Tropical Associated Co Pte Ltd v Michael Wijaya Goutama and Another [2000] SGHC 135

Case Number : Suit 1315/1998

Decision Date : 10 July 2000

Tribunal/Court : High Court

Coram : Lee Seiu Kin JC

Counsel Name(s) : Hee Theng Fong & Tay Wee Chong (Hee Theng Fong & Co) for the plaintiffs; Roland Tong (Wong Tan & Molly Lim) for the first defendant; Loy Wee Sum (Kwek Loy & Lee) for the second defendant

Parties : Tropical Associated Co Pte Ltd — Michael Wijaya Goutama; Christlinda Goutama

JUDGMENT:

Grounds of Decision

1 The Plaintiffs are a company incorporated in Singapore and part of the Kea Holdings Pte Ltd ("KHPL") group of companies. The first and second Defendants are Indonesian nationals. The first Defendant is the younger brother of the second Defendant.

2 In this action the Plaintiffs sought to recover the following:

> (a) US$300,000 from the first Defendant pursuant to a loan agreement between the Plaintiffs and the first Defendant, alternatively as damages for misrepresentation pursuant to section 2 of the Misrepresentation Act; and
>
> (b) $420,000 from the second Defendant pursuant to a contract by way of deed ("the Deed") entered into by the second Defendant and the Plaintiffs, alternatively as damages for misrepresentation pursuant to section 2 of the Misrepresentation Act.

3 The first Defendant denied that he had entered into a loan agreement with the Plaintiffs and averred that the loan was made to Universal Environmental Technologies Pte Ltd ("UET"), a company incorporated in Singapore and owned by KHPL. He also denied making any misrepresentation as alleged.

4 The second Defendant denied that she was liable to the Plaintiffs for the sum of $420,000. She averred that by the Plaintiffs failure to perform the terms of the Deed, there was no liability on her part for that sum. Alternatively, she claimed that she had entered into the Deed as a result of misrepresentations of material fact made by the Plaintiffs representatives and sought to rescind it. However she counterclaimed against the Plaintiffs for failure to perform the terms of the Deed, and claimed the sum of $155,000 in damages.

5 At the end of the trial and after hearing submissions by counsel for the parties I dismissed the Plaintiffs claims against the first and second Defendants and the second Defendants counterclaim against the Plaintiffs. I ordered the Plaintiffs to pay the full costs of the first Defendant on the standard basis and to pay the second Defendant 85% of her costs on the standard basis in respect of both the claim and counterclaim. The Plaintiffs have filed a notice of appeal against my decision on their claims and on costs and I now give the grounds of my decision on those matters.

A: Claim against the first Defendant

6 KHPL controls some 40 companies, either by way of direct ownership or indirectly, through the members of the Kea family.

The principal actor from KHPL in this saga is Edmund Kea Meng Kwang ("Kea") who is the vice-chairman and a director of KHPL. The other actors are his eldest brother, Kea Meng Cheng, the chairman of KHPL and Goh Siew Hwa ("Goh") the Group Accountant.

7 Keas late father built up the family business in Pekanbaru on the Indonesian island of Sumatra. It related mainly to forest concessions and timber. The business spread to Singapore where KHPL is now based. Kea travelled often to Pekanbaru on business and it was on one of these trips that he met the second Defendant who lived there and frequently travelled to Singapore. Sometime in 1994 the second Defendant introduced the first Defendant to Edmund Kea when they encountered one another at Changi Airport. In the course of their conversation the first Defendant informed Kea that he had a PhD in geo-environmental engineering and specialised in oil tank cleaning and environmental assessment. Although this was a new area to him, Kea expressed an interest in investing in this area and invited the first Defendant to make a presentation to the directors of KHPL. On 21 November 1994 Kea submitted a memorandum to the board of KHPL proposing to set up UET as a joint venture between KHPL and the first and second Defendants. UET which would be involved in waste treatment and environmental technology. KHPL would hold 51% of the shares of UET, the first Defendant, 39% and the second Defendant, 10%. The board approved this venture and UET was incorporated with 4 shares of $1 each, with the first Defendant, the second Defendant, Kea and Gan Boon Hock ("Gan"), a nominee of KHPL, subscribing to 1 share each. The four of them were also appointed directors of UET. Kea was elected chairman and the first Defendant appointed managing director.

8 The first Defendant set up his office at the premises of KHPL with facilities and initial capital provided through the parent company. The details of the progress of UET over the following 6 months are not directly relevant to the claims in this action. Suffice it to say that the first Defendant was not very successful in the business. Indeed, he did not manage to secure a single contract and UET could not derive any revenue during this period. As far as KHPL was concerned, UET was draining money away and the prospect of any return on their investment was diminishing. Kea said that at this stage he started to doubt the abilities of the first Defendant.

9 The Plaintiffs claim relates to a material called "Nuwood", which is a composite substance made from wood fibre bonded by recycled plastic and is claimed to possess superior strength and characteristics to both wood and plastics. The parties have different versions of the events leading to the problems between them. I first set out the Plaintiffs side of the story.

Plaintiffs version of events

10 This is what Kea related in his affidavit evidence-in-chief. Sometime in May 1995 the first Defendant sent to Kea some technical information on Nuwood. A short while after that, the first Defendant approached Kea and proposed that UET should purchase the licensing rights from a Canadian company to manufacture Nuwood. However he told Kea that the decision must be made that very day, otherwise the opportunity to purchase it would be lost. The first Defendant told Kea that it would cost US$2.5 million in total to purchase the licence, with an initial payment of US$500,000. Kea said that he was not inclined to make a decision involving such a large sum of money within such a short time. He would need to study it carefully and he would rather lose the opportunity than to make a hasty decision. That being the case, Kea told the first Defendant that UET should not be involved in Nuwood. Kea said that the first Defendant was visibly upset at his decision.

11 Kea left Singapore immediately after that meeting and returned about a week later. The first Defendant met him and raised the issue again. But this time the first Defendant said that as Kea did not wish to get involved in Nuwood he had, in partnership with others, set up a Malaysian company called Performance Point Sdn Bhd ("PP") to pursue the opportunity. The first Defendant told Kea that he had paid a commitment fee of US$30,000 which he borrowed from the second Defendant. However PP was required to pay US$300,000 immediately by way of an irrevocable letter of credit. The first Defendant said that PP was a new company with no bank facilities and requested Kea to provide a letter of credit ("LC") through the KHPL group. The first Defendant said that he would pay the bank charges. Kea replied that he was not so much concerned with the bank charges as with the security that PP could provide to KHPL for procuring the LC. The first Defendant replied that there was no risk to KHPL because one Lawrence Siaw ("Siaw"), a director of a Malaysian-listed company, had agreed to purchase the licensing rights

from PP. The first Defendant said that the agreement would be signed shortly and he would receive payment within 2 weeks whereupon he would be in a position to repay KHPL before the beneficiary of the LC received payment under it. Furthermore, payment under the LC would be made only 60 days after receipt of a confirmation certificate signed by the first Defendant. By the end of that period, PP would definitely have received the money from Siaw. The first Defendant further said that he would not sign the confirmation certificate until he received the money from Siaw.

12 Kea said that based on these personal assurances from the first Defendant he did not mind helping but only if KHPLs interest was protected. The first Defendant said that he needed the LC urgently. As Kea had to rush off to Indonesia, he told the first Defendant to let him have the proposal in writing for him to consider. Later that day, the first Defendant sent him a note with the details of the LC and asked him to approve it. Kea signed it and prepared a memorandum to the first Defendant asking him to follow up on the matter with Goh and Paul Tan, KHPLs Business Development Manager. He then set off for the airport. On his way there he telephoned Goh to tell him of the first Defendant's memorandum and that he wanted Goh to see how KPHLs interests could be protected. These events took place on 26 May 1995 which is the date on the first Defendant's note to Kea.

13 Keas narrative in his affidavit continues by relating that he returned to Singapore towards the end of June 1995. Goh met him and informed him that the LC requested by the first Defendant had been issued through the Plaintiffs. Goh apologised for not consulting him before issuing the LC and not giving him "due respect". Goh told him that while he was away, Paul Tan and the first Defendant had gone to Goh's office saying that the LC was urgently required. It could not await Kea's return to Singapore. Goh had told them that Kea had given him instructions to study the matter and he was reluctant to issue the LC. Paul Tan and the first Defendant then brought Goh to see KHPL chairman Kea Meng Cheng. Goh informed him that after a lengthy discussion, Kea Meng Cheng approved the issue of the LC. What follows next is described in paragraph 21 of Keas affidavit:

> 21. Immediately I called Mr Kea Meng Cheng from my office. I asked Mr Kea Meng Cheng why he had approved the opening of the letter of credit when I had asked Mr Goh Siew Hwa to study it. I told Mr Kea Meng Cheng that I have now received through my secretary a set of documents in duplicate for my signature from the First Defendant. The document is entitled Performance Point Sdn Bhd Shareholders Agreement and stated that UET would have 15% in Performance Point Sdn Bhd. I presumed that this Performance Point Sdn Bhd was the Malaysian company mentioned to me by the First Defendant as PP earlier. I told Mr Kea Meng Cheng that it was never agreed that UET would obtain 15% shareholding in Performance Point Sdn Bhd and I was never informed of any such arrangement. I told Mr Kea Meng Cheng angrily that I would not sign the document. I added that if I had approved the use of the letter of credit facility for the First Defendant, I would have signed the document now before me. It was ridiculous. I said that if I had agreed to the proposal of UET obtaining 15% shareholding in Performance Point Sdn Bhd, it meant that Kea Holdings Pte Ltd was going to hold only 7.5% in PP since we intended to have 51% in UET. In my view, this arrangement would have been very unfair to Kea Holdings Pte Ltd. I told him that from now onwards that he should not interfere in this and that I would handle it myself. I notified Mr Kea Meng Cheng that I would close down UET.

Kea did not say in his affidavit what was Kea Meng Chengs response to his outburst and to his original question as to why the latter signed the LC.

14 Kea said that he then spoke to Paul Tan who confirmed that the first Defendant was going to repay the loan as money would be received by PP shortly. In any event the sum of US$300,000 would be repaid before the letter of credit was negotiated. Paul Tan showed him an agreement dated 1 June 1995 between PP and Siaw in which the latter acquired the licensing rights to Nuwood in Malaysia for US$3 million. Kea however pointed out that the last clause of that agreement provided that Siaw could terminate the agreement at any time and obtain a refund of any payment. He told Paul Tan that he was not comfortable with the

matter and wanted to recover the US$300,000 immediately. On 27 June Kea wrote an emotional letter in Chinese to Paul Tan, who was his classmate in school, setting out his thoughts on the matter and the reason for his decision to close down UET. He subsequently instructed Paul Tan to stop all funding to UET. Paul Tan brought the first Defendant to see him. Kea told the first Defendant that he was no longer interested in the high technology business of UET and that he would not provide financial backing for it anymore. He told the first Defendant that he found the business very complex and as he did not know much in this area, he had decided not to continue with it. Kea said that the first Defendant appeared disappointed.

15 The gist of Keas version of the events is that sometime in May 1995 the first Defendant approached him to approve the involvement of UET in the Nuwood venture but he vetoed it. About a week later the first Defendant informed him that he had gone his own way by setting up PP as his vehicle. However he needed Keas help in extending to him KHPLs LC facilities as he had none at the time. He had in fact signed a sub-licence agreement with Siaw and expected to be able to repay in 2 weeks. Kea agreed to help, but only if it did not involve any risk on the part of KHPL. As he was in a hurry, he gave instructions for Goh to look into it. But he did not approve the issue of the LC at that stage. Goh was to consult him before its issue. I find that Keas version is not supported by the rest of the evidence and now proceed to set these out.

16 Firstly, Kea had said that after the first Defendant had approached him about issuing the LC, the latter sent him a note. This is what Kea said in paragraph 19 of his affidavit:

> 19. Later that day in the afternoon, I received a note from the First Defendant providing me with the details of the letter of credit and asking me to approve it. I signed on it marking the date as 26th May 1995. I was about to rush off to the airport. I was afraid that my signing of the note may be taken to mean that I have approved the issue of the letter of credit without any security to protect Kea Holdings Pte Ltd. So I immediately prepared a memorandum to the First Defendant asking the First Defendant to follow up with Mr Paul Tan and Mr Goh Siew Hwa. On my way to the airport, I called Mr Goh Siew Hwa and told him there was a memorandum to the First Defendant. I wanted Mr Goh Siew Hwa to study the First Defendants proposal in particular I wanted Mr Goh Siew Hwa to see how Kea Holdings Pte Ltds interest could be secured and protected.

The substance of the note sent by the first Defendant to Kea is as follows:

> The following is the details for US$300,000 L/C. Kindly approve it for further processing so that it can be issued by June 1, 1995.

Kea signed on the note and dated it 26 May 1995. Keas memorandum to the first Defendant states as follows:

> Dr Michael Goutama
>
> **L/C - US$300,000**
>
> Kindly follow-up with Paul Tan and Goh Siew Hwa (Group Accountant) in regards to the above L/C.
>
> Thank you
>
> (signed)
>
> Edmund Kea

The memorandum, whether by itself or together with the first Defendants note signed by Kea, does not convey any impression

at all that he had not approved the issue of the LC at that stage. In fact these 2 documents convey quite the opposite message, i.e. that he had approved it.

17 Secondly Goh, who had such a big part to play in this episode, did not quite support Keas version of events in his affidavit evidence-in-chief. He said that on 26 May 1995, Kea told him to "follow up" with a request by the first Defendant for an LC for US$300,000. Kea wanted him to see how KHPLs interests could be protected. That same day the first Defendant came with Paul Tan to see him. Goh said that they wanted him to process the LC which could not wait for Keas return. Gohs reply, according to his affidavit (at paragraph 13) was as follows:

> I told them that I had been instructed by Mr Edmund Kea to study the issue of the letter of credit and I was reluctant to accede to their request.

It should be noted that Goh did not say that Kea had told him not to issue the LC without consulting him, as Kea had claimed. Goh said that he and the first Defendant and Paul Tan then went to see Kea Meng Cheng, the KHPL chairman. At this session, the first Defendant explained the situation to Kea Meng Cheng and assured him that KHPLs interests would be protected as he would not sign the confirmation certificate to release the money until PP had received the money from Siaw. Goh said that the first Defendant then told them that Kea had approved the issue of the LC. Goh next said (at paragraph 14(e) of his affidavit):

> Having heard the First Defendant, I formed the view that Mr Edmund Kea must have approved in principle the issue of the letter of credit as he had signed on the written note prepared by the First Defendant. I remained silent.

Again, this shows that there was no explicit instruction from Kea to Goh to the effect that Goh should revert to Kea before issuing the LC.

18 Thirdly, Kea Meng Chengs evidence also does not support Keas version. He explained that he was not involved in the matter, which was under the charge of Kea. At the meeting with Goh, Paul Tan and the first Defendant, the latter explained the arrangement for KHPL to provide the LC on behalf of PP. Kea Meng Cheng said that he commented that a big sum was involved and he was concerned about the risk. The first Defendant told him that there was no risk as he would be receiving payment from the Malaysian company before payment was due under the LC. The first Defendant also mentioned that Kea had approved the LC. During cross-examination, Kea Meng Cheng said that he asked Paul Tan and Goh whether this was true. He said that one of them got up to leave the room as if to retrieve something and the other picked up a telephone to make a call. From their actions he perceived that they were indicating to him that Kea had approved the LC. Kea Meng Cheng said that he then told them that it was not necessary to do anything else and that if Kea had approved it he was prepared to sign the LC in Keas absence. Kea Meng Cheng also said that he commented at the meeting that the 15% shareholding alloted to UET was too little and that perhaps it could be 30%.

19 Fourthly Paul Tan, who was such a principal player in this event, was not called by the Plaintiffs to give evidence. It should be borne in mind that he was Keas classmate and, from the depth of emotion expressed by Kea in his letter, would appear to be a very old and dear friend. Presumably they had fallen out after this episode. Nevertheless, the fact that there was no attempt by the Plaintiffs to call him must be taken against the Plaintiffs.

20 Fifthly, the Plaintiffs had all along treated the US$300,000 drawn under the LC as a loan to UET or to PP, and not to the first Defendant, until they took up this action against the defendants. The instances of such treatment are as follows:

> (i) in all their internal records;
>
> (ii) in their accounts;
>
> (iii) in their efforts to recover the debt; and

(iv) in the recital to the Deed with the second Defendant (which will be described below).

21 Sixthly and finally, I am dissatisfied with the demeanour of 2 of the Plaintiffs principal witnesses, namely Kea and Goh. Kea tended to be evasive in the witness box and frequently did not give a direct answer to the question put to him. Although this can often be attributed to inexperience, I have observed that he looked nervous as if he was not telling the truth. He sometimes contradicted himself. For example he had stated in paragraph 35 of his affidavit that he did not read the Deed in detail before signing it and had relied on his solicitor and Goh to ensure the terms were satisfactory. In cross-examination he was asked whether he read it at all before signing it, he replied at first that he did not. He replied that he simply signed it when Goh asked him to do so as it had been prepared by a lawyer and an accountant. He also said that he did not know what its contents were. He said that Goh had only said that the property was worth $2.7 million and that he had discussed this with the second Defendant on the telephone. The following day this question was repeated and he re-confirmed the position in the following manner:

Q: Affidavit p152, Deed. You said yesterday that you did not read the deed before signing it, no one explained contents to you before signing and you did not know about its contents before signing it?

A: Yes.

Q: You signed the deed blindly?

A: Correct.

Several days later, his position changed and he maintained that he did not quite sign the Deed blindly. The proceedings went as follows:

Q: Goh Siew Hwa told you the contents of the Deed and sales and purchase agreement and that led you to think there was a difference between the two?

A: He did not tell me the contents. He only said that the Deed was about Christlinda Goutamas promise to pay. He said that the sales and purchase agreement was for the property. He did not explain the contents to me. I said I would sign the Deed, he was to hold on to the Deed, but I would let him know about the sales and purchase agreement on Monday.

Q: Yesterday you said that Goh Siew Hwa told you "this document, Christlinda Goutama already signed, so they are for you to sign. I asked him what they were, he said this concerned conversations you had with Christlinda Goutama on 2.5.96. This concerned property and loan of US$300,000". You now say that Goh Siew Hwa told you that the Deed was about Christlinda Goutamas promise to pay. The sales and purchase agreement was about your purchase of the property. Is it your evidence now that Goh Siew Hwa went further than simply telling you that the documents were about the conversations you had with Christlinda Goutama on 2.5.96.

A: No. Yesterday I was asked whether Goh Siew Hwa had told me about the contents of the Deed. I was not asked whether I saw the sales and purchase agreement. I just answered whatever question asked of me. What I said yesterday still stands. When I asked Goh Siew Hwa what this Deed was about, he explained that it was about the debt. This I had said just now.

Q: So Goh Siew Hwa explained to you that the Deed was about Christlinda Goutama settling the debt?

A: Yes, because I asked him what the Deed was about and that was the explanation given by him.

Q: On Tuesday, Mr Tong asked you "you say you did not know the contents of the Deed, no one explained to you and you did not read the Deed". You said "Yes"?

A: I said he did not explain the contents line by line and I didnt read it, line by line. It is still correct, not wrong.

It was clear from Keas original answers that he had meant to convey the impression that he had signed blindly. Yet when counsel explored the logical consequences of his doing so, he shifted his position. I should add that Keas evidence in this respect is contradicted by Goh who said that he had explained the Deed to Kea, after which Kea took the Deed and read through it himself before signing it.

22 There are also other instances of Keas change of evidence. He had given the impression in his affidavit that on Friday 26 May 1995, the day the first Defendant approached him for approval of the LC, he was to leave for overseas. Indeed he said in paragraph 19 that he was *"about to rush off to the airport"* that afternoon. However when called upon to check his passport, he discovered that he did not leave Singapore until Monday 29 May. He explained that he could recall that he did indeed rush to the airport that Friday, to either pick up someone from overseas or see him off. However this still posed a problem for him because he had to explain the need to leave matters in Gohs hands when he was not leaving the country on the day he signed the first Defendants note asking him to approve the LC. Furthermore, in his affidavit, Kea gave the impression that he was overseas until sometime towards the end of June 1995. However it turned out that he was gone only from 29 May to 1 June. The following were the trips he made from 29 May until the end of June 1995 with the period and destination in parentheses:

(i) 29 May - 1 June (4 days / Pekanbaru)

(ii) 4 June - 10 June (7 days / China)

(iii) 19 June - 21 June (3 days / Pekanbaru)

(iv) 25 June - 26 June (2 days / Jakarta)

(v) 28 June - 5 July (8 days / Pekanbaru)

This shows that he was in Singapore for 12 working days in June, counting Saturdays, or 9 working days not counting Saturdays. It is remarkable that Goh would have waited until the end of June to see him regarding the approval of the LC by Kea Meng Cheng. In the entire week of 12 to 17 June he was in Singapore. I do not see any reason for Goh not to see Kea during that period.

23 The Plaintiffs version is further muddied by the fact that Kea himself approved an application to change certain particulars of the LC issued by the bank. This application is dated 14 June 1995 and is consistent with the fact that Kea was in Singapore for that entire week. This amendment application was prepared pursuant to a request faxed to Goh by the first Defendant on 14 June. Kea explained this by saying that he was busy at the time and had signed the document without realising what it was. What he did not explain was why Goh had not seen him during this period when he was in Singapore for the entire week to brief him about the issuance of the LC after the meeting with Kea Meng Cheng. On 22 June 1995 the bank notified the Plaintiffs that the LC had been negotiated and that the sum would become payable when the 60-day period expired on 10 August. This was the more likely reason why Goh did not see him about the LC until towards the end of June. I find that at best, Kea was not

earnest in telling the whole unmitigated truth.

24 An additional factor is this. Kea said that the first Defendant had told him on 26 May that there would be no risk to KHPL because he expected to be paid by Siaw in 2 weeks' time. When he received the first Defendant's request to amend the LC on 14 June, it was well past the 14 days. Instead of signing the application form, Kea should have asked what happened to the payment from Siaw. Goh was the person who prepared the application form and he too would have thought of this had there in fact been such an assurance by the first Defendant.

25 As for Goh, I found him to be a most interesting witness. His voice broke on several occasions when he was asked an awkward question. For example, Goh was asked about his practice in relation to another LC that the Plaintiffs had issued to the second Defendant for the import of motorbikes to Indonesia. The evidence went as follows:

> Q : Did you tell your staff what this LC was opened for?
>
> A : No. By reading the LC they would know.
>
> Q : Affidavit pages 55-57. Is that the LC in question?
>
> A : Yes.
>
> Q : Does LC say motorcycle anywhere?
>
> A : Agree that there is no mention of motorcycle. But what I meant was that the accounts staff who wrote motorcycle must have been told by the Bill staff who established the LC. Since this is one of special LCs that plaintiff dont normally issue, I would have explained to them the purpose of the LC.
>
> Q : You are now withdrawing your earlier statement that you did not tell your staff what LC was for?
>
> A : What I meant is that normally, they would know from reading the LCs what they were for. Agree that in this case, I would have told them.

The pitch of Gohs voice rose perceptibly when giving the last answer. He was clearly nervous when it was put to him that he was changing his position.

26 Goh was later questioned about the 14 June application to amend the LC issued on behalf of PP. The questions and answers went as follows:

> Q : Affidavit paragraph 19. Who prepared the application form for the amendment see 1DBD 21?
>
> A : Ivy Lim.
>
> Q : Did you give instructions to your Accounts Dept for this amendment to be prepared?
>
> A : No. I gave instructions to Bills Section Head, Ivy Lim.
>
> Q : Signature at bottom is Edmund Keas?
>
> A : Yes.

Q : Who sent it to him to sign?

A : It was sent for his signature as part of many other documents and marked as urgent. It is a standard procedure of company that we separate documents that need urgent signature from the rest.

Q : [Repeat question].

A : I dont know who sent. There is this internal despatch arrangement on a daily basis.

His voice changed when answering the last question which he had made one attempt to avoid answering. This could indicate that there was something about the amendment application that he was hiding.

27 Yet another instance was when he was subsequently questioned on the accounting treatment given to the LC transaction:

Q : Line 5. What do you mean by "purely out of convenience"?

A : At that time, it was felt that this was only a temporary arrangement and money would be received in 2 weeks. As regards 1st defendant, Kea Holdings only had dealings with him through UET. We didnt know who PP was and we only dealt with him. So I decided to record this as a UET transaction. When we squared off at the end of 2 weeks, there would be no more balances left in the account.

Q : When you say "squared off" the debit and credit entries, does it mean that you would cancel the transactions as if it never took place, or would it appear in the books?

A : It would still appear in the books but nothing would be outstanding.

Q : Are you saying that these transactions should have been recorded as PP owing plaintiffs US$300,000 instead?

A : I would have recorded it as 1st defendant, because he was the one who came and asked for the LC. He said he represented PP, we didnt know who PP was. We looked to him for payment.

Q : It was more convenient for you to place a debit entry against UET as opposed to one against 1st defendant?

A : No. But it never crossed my mind at the time that there would be this trouble today.

His voice rose in pitch when he gave the last answer, possibly indicating that he did not have the first Defendant in mind at the time as the party obliged to the Plaintiffs in relation to the US$300,000.

28 I do not discount the possibility that Goh could simply be nervous when put in a spot. However he was also evasive on those occasions. There were also other instances when I found his answers to be rather evasive. On 2 occasions he even altered his position. The first instance is in relation to a meeting between him, Paul Tan and the first Defendant. He at first gave the impression that either he or Paul Tan had asked the first Defendant to get payment from PP. However when questioned further

he said that he could not recall whether such a request was made. The second instance relates to Keas instruction to him to revert to him after he had studied the LC and found a way to protect KHPLs interests. At first he was unable to recall whether Kea had given him this instruction. Then when he was told that this was what Kea said, his evidence changed. Extracts from the relevant parts of the Notes of Evidence are reproduced below:

> Q : You said that Edmund Kea said that you should follow up with 1st defendants request. What did you understand him to mean by "follow up"?
>
> A : That 1st defendant had requested K H Group to help to issue an LC and I was to study how Kea Holdings interest could be protected.
>
> Q : Did Edmund Kea say to you that he had approved in principle the issuance of the LC?
>
> A : I cannot remember exactly what he said but my impression from my conversation with him was that he had approved it, subject to K H Groups interest being protected in the LC.
>
> Q : Did Edmund Kea tell you in the phone conversation to get back to him after you had studied how K H Groups interests could be protected?
>
> A : Cannot remember.
>
> Q : Did Edmund Kea tell you at all to get back to him after you had studied 1st defendants request?
>
> A : Cannot remember.
>
> Q : Edmund Kea gave evidence that he made it clear to you that you were to revert to him for his decision. Did that come across clearly in the phone conversation?
>
> A : Yes.
>
> Q : Did Edmund Kea make it clear to you that you were to revert to him for his decision?
>
> A : Yes.
>
> Q : What did you understand by his instruction to revert for his decision?
>
> A : I understood it to be to get back to him to tell him how Kea Holdings interests could be protected.
>
> Q : Did you understand his instructions to mean that he would have the final say on the matter, i.e., whether the terms are acceptable to Kea Holdings?
>
> A : Yes.

29 I should add that in his Affidavit Evidence-in-Chief, Goh was not so unequivocal about Keas instructions. In paragraph 14 he described in detail the meeting with Kea Meng Cheng. At sub-paragraph (e), he said as follows:

(e) The First Defendant informed that Mr Edmund Kea had approved the issue of the letter of credit. Having heard the First Defendant, I formed the view that Mr Edmund Kea must have approved in principle the issue of the letter of credit as he had signed on the written note prepared by the First Defendant. I remained silent.

30 Throughout his testimony in the witness box, Goh appeared very uncomfortable. In my view one reason for this was that he was put in an invidious position because of the accounting treatment he had given to the LC amount, which is more consistent with the first Defendants case than the Plaintiffs. I concluded that he was torn between his duty to his employer to salvage their case and his duty to tell the truth in court.

First Defendants version of events

31 The first Defendants version of the Nuwood affair is as follows. Sometime in April 1995 he learned about the product from one Suwanda, who worked for the developer of Nuwood, SRP Industries Ltd ("SRP"), a Canadian corporation. He raised the subject with Kea with the view of getting KHPL to invest in it using UET as the vehicle. The first Defendant said that Kea liked the product and asked him to look into it further. Thereafter he and Kea met with some of their Japanese associates and asked them for their opinion of the potential of Nuwood and they gave a positive response. The first Defendant contacted SRP and conducted negotiations with SRP and their licensees, MNC International Inc. ("MNC"), a Canadian company. After negotiations with them had begun in earnest, the first Defendant asked Kea to confirm that he would invest in Nuwood. However Kea appeared to have changed his mind, saying that it was too early to take this step and he did not want UET to be involved any further. The first Defendant said that he tried to persuade Kea to change his mind but to no avail. Finally he told Kea that he would be going ahead with the project with one Richard Lee ("Lee"), a Malaysian contact. Kea said that he had no objection to this, adding that perhaps in the future UET could participate.

32 The first Defendant said that he and Lee then went about setting up the Malaysian company, PP, with the intention of manufacturing Nuwood products in Malaysia where costs were lower. He said that sometime in May 1995 PP secured the contract from MNC to hold the exclusive licence to manufacture Nuwood in Malaysia. Concurrently, PP secured a contract with Siaw to assign this right to his company. Around this time the first Defendant asked Lee whether they should include UET in the Nuwood project. The first Defendant felt obliged to Kea for providing him the opportunity in UET. Furthermore, Kea would be an additional source of funds for their venture. Lee agreed to this.

33 When the first Defendant told Kea about the agreement between PP and MNC, and the impending one with Siaw, Kea was excited about it and said the UET should participate. He asked what UET could do in PP. The first Defendant discussed this with Lee and they agreed that UET could have a 10% share in PP in return for providing the financing needed to make payments to SRP. The next payment due under the agreement was US$300,000. Sometime in end May 1995, the first Defendant told Kea about the proposal to let UET have 10% of the shares in PP. Kea said that it was too small and asked the first Defendant to have another word with Lee. Kea undertook to provide whatever funds and financing PP needed as well as access to his marketing contacts. Kea said that he would arrange to finance the next payment of US$300,000. When the first Defendant spoke to Lee and informed him that Kea wanted 15% and agreed to finance the next payment, Lee agreed. The first Defendant said that he recalled asking Kea whether the shares would be held by Kea or UET. Kea replied that since the first Defendant was the person in charge and he was in UET, the 15% shares should be held by UET. The first Defendant prepared the memorandum of 26 May 1995 and Kea signed it. Kea told him that once PP received payment from Siaw, they could repay UET.

34 After the meeting with Kea, Goh called him and said that he was instructed by Kea to arrange for the LC. In his affidavit evidence-in-chief, the first Defendant did not mention the meeting with Kea Meng Cheng. He was not asked about this in cross-examination, which is not surprising in view of the fact that Kea Meng Chengs evidence supports the first Defendants version that Kea had approved the issuance of the LC before he left Singapore. On 5 June 1995 the first Defendant prepared a summary of the set-up of PP and business plan and gave a copy to Kea. When the LC was eventually issued the first Defendant noted

that it was in the name of the Plaintiffs. He assumed that Kea had merely used the Plaintiffs as the vehicle for this LC which was done on behalf of UET.

35 The first Defendant said that he went to Canada in early June 1995 to oversee the payment of the monies under the LC and to meet with the people from SRP and MNC. When it transpired that an amendment to the LC was required, he faxed a note to Goh on 14 June and the LC was eventually amended. That same month the first Defendant returned to Singapore. He prepared a shareholders agreement for PP in which the 15% shareholding for UET was reflected and sent it to Kea. On 10 July, Paul Tan asked to meet him. Paul Tan told the first Defendant that Kea had decided to withdraw his support from UET and the Nuwood venture. He asked how and when UET would repay the US$300,000. The first Defendant said that Kea could not arbitrarily withdraw from the venture as the deal would probably collapse. However Paul Tan said that *"rich men think differently from us"* and that Keas decision was final. When pressed for an explanation, Paul Tan said that Kea was not pleased with the 15% allotted to UET because this would mean that his interest would only be 7.5% in view of his 51% holding in UET. The first Defendant managed to speak to Kea on 12 July but could not persuade him to change his mind.

Conclusions on the evidence

36 Although the first Defendant related further events after this, it is not necessary for me to go any further. I find the first Defendants version to be internally consistent and his position that Kea had approved the LC on 26 May 1995 to be corroborated by Kea Meng Cheng. I am also satisfied with the veracity of the evidence of the main witness who gave evidence on behalf of the first Defendant, namely Richard Lee. I noted that he was a frank and forthright witness. He answered questions without hesitation and tried his best to recall events. He answered the questions convincingly and logically and I can only conclude that he was telling the truth.

37 On the other hand, Keas evidence was ineptly supported by Gohs wavering evidence and contradicted by his brother, Kea Meng Cheng. I have dealt with the demeanour of Kea and Goh above. I should add that I had noted that Kea Meng Cheng was a witness who appeared forthright and reliable. Furthermore, Paul Tan was a crucial witness but was not called by the Plaintiffs. The fact that he had fallen out with Kea is clear from Keas affidavit and the letter that Kea wrote on 27 June 1995. It is a long and emotional letter but nowhere do I see anything that supports Keas version that he had not approved the LC before he left. What it does reveal is that Kea had been embarrassed by the matter because Kea Meng Cheng had queried the wisdom of accepting only 15% of the PP shares. This could explain the reason for Keas sudden change of mind over the Nuwood venture.

38 Counsel for the Plaintiffs, Mr Hee, pointed out certain aspects of the first Defendants case which he submitted showed that I should not believe him. The more salient points are as follows:

> (i) During cross-examination Mr Hee showed the first Defendant company search documents that revealed that MNC was incorporated by him in Canada and that he was its sole president, secretary and director. The first Defendant confirmed this and explained that it was a shell company he had incorporated. He had subsequently sold it to Dedo Suwanda who needed a company as a vehicle for the Nuwood project. He was asked if he had any documents to show the subsequent transfer. After an adjournment the first Defendant produced a letter of transfer of shares and his letter of resignation as director and secretary dated 26 April 1995. He explained that this was all that was needed under Canadian law. Further, Suwanda, whom the first Defendant had proposed to call as a witness did not turn up in court. Apparently he was resident in Canada. Mr Hee submitted that I should draw adverse inferences from this failure to call Suwanda. The problems with this submission are these. First of all, the Plaintiffs should have given discovery of such documents before the trial. If they had obtained them during the trial they should have been the subject of further

discovery. Having obtained leave to produce them during the trial, the only question is the extent to which I should draw adverse inferences from this revelation and from the inability of the first Defendant to procure complete documents to support his explanation. As for Suwanda, the first Defendant had in fact intended to call him as a witness and had even prepared his affidavit evidence-in-chief. However for some reason he was unable to turn up. I considered these facts in the overall context of the proceedings and evidence before me at the trial. In particular I considered the answers provided by the witnesses, whether they were internally consistent and whether they were consistent with the contemporaneous documents and the evidence of the other witnesses. Having had the opportunity to observe the first Defendant on the witness box, I had little doubt that he was truthful in his evidence. This contrasts with the evidence of Kea and Goh about which I have commented above.

(ii) Mr Hee pointed out that the first Defendant had agreed that the US$300,000 was advanced as a loan to PP which would have to be repaid. The first Defendant had said that the understanding was that PP would only repay this when they had generated sufficient "cash flow" to do so. Mr Hee submitted that this did not make commercial sense as it meant that if PP did not do well UET would never be repaid. I am afraid I do not see such an arrangement as anything out of the ordinary. In the context of the dealings that had been made between the parties, it would not have been unusual for them to have taken an optimistic view of the matter. It is often only their lawyers who see the potential pitfalls, unfortunately sometimes with great prescience. Mr Hee also pointed out that this was not spelt out in the draft shareholders' agreement for PP. I see no reason why it had to be in that agreement if, as is evident in this case, the arrangement was an informal oral agreement.

(iii) The first Defendant's memorandum to Kea asking for approval of the LC was dated 26 May 1995. Mr Hee pointed out that the in-principle agreement for the licence between PP and MNC was dated 30 May 1995, after the LC was asked for. Similarly the agreement between PP and Siaw was dated 1 June 1995. Therefore, he argued, the first Defendant's representations to Kea before 26 May about the licence and about Siaw were untrue. With respect, this argument is too simplistic. The first Defendant had explained that these matters, including the incorporation of PP, were in the works and the signed agreements were the result of the preparatory work done earlier. When he spoke to Kea about the LC, these matters were already agreed upon with MNC and Siaw. I can see nothing in this explanation that is detached from how people in the commercial world operate.

(iv) Mr Hee brought up the fact that the draft shareholders' agreement for PP was signed by the parties (except Kea) only on 21 June 1995. Again given the nature of the dealings between the parties I see nothing unusual in this document being drawn up only after the urgent matters, such as the procurement of the licence, had been taken care of.

(v) Mr Hee also suggested that the agreement between PP and Siaw was a sham. He put forward various reasons which in the circumstances I do not consider would advance his case very much as they are capable of explanation.

> One of Mr Hee's submissions was that clause 17, which gives Siaw the unilateral right, under certain conditions, to terminate the agreement if the Nuwood technology is not proven, shows that it is a sham agreement. Mr Hee submitted that this was an absolute right. That is not true. The right accrues only prior to the second payment of US$450,000. Thereafter there is no such right. More importantly, Mr Hee was unable to provide an answer to the following question: if the first Defendant had intended to draft a sham agreement, why would he include clause 17? Considering the evidence before me in totality, I found that the agreement between PP and Siaw was not a sham agreement.

39 There are a number of other points that Mr Hee had raised in relation to the first Defendant's evidence. It would be impracticable for me to address all of them in detail. I had considered them and was of the view that they did not detract from the veracity of the first Defendant's case when viewed from the context of the consistency of his evidence, his demeanour and that of his witnesses, and compared against the quality of the evidence given by Kea and Goh.

40 In conclusion therefore, I did not believe Keas evidence and believed the evidence of the first Defendant and found accordingly. Therefore the US$300,000 paid out under the LC was a loan by the Plaintiffs to UET which in turn advanced the money to PP. I further found that neither the first Defendant nor PP had indemnified the Plaintiffs against any losses arising from this transaction nor had the first Defendant or PP guaranteed the repayment of the loan. Also, the first Defendant did not make any misrepresentation to the Plaintiffs as alleged. In the premises I dismissed the Plaintiffs claim against the first Defendant.

B: Claim against the second Defendant

41 After Kea pulled out of the Nuwood venture, Paul Tan tried to get the first Defendant to agree to repay the US$300,000 paid out under the LC. However these attempts were not successful. On 31 August 1995 the first Defendant moved out of the KHPL premises and operated UET from rented premises. Kea tried to contact him but was unsuccessful. He also tried unsuccessfully to telephone the second Defendant. So on 30 September and 16 October 1995 he sent faxes to her asking her to meet him. The second Defendant replied on 20 October and they met shortly thereafter at the Hyatt Hotel coffee lounge. They discussed the repayment of the US$300,000. Kea said that the second Defendant assured him that she would repay the money if the first Defendant did not do so.

42 After that meeting further attempts were made by Paul Tan to recover the money from the first Defendant but to no avail. On 23 March 1996, Kea wrote to the second Defendant and asked her to resolve the matter urgently. This resulted in a second meeting sometime in April 1996. Kea said that at this meeting the second Defendant proposed to settle the matter by selling to Kea her apartment at Grange Heights ("the Property") at a discount which would reflect the sum concerned. Kea thought that this proposal was fair and he instructed Goh to handle the matter. A meeting was held on 2 May 1996 at the Plaintiffs premises. It was attended by the second Defendant, Goh and the Plaintiffs solicitor, Ms Wong Kai Yun ("Wong") who had been briefed by Goh earlier. During the meeting Goh telephoned Kea who was in Indonesia at the time. He passed the telephone to the second Defendant and she spoke to Kea for a while. Then Goh spoke to him. After that, on Gohs instructions, Wong prepared 4 documents as follows: (1) the Deed; (2) a sale and purchase agreement in respect of the Property ("the S&P"); (3) a letter of confirmation of the second Defendant that she did not require solicitors advice for the S&P; and (4) a transfer form for the Property.

43 The S&P states that the parties are the second Defendant and the Plaintiffs. The sale price is stated to be $2,228,000 but the parties agree that this is in error and that it should be $2,280,000, reflecting a discount of $420,000 off the price of $2.7 million. It contains the usual terms for a contract of this nature. The third document is a letter which the second Defendant signed to confirm that she understood the contents of an agreement between her and the Plaintiffs dated 2 May 1996. However it is not clear whether this refers to the S&P or the Deed.

44 The Deed is the document that forms the primary basis of the Plaintiffs claim against the second Defendant. Its preamble states that: (1) PP owes the Plaintiffs a debt of US$300,000 on account of the LC; (2) the second Defendant is the proprietor of the Property; and (3) both parties acknowledge that the market price of the Property *"shall be deemed"* to be $2.7 million. It then provides that, in consideration of the Plaintiffs forbearance to take any legal proceedings against PP, the second Defendant shall sell the Property to the Plaintiffs for $2.7 million less $420,000 (representing the equivalent of US$300,000). Such discount "shall be deemed to be made in payment of" the debt. The second Defendant signed all 4 documents before she left.

45 Kea claimed that when they spoke on the telephone on 2 May, the second Defendant had represented to him that the Property was worth $2.7 million. On 5 May he went to inspect the Property and was shocked at its condition. He felt that it was not worth $2.7 million. He checked with advertisements for similar apartments and concluded that it was worth only $2.3 million if not renovated and $2.8 million if fully renovated. On 6 May he visited the Property again, this time with Goh. He instructed Goh to obtain a valuation. On 7 May Kea telephoned the second Defendant and told her that he could not purchase the Property because the price of $2.7 million was too high. He said that other apartments at Grange Heights were going for about $2.3 million. The second Defendant replied that it was worth $2.7 million, otherwise her bank would not have granted her loan facilities amounting to 80% of the price. Subsequently the second Defendant sent her documents which showed that the bank had offered to lend her $1.84 million of her purchase price of $2.7 million, which was only 68%. Kea said that he concluded that she had landed herself into a bad deal and was trying to pass it on to him quickly. So when the second Defendant telephoned him again, he told her that he would not purchase the Property from her. Thereafter the S&P was not proceeded with.

46 What happened after that is not relevant. The Plaintiffs claims against the second Defendant are as follows:

> (i) pursuant to clause 6 of the Deed; and
>
> (ii) pursuant to section 2 of the Misrepresentation Act.

Claim under clause 6 of Deed

47 I first deal with the first head of claim, i.e. clause 6 of the Deed. It is necessary to set out the Deed in its entirety. Its terms are as follows:

> WHEREAS:
>
> (1) Performance Point (M) Sdn Bhd (Company Registration No. 348594-X) of Room 1009 TKT 10 Johor Tower 15 Jalan Gereja Johor Bharu, Malaysia (hereinafter called "the Debtor") owes [the Plaintiffs,] TAC a sum of US$300,000 (hereinafter called "the Debt") in respect of a loan advanced by TAC to the Debtor by way of a letter of credit number TRD01TMLCO21692 drawn by TAC on M/s United Overseas Bank Ltd in favour of one M/s SRP Industries Ltd.
>
> (2) [The second Defendant,] CAG is the registered proprietor of the properly known as 15 Grane Road, #22-15 Grange Heights Singapore (hereinafter called "the Property").
>
> (3) Both parties hereby acknowledge that the market price of the properly shall be deemed to be $2,700,000.
>
> IT IS HEREBY AGREED as follows:
>
> Sale of the Property

1 Both parties hereby agree that the exchange rate from United States Dollars to Singapore Dollars shall be fixed at US$1.00 to S$1.40 and that the Debt amounts to S$420,000.

2 In consideration of TACs forbearance at CAGs request to sue or take any legal proceedings which TAC is entitled to maintain against the Debtor in respect of the Debt, CAG hereby agrees to sell the property to TAC or to whomsoever TAC shall direct on the terms and conditions set to in this Agreement.

3 The purchase price of the Property shall be the sum of $2,7000,000 LESS a discount of S$420,000, amounting to S$2,228,000. Both parties hereby agree that the aforesaid discount given by CAG to TAC shall be deemed to be made in payment of the Debt.

4 CAG shall contemporaneously with the execution of this Agreement, execute the following documents:

(i) a Sale and Purchase Agreement incorporated in Schedule 1 herein;

(ii) a blank Transfer Form incorporated in Schedule 2 herein.

The duly executed blank Transfer Form shall be given to M/s Hee Theng Fong & Co to be held as stakeholder. M/s Hee Theng Fong & Co shall be authorised to release the said Transfer Form to TAC or to whomsoever TAC shall direct on the completion of the sale and purchase of the Property.

4[sic] Both parties hereby acknowledge and confirm that TAC shall be entitled to direct CAG to transfer the Property to whomsoever TAC shall nominate and on completion of such transfer, the Debt shall be deemed to be fully satisfied.

5 After completion of such transfer, in the event that the Debtor or Mr Michael Widjaya Goutama or any other interested party should make any payment of monies to TAC for purposes of the settlement of the Debt or any part thereof, TAC shall, upon receipt of such monies, release the same to CAG forthwith.

Covenant to repay the Debt

6 In the event of the default of CAG of her obligations stipulated herein or the failure for any reason whatsoever to complete the sale and purchase of the Property to TAC or to whomsoever TAC shall direct:

(i) CAG shall irrevocably and unconditionally guarantee the payment of the Debt to TAC and shall pay TAC on demand the whole of the Debt or any part thereof;

(ii) such guarantee shall be a continuing guarantee for the purpose of securing the whole of the Debt and without prejudice to the generality of the foregoing, the winding-up whether voluntarily or otherwise of the Debtor shall not affect or determine the liability of CAG under such guarantee; and

(iii) CAG hereby agrees and declares that she shall be deemed as a principal debtor for the Debt hereby guaranteed.

48 The plaintiffs contend that on a plain reading of clause 6 of the Deed, by virtue of the failure to complete the sale and purchase of the Property, the second Defendant had, by operation of the sub-clauses in clause 6, become the guarantor of the debt of US$300,000 owed by PP to the Plaintiffs. However counsel for the second Defendant, Mr Loy, submitted that she had 4 defences to this claim which can be summarised as follows:

(a) condition precedent not met;

(b) *non est factum*;

(c) misrepresentation; and

(d) construction of clause 6.

Success in any one of the defences would be sufficient to dismiss the Plaintiffs' claim under this head. In the event, I found that the defence of *non est factum* failed but the other 3 succeeded. My reasons are set out below.

(a) Condition precedent not met

49 Mr Loy pointed out that the preamble declared that PP owed the Plaintiffs the sum of US$300,000 and that clause 6 is drafted on the basis that PP owed a debt to the Plaintiffs. Therefore it is a condition precedent to the operation of clause 6 that such a debt be in existence. Put in another way, if PP did not owe the Plaintiffs any such debt, then "the Debt" in the preamble does not exist and clause 6, in particular sub-clauses (i) and (ii), does not have any effect. I agree with Mr Loys interpretation; on a plain reading of the provision that must be the conclusion.

50 I have found above that it was UET that were liable to the Plaintiffs and that neither the first Defendant nor PP guaranteed the Plaintiffs the repayment of the sum. Therefore it follows that there was no debt owed by PP to the Plaintiffs upon which the operation of clause 6 depends.

(b) Non est factum

51 The second Defendant claimed that she did not understand the nature of the commitment that she was entering into. In particular, she claimed that she was under the impression that what she had undertaken was to sell the Property to the Plaintiffs at a discount of $420,000 which would go towards settlement of the debt of US$300,000. She said that she did not understand English well and that her business affairs were conducted either in Indonesian or Mandarin. Her conversations with Kea and Goh were in a mixture of Mandarin and Hokkien and this is supported by their evidence.

52 However the solicitor, Wong, gave evidence that she had translated the terms of the Deed to the second Defendant. Wong was satisfied that the second Defendant had understood it. She was a neutral witness called by the second Defendant. I would conclude that the second Defendant had understood the terms of the Deed, including the provision in clause 6 that she would guarantee payment under certain conditions. Therefore this defence fails.

(c) Misrepresentation

53 The second Defendant claimed that she agreed to enter into the Deed and S&P because Kea had represented to her that the first Defendant owed the Plaintiffs the US$300,000, and Goh had represented to her that this sum, amounting to $420,000 after

conversion to local currency, would be deducted from the the $2.7 million in the sale of the Property. The second Defendant alleged that it was in reliance of these representations, which were false, that she executed the Deed.

54 In their Reply the Plaintiffs pleaded that Kea and Goh told the second Defendant that the first Defendant and/or PP owed the Plaintiffs the US$300,000. Evidence of this is given by Kea where he said at paragraph 31 of his Affidavit, in which he describes a conversation with the second Defendant in October 1995:

> I stated that the Plaintiffs had issued a letter of credit for and on behalf of [PP] pursuant to her brother's request. I reminded her that she was a director and shareholder of [PP]. Kea Holdings Group used their banking facility to help her brother. I added that the First Defendant agreed to pay back the sum even before the letter of credit was negotiated. I informed her that not only did the First Defendant breach his promise, he had removed everything from the UET officer and worst [*sic*] still, he had now disappeared completely. I told her that the First Defendant was highly irresponsible.

And at paragraph 34 he narrated as follows:

> In or about April 1996, I managed to meet with the Second Defendant in Singapore. I emphasised that the First Defendant was introduced by her to me. I reiterated that it was the First Defendant who requested [KHPL] and to use the letter of credit facility available to Kea Holdings Group to issue a letter of credit for and on behalf of [PP]. I said that the First Defendant promised to pay back the sum of US$300,000.00 before the letter of credit was negotiated. I told here that the First Defendant promised that the sum of US$300,000.00 was to be remitted from [PP] to the Plaintiffs but this did not happen. I added that the First Defendant assured me that he would not negotiate the letter of credit until [PP] had received the money from the Malaysian party and yet he went ahead to do so without waiting for any money to be remitted to the Plaintiffs. The Second Defendant disclosed that she had met the First Defendant and confirmed that he had a nervous breakdown. She agreed to settle the loan. "

It can be seen that Kea himself had said that he repeatedly emphasised that the first Defendant had promised to repay the US$300,000, that the latter had breached his promise to do so and that he was highly irresponsible. What must have operated on the second Defendant's mind under such circumstances must have been her brother's obligations rather than that of PP.

55 The second Defendant said that Kea had been pressing him to resolve the matter on behalf of the first Defendant. In paragraph 16 of her Affidavit, she described what happened sometime in April 1996:

> Later, Edmund Kea called me again. He pressed me for a resolution of the issue of Michael owing US$300,000.00. Being Michael's sister, I felt obligated to help resolve the issue. It did not occur to me that Michael was in fact not indebted to Edmund Kea or his companies for the sum of US$300,000.00. I simply took Edmund Kea's assertion to be true and thought more about Michael's reputation and my reputation. I did not want it to be said in Pekanbaru where Edmund Kea and myself moved around much that the Goutama family owed money and would not pay up.

The second Defendant had no direct interest in the matter concerning PP apart from the fact that she was a shareholder and director of the company. There is no reason why she would be prepared to shoulder the debt of PP. On the other hand it is Kea's own evidence that he had gone to her and appealed to her using the name of the first Defendant. I had no doubt that the second

Defendant was induced to execute the Deed because of the representation that the first Defendant owed that sum to the Plaintiffs. On the finding of fact that I had made that the first Defendant was not personally liable for the US$300,000, it follows that the representation was false. Therefore the second Defendant would be entitled to rescind the Deed.

56 Mr Loy had an alternative submission. Since I had found that the debt was owed by UET to the Plaintiffs, even if the Plaintiffs' version were correct, that the second Defendant was told that it was the first Defendant and/or PP who were liable to the Plaintiffs for the debt, that itself would be a misrepresentation of fact. I must say that I agree with his submission and the same result would obtain.

(d) Construction of clause 6

57 Clause 6 of the Deed begins with the following words:

> "In the event of the default of [the second Defendant] of her obligations stipulated herein or the failure for any reason whatsoever to complete the sale and purchase of the Property to [the Plaintiffs] or to whomsoever [the Plaintiffs] shall direct "

Mr Hee contended that the words underlined provide for the situation that arose in the present case, i.e. the refusal by the Plaintiffs to complete the sale and purchase. Mr Hee submitted that the expression "for any reason whatsoever" is broad enough to cover even the situation where the Plaintiffs are responsible for the failure to complete.

58 Mr Loy submitted that this could not be the case. He firstly submitted that as a matter of construction, clause 6 has to be read subject to the implied condition that the party seeking to benefit from the clause was not himself at default. He cited *Alghussein Establishment v Eton College* [1988] 1 WLR 587, in which the House of Lords held that there was a rule of construction that parties are presumed not to intend that either should be entitled to rely on his own breach in order to obtain a benefit. For this presumption to be displaced, there must be clear expression in the contract that gives one party the right to rely on its own default. In the present case, the Deed was to be the embodiment of the desire of the parties to settle the debt owed by PP to the Plaintiffs. By its terms, the second Defendant was to sell the Property to the Plaintiffs at a discount off the market price. The parties had agreed that the market price was $2.7 million and that the equivalent of the US$300,000 debt was $420,000. The Deed provided that the second Defendant shall take steps to complete the purchase at the discounted price and transfer the Property to the Plaintiffs or their nominee. It also provides that if, after completion of the sale, the debt, or any part of it, shall be repaid by PP or any person on their behalf, then the Plaintiffs shall pay over such sums to the second Defendant. Finally clause 6 provides that if the second Defendant shall be in default of her obligations under the Deed, then she shall become liable as guarantor of the repayment of the debt owed by PP to the Plaintiffs. It also provides that the same obligation arises if there is *"failure for any reason whatsoever to complete the sale"*.

59 Clearly the presumption applies in this case and clause 6 cannot include the situation where the failure is caused by the refusal of the Plaintiffs to complete. Furthermore if it were otherwise, what the Plaintiffs have obtained by way of the Deed would be simply a guarantee from the second Defendant that the debt would be repaid, along with an option to purchase the Property at a certain price. As there is no deadline specified in the Deed, the Plaintiffs also have the option of waiting to see whether the property market would rise or fall. If it falls, they can refuse to complete and rely on the guarantee to take effect. If it rises to a sufficiently high level, they can complete the purchase and take advantage of the rise in value in addition to receiving repayment of the debt in the form of the discount. I cannot imagine a more unequal contract and can see no reason why the presumption should not operate in the circumstances. There is certainly nothing in the Deed and the circumstances in which it was entered that could displace the presumption. Therefore I would hold that clause 6 must be interpreted to exclude the situation where the failure to complete is caused by the Plaintiffs.

Misrepresentation claim

60 The Plaintiffs pleaded in the alternative that section 2 of the Misrepresentation Act entitles them to *"the relief claimed therein"*. The facts pleaded in support of this claim are particularised in paragraph 25 of the Re-Re-Amended Statement of Claim which states as follows:

> 25. The parties failed to complete the sale and purchase of the Property:-
>
> Particulars
>
> (a) In February 1996, the Second Defendant approached Edmund Kea of the Plaintiffs and requested the Plaintiffs not to sue PP and/or the First Defendant for the repayment of the Debt.
>
> (b) The Second Defendant agreed to sell the Property to the Plaintiffs at a discount price of S$420,000 in discharge of the Debt owing to the Plaintiffs.
>
> (c) The Second Defendant represented to the Plaintiffs that the market price of the Property was S$2,700,000.00.
>
> (d) In order to induce the Plaintiffs to sign the Deed, the Second Defendant represented that she would personally repay the Debt to the Plaintiffs in the event the Property was not worth S$2,700,000.00 or for whatever reason the sale and purchase of the Property cannot be completed.
>
> (e) In reliance upon her aforesaid representations, on 4th May 1996 the Plaintiffs duly executed with the Second Defendant the Deed in terms as stated in paragraph 24 of the Re-Amended Statement of Claim.
>
> (f) On 5th May 1996, the Plaintiffs inspected the Property and discovered that the Property was in a dilapidated state.
>
> (g) On 20th May 1996, the Plaintiffs discovered from a valuation report that the market price of the Property was only S$1,900,000.00.

61 I first consider the proof of the particulars set out above. In respect of particular (a), the Plaintiffs have not produced any evidence that the second Defendant approached Kea, whether in February 1996 or at any other time, to request him not to sue PP or the first Defendant for repayment of the debt. Keas evidence is that he was the person who was making attempts to contact the second Defendant. He managed to meet her sometime in October 1995 and on that occasion he had complained to her about the first Defendants irresponsible actions. He said that the second Defendant then told him that he need not worry because should the first Defendant fail to repay, she would do so. However she told him to first try writing to the first Defendant. When this proved fruitless, Kea met the second Defendant again and complained further to her about the first Defendant. This is what Kea then said in paragraph 34 of his affidavit:

> I added that the First Defendant assured me that he would not negotiate the letter of credit until Performance Point Sdn Bhd had received the money from the Malaysian party and yet he went ahead to do so without waiting for any money to be remitted to the Plaintiffs. The Second Defendant disclosed that she had met the First Defendant and confirmed that he had a nervous breakdown. She agreed to settle the loan. She offered to let me purchase [the Property] at a

> discounted price and the discount would be settlement of the debt. I thought she was quite fair and accepted her proposal. I informed Mr Goh Siew Hwa to arrange with her for the sale and purchase of the property accordingly.

That is the closest that the Plaintiffs have come in terms of evidence in respect of particular (a). There is no allegation at all by Kea or any other witness that the second Defendant had requested the Plaintiffs not to sue PP or the first Defendant for repayment of the debt. Although clause 2 of the Deed states that the Plaintiffs forbearance to sue is a consideration for the sale of the Property at a discount, the Deed was drafted by Wong on the instructions of Goh at the meeting of 2 May 1996 which was not attended by Kea. Kea had decided to enter into the Deed by that time and what remained to be settled was only the price and the exact terms of the agreement.

62 Similarly there was no evidence in respect of particular (d). From Keas own evidence, it was the second Defendant who volunteered to repay the debt by way of the sale of the Property at a discounted price in response to his complaints about the first Defendant. There was no allegation that the second Defendant had made the representation alleged in order to induce the Plaintiffs to execute the Deed.

63 Particular (b) is admitted by the second Defendant, although not in the context of particular (a).

64 Particular (c) is denied by the second Defendant. She claimed that they were engaged in negotiation over the price and she merely told Kea that she had purchased the Property for $2.7 million. I have commented earlier about the quality of Keas evidence. On the other hand, I found the second Defendant to be an earnest and consistent witness and I prefer her evidence that she did not make such a representation. Her evidence is also supported by Goh, who said in cross-examination that all she had said was that she had bought the Property not long before and so it should still be worth the $2.7 million she had paid for it. Wong also corroborated the second Defendant's version that there was some negotiation over the price because she said that at the meeting of 2 May 1996 the second Defendant had initially asked for a higher price.

65 Furthermore it is incredulous that an experienced businessman and obviously intelligent person like Kea would rely on such a representation even if it was made. Indeed the fact that he did not sign the S&P when Goh gave it to him upon his return shows that he was wise enough to have a look at the Property to satisfy himself as to its value before committing the Plaintiffs to the purchase. I find that he was actuated to agree to the second Defendants proposal more by the prospect that she offered of recovering the US$300,000.

66 Much ado was made in relation to whether the market value of the Property was in fact $2.7 million. Both sides called their experts to give evidence on this. The Plaintiffs expert concluded that it was worth only $1.9 million whereas the second Defendants witness said that it was worth about $2.45 million. I find neither evidence to be entirely satisfactory. The Plaintiffs expert said that because the market was rising very steeply at the time, he took a conservative approach to the valuation. This begs the question whether his valuation would then represent the market value, viz. the price at which a willing buyer and willing seller would agree on in the market circumstances at the time. It seems to me that this approach is more suited to the prudent requirements of a financial institution than to a determination of market value as a layperson would understand that term. A potential buyer would certainly not be able to purchase any property at the time if he relied on such a conservative valuation. On the other hand the second Defendants expert took the other extreme, maintaining that a speculative market would not be a factor at all in determining the market value. In view of my findings above, this evidence is not relevant. However for completeness, I would make the finding that the market value was somewhere between the 2 figures but nearer the higher one.

67 It can be seen that the only representation alleged in the Plaintiffs evidence is that the second Defendant said that the market value of the Property was $2.7 million. Even if this representation were made and even if it were false, there is still the question of the loss suffered by the Plaintiffs. According to the statement of claim, their claim is under section 2 of the Misrepresentation Act. In his submission, Mr Hee appeared to be relying on section 2(1) which provides as follows:

> 2. --(1) Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has

> suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true.

68 Section 2(1) provides that a non-fraudulent misrepresentation, unless made *bona fide* and based on reasonable grounds, would be treated in the same manner as a fraudulent misrepresentation. The mere entering into of a contract as a result of such a misrepresentation does not entitle the representee to damages. He must prove that he has suffered a loss as a result of his entering into the contract after the misrepresentation was made. Mr Hee argued as follows in his written submissions:

> 228. The Plaintiffs contend that due to the Second Defendants misrepresentation, the Plaintiffs have suffered the loss and damage of US$300,000.00. The measure of damages is the tort of deceit i.e. put the Plaintiffs into the position he would have been in had the representation not been made to him. Had the representation not been made, the Plaintiffs could have recovered US$300,000.00 from the Second Defendant in settlement of the First Defendants debt.
>
> 229. After a series of meetings between Edmund Kea and the Second Defendant, the Second Defendant agreed to settle the debt for the First Defendant. On second May 1996, she signed the Deed. (Edmund Keas 1st AEIC paragraphs 31, 34 and 35, Goh Siew Hwas AEIC paragraph 29). She misrepresented to Edmund Kea that the property was worth $2.7 million and she would sell it to Edmund Kea at a discount equivalent to the debt owed by the First Defendant. The Plaintiffs must be put in position as if the representation has never been made. Had the representation not been made, the Plaintiffs would not have entered into the Deed. The Plaintiffs would be put back into the position before the Deed where the Second Defendant agreed to settle the debt for the First Defendant. The damages payable by the Second Defendant therefore should be in the form of her liability to pay the sum US$300,000.00. The Second Defendant should therefore be held liable in this present suit to pay US$300,000.00 as damages to the Plaintiffs.

69 However the two sentences underlined above, stating that the second Defendant had agreed to settle the debt for the first Defendant and that the Plaintiffs could have recovered the debt if not for the misrepresentation, are fallacious. Firstly, there is no evidence that the second Defendant had entered into a binding agreement to settle the debt for the first Defendant. Kea had only said that at their meeting in October 1995, the second Defendant had said that she would repay the debt if the first Defendant did not. There is no evidence that such undertaking was supported by any consideration. As for their discussion in April 1996, Kea said that the second Defendant had offered to repay the debt by way of a discount on the sale of the Property. It was not an undertaking to repay by cash. Therefore had the Plaintiffs not executed the Deed, there would have been no other cause of action against the second Defendant in relation to the US$300,000.

70 The true question is whether the Plaintiffs have suffered any loss as a result of their entering into the Deed. While they may have incurred a "loss" in the sense that the US$300,000 remained unpaid, this was not a result of their entering into the Deed. The US$300,000 "loss" was already suffered before the Deed was entered into and before the misrepresentation was made. Accordingly, I found that the Plaintiffs misrepresentation claim was not made out.

Costs

71 In relation to the first Defendant, as an order for costs normally follows the event and I could see no special circumstances in this case to depart from the norm, I ordered the Plaintiffs to pay the costs of the first Defendant on the standard basis. In relation to the second Defendant, she had succeeded in her defence but failed in her counterclaim. However the issues in the counterclaim are so intertwined with the Plaintiffs claim that they did not require substantial incremental time at the trial in terms of evidence. What was needed was the consideration of the legal issues and I took the view that the appropriate order to make would be for the Plaintiffs to pay 85% of the costs of the second Defendant on the standard basis in respect of the both the claim and counterclaim.

Lee Seiu Kin

Judicial Commissioner