal shares. Although the property had been put in T's sole name to facilitate M's fraud on the authorities, it was held that M could enforce the trust because she did not have to rely on her illegal acts in her proprietary claim against T. *Tinsley* was cited with approval by the Court of Appeal in *Top Ten Entertainment Pte Ltd v Lucky Red Investments Ltd* [2004] 4 SLR(R) 559 (at [34]).

84 As Lim was able to establish his proprietary right to 25% of TR's shareholding without having to rely on any illegal act, it follows that MDG's defence of illegality did not get off the ground.

MDG did not prove its defence of illegality

85 In *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank International), Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63, the Court of Appeal stated (at [31]) that the "legal burden of proving a pleaded defence rests on the proponent of the defence, unless the defence is a bare denial of the claim" [emphasis in original omitted]. Having submitted that it had no case to answer, MDG did not call any witness to prove its defence of illegality or unclean hands and on the evidence before the court, even if *Tinsley* is left aside, MDG's defences of illegality and unclean hands lacked substance.

86 MDG's main complaint was that Lim decided not to hold his TR shares in his own name because he wanted to deceive various parties, and in particular, SDC. MDG sought to rely on *Suntoso Jacob v Kong Miao Ming* [1985-1986] SLR(R) 524 ("*Suntoso*"), *Tan Soi v Pow Kwee Lan and others* [1998] 1 SLR(R) 651 ("*Tan Soi*") and *Public Prosecutor v Intra Group Holdings Inc* [1999] 1 SLR(R) 154 ("*Intra*"). However, it is pertinent to note that MDG was also involved in the wilful non-disclosure to SDC of Lim's beneficial interest in TR as it had liaised with SDC on matters concerning TR's shareholding.

87 In *Suntoso*, the appellant, a foreigner, who wanted to register his company's tug as a Singapore ship, transferred the majority of the shares in the company to the respondent, a Singaporean. The transfer of shares was necessary because a company could not register its vessel as a Singapore ship unless Singaporeans held the majority of its shares. The appellant claimed that the respondent held the transferred shares on trust for him. The Court of Appeal ruled that as the appellant had deceived

the Registrar of Singapore Ships, he could not claim the said shares from the respondent.

88 In *Tan Soi*, a coffeeshop operator was resettled to new premises. To compensate resettled persons, the Housing and Development Board ("HDB") offered him a tenancy of new premises at a reduced monthly rental together with rental rebates for five years. The resettled operator, who allowed another party to run a confectionery at the new premises at the reduced rental rate, which was in fact only applicable to him, signed a deed stating that he held the tenancy on trust for the confectionery owner. Subsequently, HDB offered to sell the premises to the operator's widow, whose children accepted the offer. It was held that the confectionery owner could not rely on the trust deed to claim any right to the property as this had thwarted HDB's rules and regulations by taking advantage of the reduced rental, which was not applicable to him.

89 In *Intra*, the approved purchaser of a residential property did not disclose that he held it on trust for a foreign company. Such a trust contravened the Residential Property Act (Cap 274, 2009 Rev Ed), which barred foreigners from acquiring landed properties without the requisite approval of the Minister for Law. It was held that the said Act barred the company's claim to the property.

90 The present case is clearly distinguishable from *Suntoro*, *Tan Soi* and *Intra*, where the claimants had deceived the public authorities by circumventing laws and administrative regulations. In contrast, there was no law or regulation which prevented Lim from being TR's shareholder and there was no evidence that SDC would have objected if Lim had decided to hold TR shares in his name.

91 MDG also complained that Lim hid his shares in TR under Chiang's name so that BOC, to whom he had furnished a personal guarantee for moneys lent to Sijori, would not know about his assets. Lim complained that MDG, having withdrawn a proposed amendment to its Defence to plead that he had attempted to mislead BOC, should not have made this allegation in its closing submissions. There has been no allegation by BOC that it had been defrauded and on the evidence presented, the court has no basis to conclude that Lim had defrauded BOC.

Alleged breach of statutes

92 MDG next contended that Lim's claim was barred because he had contravened s 157 of the Companies Act (Cap 50, 2006 Rev Ed) and s 6 of the Prevention of Corruption Act (Cap 241, 1993 Rev Ed). Lim denied that he breached either of these statutory provisions.

93 In *Hornal v Neuberger Products Ltd* [1957] 1 QB 247, Denning LJ reiterated the view he expressed in *Bater v Bater* [1951] P 35 (at 36) that the more serious the allegation, the higher degree of probability is required, although in a civil case it need not reach the very high standard required in a criminal case. Lim has not been charged with having committed offences under the statutory provisions in question and MDG called no witnesses to prove its allegations.

94 Section 157(2) of the Companies Act provides as follows:

> An officer or agent of a company shall not make improper use of any information acquired by virtue of his position as an officer or agent of the company to gain, directly or indirectly, an advantage for himself or for any other person or to cause detriment to the company.

95 While it was not disputed that Lim was an officer of Sijori and that he knew about Sijori's financial problems, MDG did not show how he made *improper* use of the information. Lim testified that he had disclosed his intended shareholding in TR to the other directors of Sijori and this was not contradicted in any way. In any case, even if Lim had made improper use of information, it is for Sijori

to claim the TR shares from him and not for MDG to reap a windfall by keeping the 25% of TR shareholding held on trust for Lim.

96 As for s 6 of the Prevention of Corruption Act, it reads as follows:

> If —
>
> (*a*) any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business;
>
> ...
>
> he shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $100,000 or to imprisonment for a term not exceeding 5 years or to both.

97 It was not established that Lim had any corrupt intent in procuring the transfer of the Project to TR. There was no evidence that he preferred MDG over another potential buyer because of the shares he was to receive in TR from MDG. He was Sijori's controlling shareholder and he could, as a shareholder, have arranged for the passing of a resolution to dispose of the lease to TR even if he, as a director, had remained neutral. Furthermore, Lim did more than what was required of Sijori in the transfer of the lease to TR to earn his TR shares. As mentioned, in bargaining with BOC to reduce the amount to discharge the loan to Sijori, Lim made it easier for TR to take over the Project but exposed himself to greater liabilities under his personal guarantee for BOC's loan to Sijori. Finally, Lim testified that he had disclosed his interest in TR shares to his fellow directors in Sijori. The court was thus in no position to find that Lim had breached s 6 of the Prevention of Corruption Act.

Alleged breach of fiduciary duty

98 MDG also asserted that Lim breached his fiduciary duties to Sijori by receiving a secret profit from MDG in the form of TR shares. Lim testified that he had disclosed his interest in TR shares to his fellow directors and there was no evidence to contradict this testimony, which was not inherently incredible or out of all common sense or reason. Probably, the disclosure was made informally rather than at a board meeting. This does not matter for in *Woolworths Ltd v Kelly* (1991) 22 NSWLR 189 ("*Woolworths*"), the Court of Appeal of New South Wales held, by a majority, that disclosure was unnecessary where a director's interest was known to the other directors. Similarly, in *Lee Panavision Ltd v Lee Lightning Ltd* [1992] BCLC 22 ("*Lee Panavision*"), Dillon LJ doubted whether the non-disclosure of an interest common to all the directors and thus known to all of them would be a breach of the UK equivalent of s 156(1) of the Companies Act. *Woolsworths* and *Lee Panavision* were followed in *Maxz Universal Development Group Pte Ltd v Lian Hwee Choo Phebe* [2010] SGHC 64. In any case, it is for Sijori and not MDG to complain of a breach of fiduciary duties. To date, no Sijori director or shareholder has complained about the trust of TR shares in Lim's favour. It follows that MDG's assertion that Lim had breached his fiduciary duties to Sijori need not be further considered.

99 MDG also alleged that two persons, Mr Ong Kim Kiat and Mdm Evelline Yohanes, who are both bankrupts, were shareholders of Sijori at the material time. On this basis, Lim was attacked for not informing the Official Assignee of his "secret profit" in the form of TR shares. However, it was made clear during re-examination that the said bankrupts were not Sijori's shareholders, after which MDG suggested that as they owned shares in a company which had a stake in Sijori, the Official Assignee

should have been informed. No authority was cited for such a proposition and no evidence was led on the shareholding of the bankrupts in any company that had a stake in Sijori. As such, whether the Official Assignee should have been informed about Lim's shares in TR need not be further considered.

Whether Chiang's arrangements with MDG barred Lim's claim

100 MDG contended that Lim cannot claim any TR shares from it if there was a trust in his favour as his nominee, Chiang, had already discharged his rights under the trust. However, Chiang denied having discharged Lim's rights and Lim claimed that Chiang had no authority to do so.

101 To begin with, MDG asserted that whatever trust arrangements may have been previously agreed upon between Seeto and Lim, they were terminated by cl 17.1 of the Shareholders' Agreement ("cl 17.1"), which reads as follows:

> This Agreement embodies all the terms and conditions agreed upon between the parties hereto as to the subject matter of this Agreement and supersedes and cancels in all respects all previous agreements and undertakings, if any, between the parties hereto with respect to the subject matter hereof, whether such be written or oral.

102 MDG's assertion was off the mark as Lim's beneficial interest in 25% of TR's shareholding was not the subject matter of the Shareholders' Agreement. In any case, *after* the Shareholders' Agreement was signed, MDG confirmed the trust arrangements in favour of Lim and Chiang in two declarations of trust. The recital in the First Declaration of Trust concerning Chiang's beneficial interest in 15% of TR's shareholding, provided as follows:

> Out of the 74% of the ordinary shares issued out of the issued and paid up capital of $10,000,000 *referred to at clause 3.2 of the Shareholders' Agreement* and held in the names of the Trustee, *15%* of the said Shares ("the Trust Shares") *are held by the Trustee in the Trustee's name upon trust* and for the benefit of the Beneficiary". [emphasis added]

103 The recital in the Second Declaration of Trust, which concerned Lim's beneficial interest in 25% of TR's shareholding, also referred to the Shareholders' Agreement. It reads as follows:

> Out of the 74% of the ordinary shares issued out of the issued and paid up capital $10,000,000 *referred to at Clause 3.2 of the Shareholders' Agreement* and held in the names of the Trustee, *25%* of the said Shares ("the Trust Shares") *are held by the Trustee in the Trustee's name upon trust* and for the benefit of the Beneficiary. [emphasis added]

104 As both Declarations of Trust were made pursuant to the Shareholders' Agreement, MDG could not contend that cl 17.1 did away with the trust arrangements agreed upon between Seeto, Lim and Chiang.

105 MDG next claimed that Lim's beneficial interest, if any, in TR shares had been terminated by the DTR signed by Chiang on 11 May 2007. It pointed out that cl 1.1 therein provided that the Shareholders' Agreement and the First Declaration of Trust shall "immediately be terminated and be treated as null and void as of the date of this Deed". MDG went so far as to claim that Lim was estopped from claiming his 25% shareholding because Chiang, as Lim's agent, represented to Rodney when he signed these documents that Lim was prepared to give up his entire shareholding in TR and that in reliance on this representation, Rodney made substantial advances to TR and obtained bank loans for TR to develop the Project. Apart from the fact that Lim questioned Rodney's alleged contributions to TR, MDG did not call any witnesses to prove the alleged representation and sought to

rely on what Seeto and Chiang had deposed in their affidavits. Having not called either Seeto or Chiang to testify, MDG could not rely on their hearsay evidence to prove that Lim was estopped from claiming any TR shares from it.

106 MDG's assertion that Chiang had signed away his and Lim's 40% of TR's shareholding on 11 May 2007 was totally devoid of reality. There was no reason for Chiang or Lim to give up the TR shares held on trust for them by MDG merely to facilitate Rodney's investment in TR. Crucially, Rodney, Seeto, Chiang and TEH signed a handwritten MOU on 30 May 2007 on the swapping of shares in TR and Roscent. Under the MOU, Chiang agreed to transfer 40% of TR's shareholding to MDG in exchange for Seeto's 6% of Roscent's shareholding as well as 1% of TR's shareholding registered in TEH's name. If the DTR had terminated the trust arrangements on 11 May 2007, Rodney would not have asked Chiang to hand over 40% of TR's shareholding to MDG when the TR shares in question were already registered in MDG's name. Notably, Rodney initially refused to accept the authenticity of the MOU even though it had been included in MDG's own bundle of documents and it was only after Lim's counsel proposed to call Rodney to testify on this document that its authenticity was no longer challenged. Undoubtedly, the MOU signed by Rodney undermined MDG's case that Lim and Chiang lost all their shares in TR under the DTR on 11 May 2007.

107 Lim's assertion that he still had a 25% shareholding in TR despite Chiang's dealings with MDG certainly called for an answer. Seeto had a lot of explaining to do as to what was intended under the DTR. As such, MDG's assertion that it had no case to answer on the trust cannot be countenanced.

108 As for the DDR signed by Chiang, it was not disputed that this deed only concerned the First Declaration of Trust. Lim accepted that the First Declaration of Trust related only to Chiang's beneficial interest in 15% of TR's shareholding. MDG did not adduce evidence to contradict this. As such, this deed had no effect on Lim's claim in the present proceedings.

109 Finally, in regard to MDG's settlement with Chiang, MDG claimed that it settled the claim by Chiang and Lim for their combined shareholding of 40% in TR. However, Chiang contended that the settlement was only concerned with his own claim to 15% of TR's shareholding. The confidentiality of the settlement was jealously guarded by both Chiang and MDG. It was not shown to the court and no witness testified on its scope. Lim's evidence that he did not authorise Chiang to discharge his own claim against MDG was not unbelievable and was not effectively challenged. There was thus no basis for the court to make a finding that Lim's claim against MDG was barred by Chiang's settlement with MDG.

Conclusion on whether Lim was barred from relying on the trust

110 For the reasons stated, MDG did not establish that Lim was barred in any way from making his claim to TR shares on the basis of a completed constituted trust in his favour. In view of my finding that there is an express trust in Lim's favour for 25% of TR's shares up to a limit of $10m of TR's issued share capital, I need not consider whether he was entitled to the said shares on the basis of an implied or constructive trust. There is also no need for me to consider whether he is entitled to the shares in respect of which signed blank Instruments of Transfer had been handed over by Seeto to Chiang, as these shares are a part of the shares to which he is entitled under the express trust in his favour. I order MDG to transfer the TR shares to which Lim is entitled under the trust to him within 30 days. I also order TR to register Lim as a member on TR's register of members as soon as MDG has transferred the TR shares in question to Lim and to file all the requisite documents with the Accounting and Corporate Regulatory Authority in relation to the transfer of TR shares to Lim.

111 In his closing submissions, Lim pointed out that there is a dispute between some shareholders

as to whether TR shares had been improperly issued to MDG and a suit has been filed by TEH with respect to this matter. Lim contended that statements by Seeto or Rodney as to how much money MDG had injected into TR cannot be trusted and he submitted (at para 537 of his closing submissions) that the appropriate relief will be for him "to be awarded 25% of the shareholding in TR, with MDG having liberty to apply if it wishes to argue that it had in fact (and honestly) put in more than $10 million into TR". Without having heard sufficient evidence on how much money MDG had injected into TR, this court is in no position to conclude that MDG has dishonestly arranged for TR shares to be issued to it without paying for them. This matter should be dealt with in other proceedings concerning the propriety of the issue of TR shares to MDG.

112 Lim also applied for an order that he be allowed to participate retrospectively in any issuance of TR shares and that he, upon making the requisite payments, is entitled to an appropriate number of shares of TR. Once Lim's TR shares held on trust have reached the cap, he cannot claim any more TR shares from MDG on the basis of the trust but he is of course entitled to exercise rights attributable to the shares held on trust for him, including the right to be allotted shares in accordance with Art 51. I thus order that he be allowed to exercise these said rights.

Whether Lim has to pay for the TR shares held on trust for him

113 Lim's case on why he did not have to pay any money for the TR shares held on trust for him was fairly simple. He first made a deal with Seeto for MDG to acquire the Sijori Lease and hotel resort through TR, under which he and Chiang were entitled to a portion of TR's shareholding without having to pay for it. He said that MDG consented to this in return for his efforts in procuring the transfer of the Project to TR, which was to be controlled by MDG. Lim said that when his shareholding in TR was increased from 30% to 40% after MDG decided to reduce its investment in TR from $7m to $6m, he agreed to inject $1m into TR for the additional 10%. He added that it was subsequently agreed that he need not pay the $1m after Seeto had repeatedly failed to fulfil his promises, including his promise to raise enough money to pay the Judgment Sum in August 2005. At that juncture, Lim was minded to exclude MDG from the plan to acquire the Project. Lim explained that Seeto agreed that in return for MDG's continued participation in the acquisition of the Project, he need not pay $1m for the additional 10% of TR's shareholding provided he and Chiang "placed [Café] in sufficient funds to make the payment" for the Judgment Sum. This evidence was not unbelievable and MDG certainly had a case to answer in regard to this matter.

114 MDG countered Lim's case that he was entitled to free shares in TR with positive averments that at all material times, it was envisaged that any shareholding in TR would be fully paid for by the acquiring party and that the Instruments of Transfer for 1,927,999 TR shares had been handed over by Seeto to Chiang in February 2007 on the "common understanding of the parties that these shares would have to be fully paid for" by Chiang and Café, as Lim's nominees. However, despite making these assertions which it had to prove, MDG called no witnesses to prove the alleged "common understanding" or to contradict Lim's evidence that he need not pay for his TR shares because of his other contributions to the plan for TR to acquire the Project. Instead, it chose to submit that it had no case to answer.

115 Lim relied on a letter from Seeto to Rodney on 4 August 2005 to corroborate his evidence that he initially had to pay only $1m and not $4m for 40% of TR's shareholding. In that letter, Seeto stated as follows:

> [1] MDG will proceed to hold 60% stake in the acquiring vehicle Treasure Resort Pte Ltd and the balance 40% of which are held by proxy of Mr Lim, current owner of Sijori Resort Sentosa.

[2] From the earlier agreement between MDG and Mr Lim, this transaction shall be capped at SGD10 million. Of *which MDG shall inject SGD6 million and another SGD1 million by Mr Lim* to clear the outstanding matters with Sentosa Development Corporation pertaining the leasing issue and to clear the lien with Bank of China.

[emphasis added]

116 Lim contended that Seeto's letter of 4 August 2005 demolished MDG's case that he and Chiang had to pay anything more than $1m for their 40% of TR's shareholding. MDG's response to this was that Seeto's letter of 4 August 2005 contained an "obvious" error as the amount that Lim had to inject into TR should have been stated as $4m and not $1m. However, there was no subsequent letter from Seeto to correct this alleged error and MDG did not call Seeto to testify on the alleged "obvious" error. The court cannot find that there had been an error merely on the basis of MDG's counsel's submission that this was the case.

117 MDG submitted that Lim had to pay for his TR shares because TR could not issue its shares to Lim for free. It contended that as it had agreed to pay $7m for 70% of TR's shareholding, it followed that Lim had to pay $3m for the 30% of TR's shareholding originally allotted to him. It asserted that this was why Lim had to pay $1m when his and Chiang's stake in TR was subsequently increased by 10% to 40%. Lim was thus repeatedly questioned on who had to pay for the TR shares claimed by him. MDG submitted that Lim's assertion that MDG had to pay for his shares made no sense because that company was short of cash at the material time and had to reduce its shareholding in TR from 70% to 60% so that its contribution to TR could be correspondingly reduced to $6m. Furthermore, MDG had to borrow money from Café to pay the Judgment Sum to SDC.

118 In his closing submissions, Lim explained that MDG had erroneously assumed that if TR issued MDG seven million shares for $7m, *another* three million TR shares had to be issued to Chiang and Lim for free. He asserted that under his arrangement with Seeto, if MDG paid $7m for seven million TR shares, TR's capital would remain at $7m. MDG would keep 70% of the $7m worth of TR shares while he was entitled to the remaining 30%. If MDG was subsequently issued more TR shares, the same formula would apply until TR's paid-up capital reached the agreed cap of $10m. Furthermore, if MDG sold or transferred some of its shares to other parties, its obligation to hold on trust the agreed percentage of TR's entire shareholding remained. Viewed in this light, there was no question of TR issuing free shares to Lim because what he claimed from MDG was a percentage of TR's issued *and fully paid-up* shares held in MDG's name.

119 In its closing submissions, MDG also sought to rely on cl 3.2 of the Shareholders' Agreement ("cl 3.2") to support its argument that the TR shares claimed by Lim had to be paid for. Clause 3.2 reads as follows:

As at the date of this Agreement, the parties intend that the issued and paid-up share capital of the Company shall comprise of 10,000,000 ordinary shares of S$10,000,000. Within six (6) months after the execution of this Agreement, the Shareholders and *the Company shall procure the subscription by CHIANG for ordinary shares* of the Company *representing 24% of* the issued and paid up *capital of the Company* of S$10,000,000 and the allotment and issue of shares to CHIANG for *a cash consideration of S$2,500,000.* Thereafter upon the said subscription by CHIANG, the shares shall be held by the Shareholders in the following proportions (expressed as a percentage of such issued and paid up share capital) so long as the issued and paid-up capital of the Company remains at S$10,000,000:-

Shareholder	Percentage (%)

CHIANG	25
[MDG]	74
TAN	1

[emphasis added]

120 MDG contended that as cl 3.2 provided that Chiang had to pay $2,500,000 for TR shares, it followed that it was never intended that Lim would get any TR shares free of charge. However, there is nothing in the Shareholders' Agreement that suggested that Lim had to pay for his shareholding in TR. Clause 3.2 had nothing to do with Lim's TR shares as it was concerned with *additional* TR shares to be issued to Chiang if he decided to invest further in TR by injecting $2,500,000 into TR within six months after the Shareholders' Agreement. In fact, the recitals in both the First Declaration of Trust and the Second Declaration of Trust, which were executed by MDG *after* the signing of the Shareholders' Agreement, made it quite clear that the 74% of TR shares acknowledged as belonging to MDG under the Shareholders' Agreement included the 40% of TR shares held on trust by MDG for Lim and Chiang. Thus, the $2,500,000 to be injected by Chiang under cl 3.2 had to be for the purchase of shares other than those already held on trust for Lim and Chiang by the time the Shareholders' Agreement was signed.

121 In his closing submissions, Chiang agreed with Lim's position and his position was stated as follows (at paras 33–35):

> 33 [I]t was agreed that the Registered Shareholders and [TR] would "procure" [Chiang's] subscription for 2,400,000 ordinary shares in [TR] for a cash consideration of $2,500,000. Upon such subscription, [Chiang] would hold 25% of the increased share capital of S$10 million.
>
> 34 The Shareholders' Agreement is completely silent on the issue of beneficial interest(s) in the shares of [TR]. Contrary to [MDG's] contention, there is nothing in clause 3.2 (or anywhere else in the Shareholders' Agreement for that matter) which indicates that [Lim's] interest in [TR] was part of the subject matter of the Shareholders' Agreement.
>
> 35 The 25% that was attributed to [Chiang] in the Shareholders' Agreement is clearly **not** a reference to [Lim's] interest in [TR]; instead, it comprised additional shares contemplated to be subscribed for by [Chiang].
>
> [emphasis in original].

122 Admittedly, Chiang did not testify but paras 33–35 of his closing submissions merely concerned the interpretation of the wording of the Shareholders' Agreement. In any case, if MDG wanted to prove that the 25% referred to in cl 3.2 did not concern additional shares that Chiang would acquire for injecting a further $2.5m into TR, it should have called Chiang and Seeto to testify on the matter, and especially so since both of them had been listed by MDG as witnesses that they intended to call. There being no credible evidence to contradict Lim's not unbelievable evidence on this matter, I am in no position to find that the Shareholders' Agreement, read together with the First Declaration of Trust and the Second Declaration of Trust, imposed an obligation on Lim to pay for his 25% of TR's shareholding.

123 MDG also sought to rely on a letter from Lim & Lim LLC ("Lim & Lim"), the former solicitors of

Chiang and Café, who wrote to Café, Chiang and Lim on 1 August 2007 as follows:

> If the action is successful, you will be able to procure 40% of the issued share capital of TR. However we anticipate to be able to achieve this, you will need to pay a sum in excess of $5 million for the shares.

124 Lim pointed out that Lim & Lim did not represent him at the material time. He further pointed out that whatever Lim & Lim may have stated, the fact remains that when the first pleadings were filed by that law firm, neither Chiang nor Café took the position that the TR shares claimed by them had to be paid for. Lim & Lim have since clarified in their reply to an enquiry from Café's solicitors that the $5m was mentioned in its letter of 1 August 2007 without having conducted a detailed analysis of the documents and without having taken full instructions from Chiang.

125 MDG also claimed that Lim had taken the position that he had to pay for the shares because he had agreed that the payment of the Judgment Sum of $1,128,128.65 was the consideration for his and Chiang's 40% stake in TR. This is wrong. In para 16.1 of the SOC, Lim pleaded:

> No further payments by [Chiang] and/or [Lim] would be required for the 40% share in [TR] provided that [Chiang] and/or [Lim] placed [Café] in sufficient funds to make the payments pleaded in paragraph 13 above.

126 Lim asserted that all that para 16.1 of the SOC stated was that he and Chiang had assumed the obligation to *place* sufficient funds in Café to pay the Judgment Sum. This did not mean that they had to pay for the Judgment Sum. Instead, the money was placed in Café's account so that Café could extend a loan to MDG to pay the Judgment Sum to SDC. This sum had to be repaid to Café.

127 MDG also sought to rely on Chiang's affidavit to show that the 25% of TR shares claimed by Lim had to be paid for. However, as MDG did not call Chiang to testify and refused to reveal the terms of its settlement with Chiang, it was in no position to rely on Chiang's affidavit to prove its case that the TR shares claimed by Lim had to be paid for.

128 Lim's evidence that he did not have to pay for his 25% shareholding in TR, which was not effectively challenged, was not inherently incredible or out of all common sense or reason. It is pertinent to note that MDG, TR, Seeto and Rodney had never written to Lim to ask for payment for the TR shares claimed by him. I accept that Lim has established a *prima facie* case that it was agreed between him and Seeto, on behalf of MDG, that he was only required to inject $1m for his shareholding in TR and that it was subsequently agreed that he need not pay this $1m if MDG was allowed to continue to collaborate with him and Chiang on the plan to acquire the Project. MDG, having submitted that it had no case to answer when it was patently clear that Seeto had a lot of explaining to do for his actions and contracts, must live with the consequences of its submission. It would have been much easier for the court to hear Seeto's evidence than to make findings based on a supposed error in his letter of 4 August 2005 to Rodney and on arithmetical calculations which could be construed in more ways than one. As such, I find that Lim is not obliged to pay for the TR shares claimed by him.

Lim's claim against Chiang

129 Lim insisted that Chiang had no authority to discharge or compromise his right to TR shares held on trust for him by MDG. As such, he asserted that Chiang was liable for any loss suffered by him as a result of the latter's arrangements with MDG. Chiang submitted that he had no case to answer and called no witnesses. As Lim's evidence that Chiang had no authority to prejudice his claim against

MDG was not effectively challenged at the trial, I find that Lim did not authorise Chiang to settle his claim against MDG. All the same, as Lim's claim against Chiang is wholly contingent on a finding by the court that the TR shares beneficially owned by him were no longer his because of Chiang's actions, his claim against Chiang need not be further considered as he succeeded in his action against MDG.

Café's claims against MDG

130 Apart from claiming 25% of TR's shareholding from MDG as Lim's nominee, Café also claimed from MDG sums of money pursuant to its arrangements with Seeto.

131 In so far as the TR shares were concerned, Café sought the following remedies against MDG and TR:

(i) a declaration that MDG holds 25% of the paid-up share capital of TR on a constructive trust for Café;

(ii) in the alternative, an order against TR and/or its directors to have the Instruments of Transfer registered or to rectify TR's register of members to restore Café's name as the registered owner of 25% of the issued shareholdings of TR; and

(iii) an order that MDG and/or its director procure the registration of the Instruments of Transfer.

Café's claim for TR shares

132 As I have found that Lim is entitled to TR shares on the basis of an express trust in his favour, there is no need to consider Café's claim for TR shares, which was launched on the basis that it was Lim's nominee for the said shares. In view of this, only Café's other claims against MDG will be considered below.

Café's loan to MDG

133 It may be recalled that MDG borrowed money from Café to pay part of the Judgment Sum to SDC. While a major part of the Loan has been repaid, there was a dispute on the outstanding amount. Café claimed that the balance of the Loan that remains unpaid amounts to $362,100.20. However, MDG asserted that the outstanding sum is only $176,095.20.

134 What was disputed was whether three of MDG's cheques for a total of $186,000 issued in favour of Chiang reduced the Loan. The first cheque for $36,000 was issued on 13 December 2005, the second for $50,000 was issued on 23 December 2005 and the third cheque for $100,000 was issued on 3 February 2007. Café suggested that these three cheques were paid to Chiang personally for some other matters and did not go towards reducing the Loan to MDG. However, MDG pointed out that at the material time, Café was Chiang's vehicle or nominee and three cash payments that it made on 25 August 2005 to Chiang directly had been accepted by Café as part payments of the Loan. MDG argued that if credit had been given for its cash payments to Chiang, there was no reason for cheques that it issued to Chiang to be treated differently. When cross-examined, Mdm Soh ultimately admitted that the disputed sum of $186,000 was paid to Chiang while he was acting as Café's director, nominee, trustee, agent and proxy. She further agreed that if MDG had not dishonestly issued the three cheques in question to Chiang, whether or not Chiang put the money into Café's coffers was a matter between him and Café. As there was no evidence that MDG had acted dishonestly in issuing the said three cheques to Chiang for $186,000, this sum must be taken into

account when the outstanding loan amount is computed. I order MDG to pay the outstanding balance of the Loan to Café.

The compensation of $100,000

135 Café also claimed $100,000 from MDG on the basis that Seeto had agreed in August 2005 to pay this amount if MDG failed to repay the Loan given to it for settling Sijori's judgment debt by 15 September 2005. This was recorded in cl 4 of an undated agreement ("the Undated Agreement"), which provides as follows:

> In the event that MDG is unable to make good the payment of $540,634.91 on the agreed date, MDG shall pay an amount of $100,000 as compensation to Café Aquarium Pte Ltd which is to be deducted from the raised amount by MDG.

136 MDG did not repay the Loan on time. All the same, it asserted that Café was not entitled to the $100,000 in question for two reasons. First, the Undated Agreement never came into effect as it was not performed. Secondly, MDG contended that cl 4 is a penalty clause and not a genuine pre-estimate of Café's loss for breach of contract.

137 A penalty clause is not enforceable (see *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 and *CLAAS Medical Centre Pte Ltd v Ng Boon Ching* [2010] 2 SLR 386). Surprisingly, Café's director, Mdm Soh, likened the $100,000 "compensation" under cl 4 to a fine or penalty. The relevant part of the proceedings is as follows:

> Q: [I]'ve asked my people to recompute the interest, and they tell me it is 198 per cent per annum. Do you agree?
>
> A: The document pertains to a compensation, and there's no percentage. It's like when you --- when you park a car, you pay a ... 50 cents coupon. *If you don't pay for that 50 cents, you get a $30, $50 or $70 fine. So there's no interest to talk about*....
>
> ....
>
> Q: Thank you very much. *And another word for "fine" is "penalty"; correct*?
>
> ....
>
> A: *In English, yes*.
>
> [emphasis added]

138 Apart from Mdm Soh's concession that cl 4 is a penalty clause, there was no evidence on what loss Café would have suffered if the loan was not fully repaid by 15 September 2005. I thus find that cl 4 cannot be relied on by Café against MDG.

Costs

139 Lim is entitled to only two-thirds of the costs with respect to his claim against MDG because his claim to TR shares pursuant to a JVA, which occupied a large part of the proceedings, was not established although he succeeded in his claim for TR shares on the basis that there was a trust in his favour.

140 Café is entitled to half its costs with respect to its claims against MDG.

141 No order for costs is made in relation to Lim's claim against Chiang.