IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 227

Suit No 732 of 2016

Between

EFG Bank AG, Singapore Branch

… *Plaintiff*

And

(1) Surewin Worldwide Ltd
(2) Singfor Life Insurance Co Ltd
(3) EFG Wealth Solutions (Singapore) Ltd

… *Defendants*

JUDGMENT

[Agency] — [Principal] — [Holding out] — [Scope of representations in account-opening booklet]
[Banking] — [Lending and security]
[Civil Procedure] — [Pleadings]
[Conflict of Laws] — [Foreign arbitration] — [Issue estoppel]
[Contract] — [Illegality and public policy] — [Illegality under international and foreign law]
[Personal Property] — [Priorities] — [Time of attachment of security interest over assets in bank account] — [*Bona fide* purchaser for value without notice]

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v
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20–21, 25–28 August, 1–4, 8–9 September 2020, 29–30 March 2021

12 November 2021 Judgment reserved.

Vinodh Coomaraswamy J:

Introduction

1 In 2008, the plaintiff implemented an investment structure and a credit structure for the second defendant. Under the investment structure, the second defendant subscribed for all of the units in a dedicated unit trust. As consideration for the subscription, the second defendant transferred substantial assets into an account which the trustee of the unit trust had opened with the plaintiff. Under the credit structure, the trustee pledged those assets to the plaintiff to secure a credit facility which the plaintiff extended to the first defendant.

2 The first defendant drew substantial sums on the credit facility. It now owes the plaintiff more than US$194m. It is unable to repay any part of that sum. The central issue in this action is whether the security which the plaintiff

took under the credit structure is valid and enforceable as against the second defendant.

3 I have decided this action in favour of the plaintiff. I have accepted the second defendant's case that its act in subscribing for all of the units in the unit trust was illegal under the law of Taiwan, the jurisdiction in which the second defendant is incorporated and carried on business. But I have also accepted the plaintiff's case that it would be disproportionate in all the circumstances to hold its security to be invalid or unenforceable.

4 I now set out the reasons for my decision.

Background

The parties

5 The plaintiff is a private bank incorporated in Switzerland.[1] It has branches worldwide, including in Singapore and in Hong Kong.[2]

6 The first defendant is a special purpose company incorporated in the British Virgin Islands ("BVI").[3] The first defendant's sole nominee shareholder has declared that it holds its shares in the first defendant on trust for the second defendant.[4] The first defendant was struck off the BVI companies register in

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1 Statement of Claim (Amendment No 1) ("SOC") at para 1.

2 SOC at para 1; Affidavit of evidence-in-chief ("AEIC") of Albert Chiu Sin Chuen dated 30 June 2020 ("Chiu's AEIC") at para 9.

3 SOC at para 2.

4 18 Agreed Bundle ("AB") 9659.

2015.[5] In that sense, therefore, it has ceased to be a legal person. I shall nevertheless continue to use the present tense in referring to it.

7 The second defendant is a company incorporated in Taiwan.[6] Until 2014, it carried on business in Taiwan as a life insurer.[7] In 2014, Taiwan's Financial Supervisory Commission ("the FSC") appointed The Taiwan Insurance Guaranty Fund ("TIGF") as the second defendant's receiver.[8] In 2016, the second defendant went into insolvent liquidation. TIGF was appointed the second defendant's liquidator.[9]

8 The third defendant is a Singapore company engaged in the wealth structuring business.[10] In 2012, the third defendant replaced the initial trustee of the unit trust. The third defendant is an affiliate of the plaintiff.[11] The third defendant advances in this action a positive case that the plaintiff's security interest is valid and enforceable in Singapore law.[12] In all other respects, the third defendant takes a neutral position in this action.

The second defendant opens an account with the plaintiff

9 The facts relevant to this action begin in 2006. In that year, two Taiwanese businessmen – Huang Cheng-I and Teng Wen-Chung – acquired

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5 Chiu's AEIC at para 5.

6 SOC at para 3.

7 SOC at para 3.

8 SOC at para 3.

9 SOC at para 3.

10 Third Defendant's Defence and Defence Against Counterclaim (Amendment No 2) ("D3D&DCC") at para 1.

11 SOC at para 4.

12 Third affidavit of Tan Kay Siong filed on 8 March 2018, paras 21 to 22.

96% of the second defendant.[13] In February 2007, Mr Huang was appointed as the second defendant's chairman and Mr Teng as its vice-chairman.[14]

10 In April 2007, Mr Teng approached one Jolene Wu Hsiao-Yun, a client relationship officer at the plaintiff's Hong Kong branch.[15] According to the plaintiff, Mr Teng told Ms Wu that he and Mr Huang wanted to grow the second defendant's assets through investment.[16]

11 Mr Teng's approach to Ms Wu had two results. First, in May 2007, the second defendant opened an account with the plaintiff's Singapore branch ("the Singfor Account").[17] Second, in 2007 and 2008 the plaintiff implemented two investment structures and one credit structure for the second defendant. For reasons which will become apparent, I shall refer to the first investment structure as "the STAAP Structure" and to the second investment structure as "the SFIP-1 Structure". Although the three structures are connected, the STAAP Structure has not given rise to any disputes. Only the SFIP-1 Structure and the credit structure are therefore the subject matter of this action.

The STAAP Structure

12 The STAAP Structure was established in 2007 by the following steps. The second defendant subscribed for all the shares in a special purpose company incorporated in the Bahamas named Singfor Tactical Asset Allocation Portfolio

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13 Defence and Counterclaim of the Second Defendant (Amendment No 2) ("D&CC") at para 8.

14 D&CC at para 8.

15 Chiu's AEIC at [10]; 11 AB 5467 at para 8.

16 11 AB 5468 at para 10.

17 D&CC at para 10.

SA ("STAAP"). STAAP opened an account with the plaintiff's Singapore branch ("the STAAP Account").[18] The second defendant transferred substantial assets into the STAAP Account.[19] The plaintiff and the second defendant entered into a discretionary management mandate under which the plaintiff undertook to manage the assets in the STAAP Account for the second defendant ("the STAAP Mandate").[20]

The credit structure

13 The STAAP Structure was coupled with the credit structure. The credit structure was intended to allow the first defendant to borrow money from the plaintiff using the assets in the STAAP Account as security.

14 The credit structure was established as follows. In May 2007, the plaintiff acquired two special purpose BVI companies for the second defendant. One of these companies is the first defendant. The other is a company known as High Grounds Assets International Ltd ("High Grounds").[21] Upon acquisition, the nominee shareholder of each company declared that it held the shares in each company on trust for Mr Teng and Mr Huang personally.[22] In June 2007, a month after acquisition, each company's nominee shareholder declared that it held its shares in each company on trust for the second defendant.[23] There is no suggestion that that declaration of trust has ever been revoked or superseded.

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18 19 AB 10156–10211.

19 Chiu's AEIC at para 48.

20 20 AB 11099–11107.

21 16 AB 8466–8467.

22 16 AB 8784, 8884–8885 and 8905–8906.

23 18 AB 9721–9722, 9840 and 9850.

15 The first defendant and High Grounds each opened an account with the plaintiff's Singapore branch.[24] I shall refer to these accounts respectively as "the Surewin Account" and "the High Grounds Account". In August 2007, the plaintiff extended a credit facility ("the Facility") to the first defendant "[f]or investments outside the Bank".[25] In September 2007, STAAP pledged the assets in the STAAP Account to the plaintiff as security for the Facility ("the STAAP Pledge").[26]

The SFIP-1 Structure

16 Towards the end of 2007, Mr Teng approached the plaintiff's James Lee. Mr Lee was the Deputy Chief Executive Officer of the plaintiff's parent company. He was also a member of the plaintiff's Executive Credit Committee and attended meetings of the plaintiff's Operating Credit Committee.[27] Mr Teng sought Mr Lee's assistance in restructuring the second defendant's investment portfolio and in boosting the second defendant's investment returns.[28] Mr Lee approached one Richard Levinson, co-founder of Canaras Capital Management LLC and Canaras LLC (collectively, "Canaras"), to design a solution which would achieve Mr Teng's objectives.[29]

17 In January 2008, Mr Huang retired and Mr Teng was appointed chairman of the second defendant.[30] Also in or around January 2008, Mr Teng

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24 17 AB 8955–8998 and 9059–9101.

25 21 AB 11293–11300.

26 Chiu's AEIC at para 48.

27 AEIC of James Tak Him Lee dated 30 June 2020 ("Lee's AEIC") at paras 6 and 9.

28 Lee's AEIC at para 35.

29 Lee's AEIC at para 37.

30 AEIC of Chyou Syan-Cheng dated 1 July 2020 ("Chyou's AEIC") at paras 52–53.

acquired all of Mr Huang's shares.[31] As a result, Mr Teng was the second defendant's single most senior executive and its sole majority shareholder in and after January 2008.

18 Following the advice from Canaras, the SFIP-1 Structure was implemented in 2008 by the following steps. By a trust deed dated 7 March 2008 ("the Trust Deed"),[32] the plaintiff established the dedicated unit trust in question ("the SFIP-1 Unit Trust"). Volaw Corporate Trustee Limited ("Volaw") was appointed the trustee of the SFIP-1 Unit Trust at inception. Volaw is incorporated in and carries on business in Jersey. The Trust Deed is expressly governed by the laws of Jersey.

19 Also on 7 March 2008, Volaw opened an account with the plaintiff's Singapore branch ("the SFIP-1 Account").[33] On the same day, Volaw executed a document headed "Pledge of Assets as Security" ("the SFIP-1 Pledge").[34] It is the validity and enforceability of the SFIP-1 Pledge which is the central issue in this action. Despite the title of the document which Volaw executed and the abbreviation I have adopted, the security interest which this document created is a charge and not in truth a pledge.

20 By cl 2 of the SFIP-1 Pledge, in consideration of the plaintiff extending the Facility to the first defendant, Volaw charged "the Pledged Assets" to the plaintiff as continuing security for the due payment of all of the first defendant's liabilities to the plaintiff. The SFIP-1 Pledge defines "Pledged Assets" as all of

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31 AEIC of Chen Hsiu-Fang dated 14 July 2020 ("Chen Hsiu-Fang's AEIC") at para 63; 30 AB 16908.

32 25 AB 14091-14123.

33 26 AB 14168–14213.

34 25 AB 14058–14065.

Volaw's present and future interest in all assets which were to come into the possession of or under the control of the plaintiff for Volaw's account. The SFIP-1 Pledge thereby charged the present and future contents of the SFIP-1 Account to the plaintiff as security for all of the first defendant's debts. The SFIP-1 Pledge is expressly governed by Singapore law and confers non-exclusive jurisdiction on the courts of Singapore.

21 On 8 March 2008, Mr Teng issued letters addressed to EFG Bank and to Volaw consenting to the SFIP-1 Pledge ("the Consent Letters"). The signature block of these letters indicate that he claimed to sign them "for and on behalf of" the second defendant and in his capacity as the second defendant's chairman.[35]

22 In April 2008, the second defendant subscribed for all of the units in the SFIP-1 Unit Trust. As consideration for the subscription, the second defendant transferred bonds worth US$148.8m from the Singfor Account to the SFIP-1 Account.[36]

23 On the same day, the second defendant granted the plaintiff a discretionary investment management mandate in respect of the assets in the SFIP-1 Account ("the SFIP-1 Mandate").[37] The SFIP-1 Mandate is expressly governed by Taiwanese law and contains an arbitration agreement stipulating that disputes under that contract are to be resolved by arbitration in Taiwan.

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35 26 AB 14267–14268.

36 27 AB 14966–14967.

37 27 AB 14989–15003.

24 The second defendant subscribed on several later occasions for additional units in the SFIP-1 Unit Trust. As consideration for one of these subscriptions, the second defendant transferred all of the assets in the STAAP Account into the SFIP-1 Account.[38] The STAAP Structure was then terminated. The STAAP Structure and the STAAP Pledge do not give rise to any dispute.

25 Between 2008 and 2012, the plaintiff increased the credit limit under Facility in stages, from US$30m to US$240m.[39] The first defendant drew substantial sums against the Facility. All of those sums were paid to third parties for the personal benefit of Mr Teng rather than for the corporate benefit of the second defendant.

26 In 2012, the third defendant replaced Volaw as the trustee of the SFIP-1 Unit Trust.[40] The third defendant is therefore also the chargor under the SFIP-1 Pledge.

The second defendant goes into receivership

27 TIGF took control of the second defendant in August 2014. Following its investigations, TIGF caused the second defendant to terminate the SFIP-1 Mandate in November 2014.[41]

28 In February 2015, the plaintiff declared events of default under the Facility and terminated it. At the same time, the plaintiff terminated a separate,

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38 37 AB 20695 and 21002–21007.

39 25 AB 13773; 48 AB 27465.

40 37 AB 21113–21122.

41 56 AB 31653.

smaller credit facility that it had granted to the first defendant.[42] The plaintiff has recovered a total sum of US$32.12m through rights of recourse apart from the SFIP-1 Pledge.[43] The plaintiff applied these recoveries to discharge in full the first defendant's liability under the smaller credit facility and then to discharge in part the first defendant's liability under the Facility.

29 As of December 2015, US$199.7m remained due from the first defendant to the plaintiff under the Facility.[44]

30 In December 2015, the plaintiff commenced action in Singapore against Mr Teng, seeking to recover that full sum under an indemnity which he had given to the plaintiff in January 2012 in respect of the first defendant's liabilities. In February 2017, the plaintiff secured summary judgment against Mr Teng for the sum of US$199.7m plus interest and costs:[45] see at first instance *EFG Bank AG, Singapore Branch v Teng Wen-Chung* [2017] SGHC 318 ("*EFG Bank v Teng*") and on appeal *Teng Wen-Chung* v *EFG Bank AG, Singapore Branch* [2018] 2 SLR 1145 ("*Teng v EFG Bank*"). This judgment against Mr Teng remains wholly unsatisfied.[46]

31 In 2016, Mr Teng and Mr Huang were prosecuted in Taiwan for criminal breach of trust and money laundering. The subject matter of the charges against them included their conduct in connection with the SFIP-1 Structure, the SFIP-1

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42 58 AB 32817–23818.

43 SOC at paras 18–19.

44 SOC at para 20.

45 HC/ORC 1241/2017 in HC/S 1297/2015.

46 Plaintiff's Closing Submissions dated 30 October 2020 ("PCS") at para 25.

Pledge and the Facility. In 2019, after appeals and a retrial, they were both found guilty and sentenced to lengthy terms of imprisonment.[47]

32 The assets in the SFIP-1 Account have been realised.[48] The account now holds US$194.57m in cash,[49] plus accrued interest.

33 In July 2016, the plaintiff commenced this action against the first and second defendants. In March 2018, the plaintiff joined the third defendant to this action.[50] The basis for the joinder was that the third defendant – as the current trustee of the SFIP-1 Unit Trust and as the chargor under the SFIP-1 Pledge – was a necessary and proper party to this action, given that the second defendant's defence challenges the validity and enforceability of the SFIP-1 Pledge.

Relief sought

34 The only substantive relief which the plaintiff seeks by its claim is a declaration that the SFIP-1 Pledge is valid and enforceable.[51]

35 The second defendant brings a counterclaim against the plaintiff and the third defendant. The only substantive relief which the second defendant seeks by its counterclaim are two declarations to the opposite effect of the declaration which the plaintiff seeks: (a) a declaration that the assets in the SFIP-1 Account

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47 SOC at para 38; D2CS at para 100, n 134.

48 D2CS at para 5, n 1.

49 AEIC of Ian Osborn dated 1 July 2020 ("Osborn's AEIC") at para 12; Transcript, 30 March 2021, at p 1, lines 17–22.

50 HC/ORC 1970/2018.

51 SOC at p 28, prayer 1.

are *not* subject to the SFIP-1 Pledge;[52] and (b) a declaration that the third defendant holds the assets in the SFIP-1 Account on trust for the second defendant.[53] The second defendant also seeks by counterclaim an order that the third defendant terminate the SFIP-1 Unit Trust or any trust relationship with the second defendant and return the assets in the SFIP-1 Account to the second defendant.[54]

36 The plaintiff advances a counterclaim to the second defendant's counterclaim. It relies on this if I find that the plaintiff's claim fails and the second defendant's counterclaim succeeds. By its counterclaim to the counterclaim, the plaintiff seeks either damages against the second defendant equal to the value of the assets in the SFIP-1 Account or an indemnity for the loss it will suffer by reason of the SFIP-1 Pledge being held to be invalid or unenforceable. The plaintiff claims this relief on three grounds: (a) that the second defendant is liable to the plaintiff in misrepresentation; (b) that the second defendant is vicariously liable for Mr Teng's and Mr Huang's fraud or unauthorised activities; and (c) that the second defendant breached its contract with the plaintiff by failing to prevent Mr Teng's and Mr Huang's fraud or unauthorised activities.[55]

Issues to be determined

37 This entire action turns on a single central issue: whether the SFIP-1 Pledge is valid and enforceable under Singapore law.

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52 D&CC at p 70, prayer 1A.

53 D&CC at p 70, prayer 1.

54 D&CC at p 70, prayer 2.

55 Plaintiff's Reply and Defence to Counterclaim (Amendment No 4) ("R&DCC") at para 122.

38 It is undisputed that the SFIP-1 Pledge is an authentic document[56] and that it is, under Singapore law, a validly formed contract.[57]

39 The second defendant mounts its challenge to the SFIP-1 Pledge by impugning both its contractual effect and its proprietary effect. On its contractual effect, the second defendant argues that the second defendant's subscription for all of the units in the SFIP-1 Unit Trust and Mr Teng's consent to the SFIP-1 Pledge are illegal under Taiwanese law.[58] On the proprietary effect of the SFIP-1 Pledge, the second defendant argues that the security interest it creates in the plaintiff's favour ranks after the second defendant's beneficial interest in the assets in the SFIP-1 Account.[59]

40 On the first ground of challenge, the second defendant also takes an overarching preliminary point. In August 2016, the second defendant commenced an arbitration in Taiwan against the plaintiff under the arbitration agreement in the SFIP-1 Mandate (see [23] above).[60] In 2018, the tribunal delivered its final award, finding in the second defendant's favour ("the Taiwanese Award").[61] The second defendant's preliminary point is that the Taiwanese Award's findings on certain issues of relevance in this action give rise to an issue estoppel preventing the plaintiff from relitigating those issues now.

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56 PCS at para 30.

57 Transcript, 30 March 2021, at p 5, lines 1–2.

58 D&CC at paras 105, 108–109 and 111.

59 D&CC at para 113(2).

60 2 AB 904–908.

61 D&CC at paras 69 and 76–77; 8 AB 4201–4375.

41 There are therefore three broad issues for me to determine:

(a) Does the Taiwanese Award give rise to any issue estoppel against the plaintiff?

(b) Does the plaintiff's security interest under the SFIP-1 Pledge rank after the second defendant's beneficial interest in the assets in the SFIP-1 Account?

(c) Is the SFIP-1 Pledge unenforceable by reason of illegality under Taiwanese law?

42 I deal with each of these three broad issues in turn.

Issue estoppel

The arbitration

43 In the arbitration, the second defendant's case was that the express terms of the SFIP-1 Mandate obliged the plaintiff to return to the second defendant, upon the second defendant's termination of the mandate (see [27] above), all of the assets which the second defendant had placed under the plaintiff's management pursuant to the mandate.[62] The second defendant accordingly asked the tribunal to order the plaintiff to return the assets in the SFIP-1 Account to the second defendant. The third defendant was not, of course, a party to the arbitration, not being a party to the SFIP-1 Mandate or to the arbitration agreement which it contains.

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62 D2RS at para 59; 10 AB 5250, line 23 to 5251, line 20.

44 In response, the plaintiff's case in the arbitration was as follows:

(a) The plaintiff could not return the assets because they were now owned in law by the third defendant as the trustee of the SFIP-1 Unit Trust. If the second defendant wished to recover title to the assets, it therefore ought to bring a claim against the third defendant under the Trust Deed.[63]

(b) Any contractual right which the second defendant may have had under the SFIP-1 Mandate to recover the assets and any property right the second defendant might have in those assets under the Trust Deed were subordinate to the plaintiff's security interest in those assets "by virtue of the terms of the SFIP-1 Pledge and under Singapore law". That security interest entitled the plaintiff to apply the assets in satisfaction of the sums due under the Facility notwithstanding the terms of the SFIP-1 Mandate and the Trust Deed.[64]

The plaintiff maintained throughout the arbitration that the tribunal should make no finding on whether the SFIP-1 Pledge was valid and enforceable under Singapore law because the Singapore courts were the proper forum to determine that issue under the express terms of the SFIP-1 Pledge (see [20] above).[65]

45 The tribunal accepted the second defendant's submissions. The Taiwanese Award therefore ordered the plaintiff to pay to the second defendant

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63 10 AB 5297 at para 39.1.

64 10 AB 5297 at para 39.2.

65 9 AB 4539–4540 at para 43; 8 AB 4316 at para 18.

US$193.8m, being the assets in the SFIP-1 Account at that time, together with interest.[66]

46 The second defendant submits that the Taiwanese Award contains six findings in the second defendant's favour, all of which the plaintiff is estopped from relitigating in this action:[67]

(a) First, that the second defendant's subscription to shares in STAAP breached Taiwanese law ("the STAAP Illegality Finding").[68]

(b) Second, that the second defendant's subscription to units in the SFIP-1 Unit Trust breached Taiwanese law ("the SFIP-1 Illegality Finding").[69]

(c) Third, that the breach of Taiwanese law on the first and second findings rendered the second defendant's subscription for shares in STAAP and for units in the SFIP-1 Unit Trust void *ab initio* and not merely unenforceable ("the Subscription Voidness Finding").[70]

(d) Fourth, that the SFIP-1 Pledge breached Taiwanese law, with the result that the assets that the second defendant had transferred into the SFIP-1 Account never ceased to be the second defendant's property ("the Pledge Illegality Finding").[71]

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66 8 AB 4203.

67 D&CC at paras 69 and 76–77; D2CS at para 104.

68 13 AB 7073–7075 at paras IIA(3)(e) and IIA(3)(g).

69 D&CC at para 106; 13 AB 7074–7075 at paras IIA(3)(f) and IIA(3)(g).

70 13 AB 7077–7078 at para IIB(3)(c).

71 D&CC at para 110; 13 AB 7081 at paras IIC(1) and IIC(2).

(e) Fifth, that the breach of Taiwanese law on the fourth finding rendered the SFIP-1 Pledge void *ab initio* and not merely unenforceable ("the Pledge Voidness Finding").[72]

(f) Sixth, that Ms Wu was aware that the money which the plaintiff was going to lend the first defendant under the Facility against the security of the SFIP-1 Pledge would be transferred to third parties for the personal benefit of Mr Teng rather than for the corporate benefit of the second defendant ("the Knowledge Finding").[73]

The law

47 The starting point for the test which determines whether an issue estoppel has arisen from a foreign adjudication (transnational issue estoppel), is the test which determines whether an issue estoppel has arisen from a local adjudication (domestic issue estoppel). Both parties therefore take as their starting point the test for domestic issue estoppel which the Court of Appeal set out in *Lee Tat Development Pte Ltd v Management Corporation of Strata Title Plan No 301* [2005] 3 SLR(R) 157 ("*Lee Tat*").

48 It was held in *Lee Tat* at ([14]–[15]) that a domestic issue estoppel arises if the earlier adjudication satisfies four conditions:

(a) It is a final and conclusive judgment on the merits;

(b) The judgment was entered by a court of competent jurisdiction;

(c) There is identity of parties; and

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72 13 AB 7081–7082 at para IIC(3).

73 13 AB 7087, 7088 at paras IIF(2)(c) and IIF(2)(e).

(d) There is identity of subject matter.

49 This test is modified in two ways when applied to transnational issue estoppel: *Merck Sharp & Dohme Corp (formerly known as Merck & Co, Inc) v Merck KGaA (formerly known as E Merck)* [2021] 1 SLR 1102 ("*Merck*") at [35]. First, the foreign court must have had transnational jurisdiction over the party said to be bound by the estoppel. Second, there must be no defence to recognition of the foreign judgment in Singapore.

50 At the outset, I should note a quirk of timing. The second defendant commenced the arbitration in August 2016, a month *after* the plaintiff commenced this action.[74] That is not, in itself, a ground for rejecting the Taiwanese Award as being capable of giving rise to an issue estoppel. That would be the result only if the second defendant's conduct in securing the Taiwanese Award could be characterised as an abuse of process (*Jixin Xu v Wei Wang* (2019) 58 VR 536 at [107(d)]). The plaintiff does not suggest that the second defendant is guilty of any such abuse.

51 I now deal with the elements of a transnational issue estoppel. It is convenient to begin with identity of parties.

Identity of parties

52 There is identity of parties in so far as the second defendant is concerned. The second defendant was the claimant in the arbitration and is a party to this action.

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[74] Transcript, 29 March 2021, at p 113, lines 12–16.

53 There is also identity of parties in so far as the plaintiff is concerned. The respondents in the arbitration were named as "EFG Bank AG" and "EFG Bank AG, Hong Kong Branch".[75] The plaintiff in this action is named as "EFG Bank AG, Singapore branch". These differences of nomenclature carry no legal or procedural significance for present purposes. EFG Bank AG is a single bank and a single legal person. The branches of a bank are simply different aspects of that single legal person: see *TMT Co Ltd v The Royal Bank of Scotland plc (trading as RBS Greenwich Futures) and others* [2018] 3 SLR 70 at [53].[76]

54 The plaintiff submits, however, that identity of parties is absent because the third defendant was not a party to the arbitration but is a party to this action.[77]

55 On the question of identity of parties, the court will "[look] past the form to consider whether, in substance, the parties involved in the two sets of proceedings [are] effectively the same": *Koh Sin Chong Freddie v Singapore Swimming Club* [2015] 1 SLR 1240 at [110], citing *Lee Tat* at [14] and *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 ("*Goh Nellie*") at [33]. Identity of parties is present if the parties are identical in relation to the issue on which the issue estoppel is said to arise: *Griffin Real Estate Investment Holdings Pte Ltd (in liquidation) v ERC Unicampus Pte Ltd* [2019] 5 SLR 105 at [19]. It is only the principal players in both proceedings who need to be effectively identical: *Cost Engineers (SEA) Pte Ltd v Chan Siew Lun* [2016] 1 SLR 137 ("*Cost Engineers*") at [58], citing *Goh Nellie* at [33].

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75 8 AB 4072.

76 D2CS at para 111; Second Defendant's Reply Closing Submissions to Plaintiff's Closing Submissions dated 4 December 2020 ("D2RS") at para 62.

77 R&DCC at para 72.1; PCS at paras 189–191.

56 The plaintiff's argument proceeds as follows. The third defendant is a principal player because it has an interest in the outcome of this action. It is the trustee of the SFIP-1 Unit Trust and is therefore the legal owner of the assets in the SFIP-1 Account. It is the chargor under the SFIP-1 Pledge. Further, the third defendant is not merely a nominal defendant in this action. It advances a positive case that the SFIP-1 Pledge is valid and enforceable.[78] The position of the third defendant as the SFIP-1 Unit Trust's trustee is especially important in this action because the second defendant's case implies that the trustee acted in breach of trust in executing the SFIP-1 Pledge (as I have indeed found: see [149] below).[79] In fact, the second defendant itself acknowledged in earlier interlocutory proceedings in which it challenged jurisdiction and service that the third defendant was a necessary and proper party to this action.[80]

57 I do not accept the plaintiff's submission. A party to the later proceedings who was not a party to the earlier proceedings is not a principal player simply because it has an interest in the outcome of the later proceedings. In *Cost Engineers* (at [58]), Steven Chong J (as he then was) cited *Jaidin bin Jaiman v Loganathan a/l Karpaya and another* [2013] 1 SLR 318 ("*Jaidin bin Jaiman*") to illustrate the meaning of "principal players". In *Jaidin bin Jaiman*, a court had apportioned liability as between a motorcyclist and a driver in proceedings to which they were the only parties. The motorcyclist's pillion rider then brought fresh proceedings against the motorcyclist and the driver. The court held that the apportionment of liability in the earlier proceedings was *res judicata* as between the motorcyclist and the driver: *Jaidin bin Jaiman* at [11].

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78 Plaintiff's Reply Submissions dated 4 December 2020 ("PRS") at para 29.

79 Transcript, 29 March 2021, at p 110, lines 13–17.

80 PRS at para 29; HC/ORC 7452/2017; Notes of Argument in HC/SUM 3218/2017 dated 30 August 2017 at p 22, lines 13–15.

The requirement of identity of parties was satisfied because the pillion rider did not contribute to the accident and thus could not have affected the apportionment of liability between the motorcyclist and the driver in the earlier proceedings: *Jaidin bin Jaiman* at [7]. On the issue of apportionment, therefore, the pillion rider was not a principal player. Identity of parties was not absent simply because the pillion rider had an interest in the outcome of the later proceedings.

58 The third defendant is not a principal player in relation to the tribunal's findings on any of the six issues on which the second defendant now seeks to rely. That is because the only interest which the third defendant has in this action, as established by the only positive case which it advances in this action, is on the issue of whether the SFIP-1 Pledge is valid and enforceable *under Singapore law*.[81] That is not any one of the six issues on which the second defendant relies as giving rise to an issue estoppel.

59 Identity of parties is therefore present for the purposes of considering whether the Taiwanese Award gives rise to transnational issue estoppel. The plaintiff and the second defendant are the only principal players with respect to the six issues on which the second defendant relies as giving rise to a transnational issue estoppel.

Identity of issues

60 The plaintiff submits that there is no identity of issues,[82] or at least no full identity of issues, because Jersey law and Singapore law are relevant to the

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81 D2CS at para 17.

82 PCS at para 192.

validity and enforceability of the SFIP-1 Pledge but were not considered in the Taiwanese Award.[83]

61 Full identity of issues is not required for an issue estoppel to arise. But the determination said to give rise to an issue estoppel must have been "fundamental and not merely collateral to the previous decision so that the decision could not stand without that determination": *Goh Nellie* at [35], cited in *Merck* at [40]. The determination should not be merely a "[step] in a process of reasoning tending to establish or support the proposition upon which the rights depend": *Goh Nellie* at [36]–[37], citing *Blair v Curran* (1939) 62 CLR 464 at 532.

62 Whether a determination is fundamental or merely collateral to a decision is assessed bearing in mind the balance between the public interest in finality in litigation and the private interest in not foreclosing a litigant from arguing an issue that, in substance, was not the central issue determined in previous proceedings: *Goh Nellie* at [37]. Further, in defining the issues in both proceedings, the court should interpret the decisions of a foreign legal system cautiously, particularly in ascertaining what was actually decided and whether the issue in question was necessary or merely collateral to the decision: *Merck* at [40], citing *Carl Zeiss Stiftung v Rayner & Keeler Ltd and Others (No 2)* [1967] 1 AC 853 at 918.

63 The second defendant does not explain how the STAAP Illegality Finding was fundamental to the tribunal's decision. But the plaintiff does not allege that it was not. I therefore need not say any more about this finding.

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[83] Transcript, 29 March 2021, at p 111, lines 7–20.

64 I accept the second defendant's submission that the SFIP-1 Illegality Finding, the Subscription Voidness Finding, the Pledge Illegality Finding and the Pledge Voidness Finding were fundamental to the tribunal's decision in the Taiwanese Award.[84] The chain of reasoning from the tribunal's findings to its decision may be summarised as follows:

(a) The tribunal made the SFIP-1 Illegality Finding.

(b) Given the SFIP-1 Illegality Finding, the tribunal made the Subscription Voidness Finding.

(c) Given the Subscription Voidness Finding, the tribunal found that the assets in the SFIP-1 Account remained the second defendant's property.

(d) Given that the assets in the SFIP-1 Account remained the second defendant's property, the tribunal made the Pledge Illegality Finding.

(e) Given the Pledge Illegality Finding, and the finding that the effect of violating Taiwanese law was voidness *ab initio* rather than mere unenforceability, the Tribunal made the Pledge Voidness Finding.

(f) The tribunal found that the loss that the plaintiff would suffer if ordered to return the assets was not unfair because the direct cause of the plaintiff's loss was its acts in transferring the money which the plaintiff advanced to the first defendant under the Facility out of the first defendant's account to third parties for the personal benefit of Mr Teng.

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[84] D2CS at paras 117(a)–117(b).

(g) The tribunal therefore decided that the plaintiff remained bound by the express terms of the SFIP-1 Mandate to recover the assets in the SFIP-1 Account from the third defendant and return them to the second defendant.

65 The second defendant also submits that the Knowledge Finding was fundamental to the tribunal's decision, and in particular to the finding at [64(f)] above.[85] I do not accept that submission. The finding at [64(f)] above was premised on a number of separate findings. The Knowledge Finding was only one of them.[86] The second defendant does not explain how the Knowledge Finding was *fundamental* to the finding at [64(f)] above.

Defences to recognition

66 It is not disputed that a foreign arbitral award is capable of giving rise to a transnational issue estoppel. The Taiwanese Award is therefore to be treated for this purpose as the equivalent of a final and conclusive judgment of a foreign court.[87] The question before me is whether there are any defences to the recognition in Singapore of the Taiwanese Award.

67 The plaintiff submits that the Taiwanese Award does not give rise to any issue estoppel in this action because the plaintiff has defences to the recognition in Singapore of the award.[88] Those defences are that the tribunal issued the Taiwanese Award in excess of jurisdiction and in breach of natural justice.

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85 D2CS at para 117(c).

86 13 AB 7084–7089 at para IIF.

87 Second Defendant's Further Written Submissions dated 19 February 2021 ("D2SS") at para 13.

88 PCS at para 185.

68 The plaintiff has challenged the Taiwanese Award on two previous occasions. The first failed and the second succeeded. First, in February 2018, the plaintiff applied to set the award aside in Taiwan.[89] That application failed at first instance and on appeal.[90] The Taiwanese courts held that there were no grounds under Taiwanese law on which to set the award aside.[91] Second, in October 2018, the plaintiff challenged the second defendant's attempt to enforce the award in Hong Kong.[92] In November 2020, the Hong Kong Court of First Instance ("HK CFI") found that the tribunal had rendered the award in excess of jurisdiction and in breach of natural justice.[93] In January 2021, the HK CFI refused the second defendant's application for leave to appeal against its decision.[94]

69 These foreign judgments cannot, of course, bind me on the issue of whether the plaintiff has defences to the recognition of the Taiwanese Award.[95] Further, no party argues that either of these foreign judgments raise any sort of issue estoppel on the enforceability or otherwise of the Taiwanese Award.[96] The submission is, instead, that I can adopt the reasoning of either the Taiwanese

89 8 AB 4376–4385.

90 Kuo-Bin Lin's 11th affidavit at para 8.

91 Kuo-Bin Lin's 11th affidavit at p 185, paras E(5)– H.

92 8 AB 4395–4400.

93 Saw Teng Sheng's 2nd affidavit at para 5; p 32, para 58; p 48, para 96.

94 Saw Teng Sheng's 3rd affidavit at para 5.

95 Plaintiff's Supplemental Submissions on Hong Kong and Taiwan Court Decisions dated 19 February 2021 ("PSS") at para 4; D2SS at paras [5(b)]–[5(c)].

96 Transcript, 29 March 2021, at p 115, lines 15–22; Transcript, 30 March 2021, at p 133, line 22 to p 134, line 13.

courts or the HK CFI on the issue of defences to recognition to the extent that I find that reasoning persuasive.[97]

Pleadings objection

70 The second defendant takes a preliminary objection on the plaintiff's pleadings. The second defendant objects to the plaintiff relying on the breach of natural justice ground[98] as a defence to recognition because the plaintiff has not pleaded this ground.

71 The second defendant bears the burden of establishing the issue estoppel on which it relies. However, O 18 r 8(1) of the Rules of Court (2014 Rev Ed) obliges the plaintiff to plead specifically the grounds on which it relies to argue that no issue estoppel arises. These grounds include the defences to recognition on which it intends to rely.

72 The HK CFI's judgment in which it found that the tribunal had breached natural justice was delivered only after the parties had filed their closing submissions in this action. To that extent, the natural justice ground could be said to be a supervening event that the plaintiff could not possibly have pleaded. Nevertheless, I accept the second defendant's submission[99] that breach of natural justice is a well-established ground in Singapore law on which to challenge an award. The plaintiff therefore did not need to see the HK CFI's reasoning in its judgment in order to decide whether to plead a breach of natural justice as a defence to recognition.

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97 Transcript, 30 March 2021, at p 131, lines 7–8.

98 Second Defendant's Further Reply Written Submissions ("D2SRS") at paras 12–14.

99 Transcript, 30 March 2021, at p 132, lines 2–6.

73 I accept also that the second defendant would suffer prejudice for which it cannot be compensated by costs if the case it has to meet on recognition were now to include the unpleaded breach of natural justice ground. As the second defendant points out, not all of the material from the arbitration is in evidence before me. The material which is in evidence before me was selected on the basis of relevance to the pleadings. Those pleadings did not raise the natural justice ground.[100]

74 I therefore hold that the plaintiff is bound by its pleadings to advance only the excess of jurisdiction ground as a defence to recognition.

Excess of jurisdiction

75 The plaintiff argues that the tribunal exceeded its jurisdiction in making the SFIP-1 Illegality Finding, the Subscription Voidness Finding, the Pledge Illegality Finding and the Pledge Voidness Finding.[101]

76 An award issued by a tribunal seated in Taiwan is enforced in Singapore under s 46(1) read with s 46(3) of the Arbitration Act (Cap 10, 2002 Rev Ed) and not under Part III of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA"). That is because Taiwan is not a contracting party to the New York Convention: *Arbitration in Singapore: A Practical Guide* (Sundaresh Menon ed-in-chief) (Sweet & Maxwell, 2nd Ed, 2018) ("*Arbitration in Singapore*") at para 14.082. I proceed on the basis that the grounds for refusing enforcement under s 46 of the Arbitration Act are the same as the grounds set out in Art 36(1) of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law"): see *Arbitration in Singapore* at para 14.083. In

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100 Transcript, 30 March 2021, at p 132, lines 7–23.

101 PCS at para 185.

PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal [2014] 1 SLR 372, the Court of Appeal held (at [84]) that the grounds for refusing enforcement under s 19 of the IAA of an international arbitration seated in Singapore are the same as the grounds set out in Art 36(1) of the Model Law. Those grounds should apply equally to enforcement under s 46 of the Arbitration Act: *Arbitration in Singapore* at para 14.026.

77 Excess of jurisdiction is therefore a defence to the enforcement of the Taiwanese Award in Singapore. Article 36(1)(*a*)(iii) of the Model Law provides that a Singapore court may refuse to recognise or enforce an award if:

> the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or *it contains decisions on matters beyond the scope of the submission to arbitration*, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced ...
>
> [emphasis added]

78 Determining whether an award contains decisions on matters beyond the scope of the submission to arbitration for the purpose of recognising or enforcing the award under Art 36(1)(*a*)(iii) of the Model Law is analogous to determining whether to set aside an award on that ground under Art 34(2)(*a*)(iii) of the Model Law. The determination involves a two-stage process (see *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 at [30], citing *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 ("*PT Asuransi (CA)*") at [40] and [44]):

> (a) First, the court must determine what matters were within the scope of the submission to the tribunal; and

(b) Second, the court must determine whether the award involved those matters, or whether it involved "a new difference … outside the scope of the submission to arbitration and accordingly … *irrelevant to the issues requiring determination*" [emphasis in original].

79 In its request for arbitration, the second defendant asserted its primary claim that the express terms of the SFIP-1 Mandate obliged the plaintiff to return the assets upon termination of the SFIP-1 Mandate.[102] The second defendant also asserted that the SFIP-1 Pledge afforded the plaintiff no excuse for failing to comply with this obligation because the SFIP-1 Pledge was void under Singapore law for lack of consideration.

80 Before me, the second defendant submits the plaintiff's case in the arbitration was that the SFIP-1 Mandate was only one agreement out of a single composite transaction comprising a suite of agreements which also included the Trust Deed and the SFIP-1 Pledge, and that the plaintiff's rights and the second defendant's obligations under this single composite transaction gave the plaintiff a defence to the second defendant's claim.[103] On this basis, the second defendant now submits that the tribunal acted within its jurisdiction in arriving at its findings on the four issues (see [75] above).

81 I do not accept the second defendant's submission. I find the analysis of the Taiwanese Award undertaken by the HK CFI to be persuasive. The arbitration agreement in the SFIP-1 Mandate confined the tribunal's jurisdiction to disputes arising out of or in connection with the SFIP-1 Mandate. That contractual relationship was governed by Taiwanese law. The arbitration

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102 D2RS at para 59; 10 AB 5250, line 23 to 5251, line 20.

103 D2RS at para 60; D2SRS at para 29(b).

agreement did not give the tribunal jurisdiction to make any determinations binding on the plaintiff and the second defendant with regard to the Trust Deed or the SFIP-1 Pledge. Each of those is a separate instrument with its own dispute resolution clause. Further, the second defendant is not privy to any of those instruments. The Trust Deed is a unilateral declaration of trust by Volaw. The SFIP-1 Pledge is the unilateral creation of a security interest by Volaw (now, the third defendant) in favour of the plaintiff.

82 The tribunal would have acted within its jurisdiction if it had confined itself to making the STAAP Illegality Finding,[104] the SFIP-1 Illegality Finding[105] and the Pledge Illegality Finding[106] *as matters of Taiwanese law* in order to determine a dispute which engaged *only* the terms of the SFIP-1 Mandate under Taiwanese law. But the tribunal exceeded its jurisdiction when it purported to make these findings as having general effect, *ie* as having effect beyond Taiwanese law and on contracts beyond the SFIP-1 Mandate. Furthermore, the tribunal had no jurisdiction whatsoever to make the Subscription Voidness Finding[107] and the Pledge Voidness Finding.[108] Those findings touch on contracts entirely outside the scope of the parties' reference to arbitration. To the extent that the tribunal's findings go beyond the SFIP-1 Mandate as a matter of Taiwanese law, those findings were outside the tribunal's jurisdiction.

83 If the tribunal had not exceeded its jurisdiction in this way, it could not have arrived at its ultimate decision that the SFIP-1 Mandate obliged the

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104 13 AB 7073–7075 at paras IIA(3)(e) and IIA(3)(g).

105 D&CC at para 106; 13 AB 7074–7075 at paras IIA(3)(f) and IIA(3)(g).

106 D&CC at para 110; 13 AB 7081 at paras IIC(1) and IIC(2).

107 13 AB 7077–7078 at para IIB(3)(c).

108 13 AB 7081–7082 at para IIC(3).

plaintiff to recover US$193.8m from the third defendant and return it to the second defendant. That ultimate decision required both the Subscription Voidness Finding and the Pledge Voidness Finding in order to negate the proprietary consequences of the Trust Deed under Jersey law and of the SFIP-1 Pledge under Singapore law.

84 The plaintiff has therefore established that it has a defence to recognition in Singapore of the Taiwanese Award on these four issues (see [75] above). As a result, no issue estoppel can arise against the plaintiff in this action on those issues.

85 I now turn to consider the two grounds on which the second defendant challenges the SFIP-1 Pledge free of any issue estoppel. I begin with the proprietary consequences of the SFIP-1 Pledge and the question of priorities.

Priorities

Pleadings objection

86 The second defendant advances two arguments to support its submission that the plaintiff took its security interest under the SFIP-1 Pledge in the assets in the SFIP-1 Account subject to the second defendant's beneficial interest in those assets.[109] First, the second defendant argues that, if the plaintiff has a *legal* security interest, it was not a *bona fide* purchaser of that legal interest for value without notice of the second defendant's beneficial interest.[110] Second, the second defendant argues that, if the plaintiff has an *equitable* security interest,

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109 D2CS at para 180.

110 D2CS at paras 16 and 188.

that equitable interest is postponed to the second defendant's later equitable interest because the plaintiff was guilty of inequitable conduct.[111]

87 The plaintiff accepts that the second defendant has at least obliquely pleaded the first argument.[112] But the plaintiff submits that the second defendant has not pleaded the second argument: it has not even obliquely pleaded either the rule of inequitable conduct on which it relies or any particulars of the plaintiff's inequitable conduct on which it relies.[113] In response, the second defendant submits that the second argument is fundamentally a question of priorities and that it has adequately pleaded the issue of priorities by pleading that the plaintiff took the SFIP-1 Pledge subject to the second defendant's equitable interest in the underlying assets.[114]

88 I accept the plaintiff's submission that the second defendant has not pleaded the material facts necessary to give the plaintiff adequate notice of the case it has to meet on the second argument. I therefore hold the second defendant to its pleaded case and consider only its first argument: whether the plaintiff is a *bona fide* purchaser for value without notice of a legal interest in the assets in the SFIP-1 Account.

The issues

89 It is common ground that the second defendant has a beneficial interest in the assets in the SFIP-1 Account.[115] Volaw was the original trustee of the

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111 D2CS at paras 16 and 194.

112 Transcript, 29 March 2021, at p 76, lines 17–20; p 96, lines 1–6.

113 Transcript, 29 March 2021, at p 76, line 10 to p 77, line 5.

114 D2RS at para 69(c); Transcript, 30 March 2021, at p 78, lines 2–7.

115 D&CC at para 113(1); R&DCC at para 113.

SFIP-1 Unit Trust and was the plaintiff's customer in respect of the SFIP-1 Account. Volaw became the legal owner of the assets in the SFIP-1 Account when the second defendant subscribed for units in the SFIP-1 Unit Trust and transferred its assets into the SFIP-1 Account as consideration. As the second defendant points out,[116] Volaw declared the second defendant to be the beneficial owner of the SFIP-1 Account when it opened the SFIP-1 Account.[117] The third defendant made the same declaration when it succeeded Volaw as trustee.[118]

90 The plaintiff's security interest under the SFIP-1 Pledge will be valid and enforceable if: (a) the second defendant consented to Volaw granting the SFIP-1 Pledge; and (b) the plaintiff was a *bona fide* purchaser for value of its security interest under the SFIP-1 Pledge without notice of the second defendant's beneficial interest in the assets in the SFIP-1 Account.

91 I examine these two issues in turn.

The second defendant did not give its prior consent to the SFIP-1 Pledge

The Consent Letters bind the second defendant

92 The Consent Letters (see [21] above) constitute valid consent by the second defendant to the SFIP-1 Pledge if and only if: (a) Mr Teng had the second defendant's authority to sign them on its behalf; and (b) the second defendant had the power and capacity to consent to the SFIP-1 Pledge.[119] A

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116 Second Defendant's Reply Closing Submissions to Third Defendant's Closing Submissions ("D2RS-D3") at para 14.

117 25 AB 13998.

118 44 AB 24849.

119 PRS at para 90.

common subsidiary issue is whether the second defendant was prohibited by Taiwanese law from consenting to the SFIP-1 Pledge. I therefore deal with that subsidiary issue first.

(1) Taiwanese law as pleaded did not prohibit consent

93 The second defendant submits that two provisions of Taiwanese law prohibited it from consenting to the SFIP-1 Pledge.[120]

94 First, Art 16 of the Taiwan Company Act 1929 (Taiwan) ("the TCA") provides (as translated) that "[a] company shall not act as a guarantor of any nature, unless otherwise permitted by any other law or by the Articles of Incorporation of the company".[121] The plaintiff's and the second defendant's Taiwanese law experts agree that "act[ing] as a guarantor" includes "[p]roviding the company's property for creation of security interest for others", citing the Taiwan Supreme Court decision in 74-Tai-Shang-Zi-703 (1985).[122] It is also common ground that the second defendant's corporate constitution contains no provision permitting the second defendant to act as a guarantor or to pledge its assets to secure a third party's debts.[123]

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120 D2CS at para 12.

121 AEIC of Tseng Wang-Ruu dated 14 August 2020 ("Tseng's AEIC"), Exhibit TWR-2 ("Tseng's 1st Report"), Exhibit 15 at 173.

122 Tseng's 1st Report at para 100; AEIC of Wang Hsin-Chun dated 14 August 2020, Exhibit WHC-2 ("Wang's 1st Report") at para 100; AEIC of Huang Yuh-Kae dated 12 August 2020 ("Huang's AEIC"), Exhibit YKH-2, Sub-Exhibit TYT-3 ("Huang's 1st Report") at para 52.

123 Wang's 1st Report at para 97.

95 Second, Art 143 of the Taiwan Insurance Act 1929 ("the TIA") (as translated) provides that "[a]n insurance company may not … act as a guarantor for a third party or provide its assets as collateral for the debt of another".[124]

96 The second defendant submits that the SFIP-1 Structure violates both Art 16 of the TCA and Art 143 of the TIA directly or by virtue of the Taiwanese doctrine of evasion of law.[125] In response, the plaintiff submits that the SFIP-1 Structure violates neither provision and that the second defendant is precluded from relying on the evasion of law doctrine.[126] I accept the plaintiff's submissions for the following reasons.

(A) STATUTORY LANGUAGE

97 The plaintiff's Taiwanese law expert, Prof Huang Yuh-Kae, takes the view that the second defendant neither acted as a guarantor nor provided its assets as security for a third party's debts. That is because the SFIP-1 Structure did not involve the second defendant granting any pledge of its own assets.[127] The SFIP-1 Pledge did not arise out of any contract to which the second defendant was a party. The plaintiff submits[128] that the SFIP-1 Pledge involved *Volaw* pledging assets in *Volaw's* account to the plaintiff in *Volaw's* capacity as the legal owner of the assets.[129] The only property of the second defendant which arose from the SFIP-1 Structure were the units allotted to the second defendant

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124 Tseng's 1st Report, Exhibit 1 at 73.

125 Transcript, 30 March 2021, at p 96, lines 3–10.

126 PCS at para 147.

127 Huang's 1st Report at paras 52–53.

128 PCS at para 148.

129 27 AB 15004.

in the SFIP-1 Unit Trust upon subscription. The plaintiff held those units for the second defendant in the Singfor Account free of any pledge.

98 In response, the second defendant's Taiwanese law experts, Prof Tseng Wang-Ruu and Prof Wang Hsin-Chun, say that the SFIP-1 Pledge breached both Art 16 of the TCA and Art 143 of the TIA. Prof Wang says that the question under both those provisions is economic effect rather than technical form: did the second defendant in economic effect provide its assets as security for a third party's debts regardless of the form of the transaction? As Prof Wang puts it, "[o]ne needs to look at the effect of the transaction and see whether it is prohibited by the law".[130] On that basis, both of the second defendant's experts are of the view that "[w]hat was pledged were assets which belong to [the second defendant]".[131]

99 To support the argument that the SFIP-1 Pledge was a pledge of the second defendant's assets, the second defendant argues that the existence and nature of its beneficial interest in the assets transferred into the SFIP-1 Account continued uninterrupted and unchanged by the assets becoming subject to the SFIP-1 Unit Trust. The second defendant's submission is that there was no *scintilla temporis* when the assets were comprised in the SFIP-1 Unit Trust and unitised to interrupt or change the nature of its beneficial interest.[132] I accept that submission. But that does not establish that, for the purposes of Art 16 of the TCA and Art 143 of the TIA, the assets that became subject to the SFIP-1 Pledge were assets belonging to the second defendant.

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130 Wang's Supplementary AEIC, Exhibit WHC-4 ("Wang's Responses to Written Questions") at paras 32–33.

131 Tseng's 1st Report at para 105; Wang's 1st Report at para 105.

132 D2CS at paras 127 and 196 to 197; D2RS-D3 at para 21.

100 The interpretation of Art 16 of the TCA and Art 143 of the TIA advanced by the second defendant's experts is not reflected in the language of either provision. The language does not prohibit Volaw from creating a charge over assets that Volaw owns in law and in which a Taiwanese company has a beneficial interest. Nor is there any indication that either provision was intended to have extra-territorial reach so as to bind Volaw in Jersey. All that the second defendant did in connection with the SFIP-1 Pledge was ostensibly to consent to Volaw granting the SFIP-1 Pledge. As the plaintiff points out,[133] the second defendant's experts cite no authority to support an extended interpretation of either provision as prohibiting such consent. I therefore prefer and accept the plaintiff's expert evidence. I hold that the SFIP-1 Pledge did not breach either Art 16 of the TCA or Art 143 of the TIA.

(B) EVASION OF LAW DOCTRINE

101 In the alternative, the second defendant's experts say that the Taiwanese evasion of law doctrine prohibits a Taiwanese insurance company from circumventing Art 16 of the TCA and Art 143 of the TIA by entering into a transaction designed and intended to evade the restrictions in those provisions.[134]

102 The plaintiff submits that the second defendant has not pleaded even the factual basis for the evasion of law doctrine, *ie*, that the plaintiff intended to evade or circumvent these Taiwanese law restrictions.[135] In response, the second defendant says that it suffices that it has pleaded that the parties performed acts

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133 PCS at para 151.

134 Tseng's 1st Report at para 106; Wang's 1st Report at para 106; Wang's Responses to Written Questions at para 3.

135 PRS at para 61.

which were illegal under Taiwanese law and that they knew that this venture was illegal.[136]

103 I accept the plaintiff's submission. The second defendant has failed to plead the evasion of law doctrine. Where a party seeks to rely on foreign law, it should plead that law as fact: *Singapore Civil Procedure 2021* vol 1 (Cavinder Bull gen ed) (Sweet & Maxwell, 2021) at para 18/11/3, citing *Goh Chok Tong v Tang Liang Hong* [1997] 1 SLR(R) 811. If the second defendant were now allowed to rely on the evasion of law doctrine under Taiwanese law despite not having pleaded it, the plaintiff will be prejudiced in a manner for which it cannot be compensated by costs. Had the doctrine been pleaded, the plaintiff could have adduced factual evidence as well as expert evidence on Taiwanese law to prove that the doctrine does not apply.[137] In particular, the plaintiff could have called evidence as to whether Mr Levinson, who designed the SFIP-1 Structure, did so with intent to evade Taiwanese law in order to produce a result prohibited by these statutory provisions or whether he did so in order to comply with Taiwanese law in order to produce a result that was not prohibited by Taiwanese law.[138]

104 On the second defendant's case as pleaded, therefore, I find that the SFIP-1 Pledge did not breach either Art 16 of the TCA or Art 143 of the TIA.

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136 D&CC at para 31.

137 Transcript, 29 March 2021, at p 78, lines 2–20; p 80, lines 1–4, 11–13.

138 Transcript, 30 March 2021, at p 186, line 14 to p 187, line 24.

(2) The second defendant had power and capacity to consent

105 The second defendant next submits that, by reason of both Art 16 of the TCA and Art 143 of the TIA,[139] it lacked the power and the capacity to charge its assets as security for a third party's debts and therefore to consent to the SFIP-1 Pledge.[140] Given my finding that Art 16 of the TCA and Art 143 of the TIA do not prohibit the SFIP-1 Pledge (see [93]–[104] above), I find also that neither provision deprived the second defendant of the power or the capacity to consent to the SFIP-1 Pledge.

(3) Mr Teng had authority to issue the Consent Letters

106 The plaintiff's case is that Mr Teng had at all material times either the second defendant's actual or ostensible authority to issue the Consent Letters consenting to the SFIP-1 Pledge for and on behalf of the second defendant.[141] I accept the plaintiff's case on Mr Teng's actual authority but not on his ostensible authority. I address each type of authority in turn.

(A) ACTUAL AUTHORITY

107 Taiwanese law governs the issue of whether Mr Teng had actual authority to issue the Consent Letters on the second defendant's behalf. That is because the second defendant is a company incorporated in Taiwan.[142] The source of an agent's actual authority to represent a principal that is a corporation "must ultimately derive from the law of the place of incorporation, which

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139 D2CS at para 138.

140 D&CC at para 91.

141 PCS at para 82.

142 PCS at para 33; D2CS at paras 213–214; Third Defendant's Closing Submissions dated 30 October 2020 ("D3CS") at para 29.

regulates the company's capacity and internal management, including the identification of the persons authorised to act on the corporation's behalf": *Dicey, Morris & Collins on the Conflict of Laws* vol 2 (Lord Collins of Mapesbury gen ed) (Sweet & Maxwell, 15th Ed, 2012) ("*Dicey, Morris & Collins*") at para 33-451.

108 The plaintiff submits that Mr Teng had actual authority to issue the Consent Letters for two reasons.

109 The plaintiff's first submission is that Mr Teng was, loosely speaking, "the boss" of the second defendant.[143] Two witnesses called by the second defendant at trial gave evidence to that effect: (a) Chyou Syan-Cheng,[144] who was the second defendant's Senior Vice President of Investment until March 2008;[145] and (b) Liao Chia-Hsing,[146] who was employed in the second defendant's capital management department until 2015.[147] When Mr Teng signed the Consent Letters on 8 March 2008, he was the chairman of the second defendant, a director of the second defendant and the majority shareholder of the second defendant.[148] The second defendant's senior executives invariably complied with his instructions. They did this even after the FSC suspended him as the second defendant's chairman in January 2009.[149]

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143 PCS at para 70; Transcript, 30 March 2021, at p 177, lines 9–15.

144 Transcript, 1 September 2020, at p 54, lines 3–4.

145 Chyou's AEIC at para 3.

146 Transcript, 2 September 2020, at p 8, lines 9–11.

147 Chyou's AEIC at paras 6–8.

148 PCS at para 32.

149 Transcript, 2 September 2020, at p 32, lines 4–11; p 34, lines 4–11; 63 AB 35083.

110 I accept the plaintiff's submission. But this takes the plaintiff only so far on actual authority. As the second defendant submits, the way the second defendant's senior executives and other employees treated Mr Teng does not go to the issue of actual authority.[150] The plaintiff has not pleaded that, under Taiwanese law, Mr Teng could acquire actual authority by the fact that the second defendant's executives invariably complied with his instructions.

111 The plaintiff's alternative submission is that the provisions of the TCA gave Mr Teng actual authority to issue the Consent Letters.[151] Article 208-3 of the TCA provides that "[t]he chairman of the board of directors ... shall externally represent the company".[152] Further, Art 57 read with Art 208-5 of the TCA provides that "directors representing the company" "shall have the power to conduct all affairs pertaining to the business of the company".[153] This broad authority conferred by Arts 57 and 208-5 does not require the board of directors to resolve formally and explicitly to give the director specific authority before the director can exercise it.[154]

112 The dispute on this aspect of the plaintiff's case is whether consenting to the SFIP-1 Pledge constitutes "affairs pertaining to the business of the company". The second defendant submits that an illegal act cannot constitute "affairs pertaining to the business of the company" within the meaning of Art 57 of the TCA (see [247] below). That may be so. But I have found that the

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150 D2RS at para 31.

151 PCS at paras 36–37; D3CS at para 74.

152 Tseng's 1st Report, Exhibit 15 at 174.

153 Tseng's 1st Report, Exhibit 15 at 173–174.

154 AEIC of Wu Yen-Te dated 14 August 2020 ("Wu's AEIC"), Exhibit YTW-1 ("Wu's 1st Report") at para 10.

SFIP-1 Pledge did not breach either Art 16 of the TCA or Art 143 of the TIA (see [93]–[104] above). The second defendant's submission therefore fails.

113 I therefore find that Mr Teng did have actual authority under the TCA to issue the Consent Letters on the second defendant's behalf consenting to the SFIP-1 Pledge.

(B) OSTENSIBLE AUTHORITY

114 Because I have found that Mr Teng had actual authority to issue the Consent Letters, it is not necessary for me to consider whether he had ostensible authority to do so. But I will deal with the issue, given the parties' extensive submissions on the underlying law and facts. I find that Mr Teng did not have ostensible authority to issue the Consent Letters on the defendant's behalf.

115 The plaintiff and the second defendant accept that Singapore law governs Mr Teng's ostensible authority to issue the Consent Letters. That is because the SFIP-1 Pledge is governed by Singapore law.[155]

116 In Singapore law, an agent has ostensible authority to bind his principal as against a counterparty if his principal has represented to the counterparty that the agent has such authority with the intention that the counterparty should rely on the representation and the counterparty does in fact rely on the representation.[156] The representation then clothes the agent with ostensible authority "to do all such acts as agents in his position usually do": *Walter Woon on Company Law* (Tan Cheng Han gen ed) (Sweet & Maxwell, 3rd Rev Ed, 2009) at para 3.27.

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155 PCS para 34; D2CS para 198.

156 PCS at para 34.

117 The plaintiff submits that a third party would reasonably assume that an agent who is the chairman, a director and the majority shareholder of a company has the company's authority to act on its behalf and to bind the company.[157] I do not accept this submission. The mere fact that a person satisfies all three of these criteria does not amount to the company's representation to third parties that that person has the company's authority to do any and all conceivable acts on the company's behalf.

118 In the alternative, the plaintiff submits that the second defendant represented to the plaintiff that Mr Teng had its authority to issue the Consent Letters in two documents: (a) the account-opening booklet for the Singfor Account ("the ACB"); and (b) the minutes of a meeting of the second defendant's board held on 30 January 2008 ("the Board Minutes"). The plaintiff says that it relied on these representations in acting on the Consent Letters.[158] I deal with each document in turn.

(I) THE ACCOUNT-OPENING BOOKLET

119 The ACB was executed on behalf of the second defendant by its president (one Chen Wen-Yen) ("President Chen") and one of its directors (one Pu Yun-Hsi) ("Director Pu").[159] The second defendant points out that Mr Teng is not one of the authorised signatories listed in the ACB. It draws my attention to three versions of the ACB which are in evidence. These three versions appear at Tabs 7, 8 and 9 of the affidavit of evidence in chief of the second defendant's witness, one Chen Hsiu-Fang ("Ms HF Chen"). Ms HF Chen was employed in the second defendant's capital management and foreign investment departments

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157 PCS at para 40.

158 PCS at para 40.

159 Transcript, 29 March 2021, at p 16, lines 1–9; 16 AB 8682.

until 2015.[160] Ms HF Chen's evidence is that the plaintiff sent the versions of the ACB at Tabs 7 and 8 to her.[161] Ms HF Chen says that the Tab 7 version was the first version that she completed and submitted to the plaintiff.[162] The version at Tab 9[163] is the ACB on which the plaintiff relies in these proceedings.[164]

120 The Tab 7 version of the ACB[165] is incomplete: it is missing the even-numbered pages. Part 5 of the ACB is the signature card setting out the specimen signatures of all authorised signatories. Part 5 of the Tab 7 version consists of a single page. That page sets out the names and specimen signatures of four signatories in the first four fields: President Chen, Director Pu, one Liu Ko-Hsien (a manager of the second defendant) and Mr Chyou.[166] The fifth and sixth fields of the signature card are left blank. At the bottom of the signature card is the phrase "[End of Part 5]" and below that the page number "25".

121 The Tab 8 version of the ACB[167] is missing even more pages than the Tab 7 version. In the Tab 8 version, Part 5 sets out the same four names and their specimen signatures with the fifth and sixth fields left blank.[168] This page is likewise paginated as page 25. But next to the phrase "[End of Part 5]" is the additional typed phrase "Page 1 of 2". But there is no "Page 2 of 2" and there is no page 26.

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160 Chen Hsiu-Fang's AEIC at paras 5–11.

161 Chen Hsiu-Fang's AEIC at paras 29–30.

162 Transcript, 3 September 2020, at p 108, line 10 to p 109, line 1.

163 Chen Hsiu-Fang's AEIC at 270–325.

164 Transcript, 30 March 2021, at p 40, lines 14–16.

165 Chen Hsiu-Fang's AEIC at 231.

166 Chen Hsiu-Fang's AEIC at 241.

167 Chen Hsiu-Fang's AEIC at 255.

168 Chen Hsiu-Fang's AEIC at 266.

122 The Tab 9 version of the ACB[169] is complete and has no missing pages. Part 5 of the Tab 9 version is also at page 25 and also contains the same four names and their specimen signatures with the fifth and sixth fields left blank. This page also bears the typewritten phrase "Page 1 of 2" at its foot. But Part 5 of the Tab 9 version contains a second page, also paginated number 25, with the additional typewritten phrase "Page 2 of 2" at the foot.[170] That second page sets out the names and specimen signatures of Mr Huang and Mr Teng. The first page of Part 5 in all three versions is countersigned by President Chen and Director Pu. However, the second page of Part 5 in the Tab 9 version is not countersigned by them.

123 From all this, the second defendant invites me to infer that, when the second defendant returned the completed ACB to the plaintiff, the ACB did not include the second page of Part 5 with Mr Teng's name and specimen signature.[171] The second defendant says that the plaintiff has failed to call a witness to prove that the plaintiff received this second page and incorporated it into the ACB.[172] The second defendant therefore invites me to find that Mr Teng is not an authorised signatory of the Singfor Account.[173]

124 I do not accept the second defendant's submission. I find on the balance of probabilities that Mr Teng was an authorised signatory of the Singfor Account. I do so for three reasons.

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169 Chen Hsiu-Fang's AEIC at 269.

170 Chen Hsiu-Fang's AEIC at 296.

171 Transcript, 30 March 2021, at p 49, lines 9–11.

172 Transcript, 30 March 2021, at p 48, lines 14–18.

173 Transcript, 30 March 2021, at p 48, lines 2–5.

125 First, as the plaintiff points out,[174] the plaintiff' has proven the complete ACB found at Tab 9. The affidavit of evidence in chief of one Albert Chiu Sin Chuen, the plaintiff's Executive Chairman for the Asia Pacific Region,[175] exhibits the complete ACB.[176] It is correct that the plaintiff did not call a witness to testify specifically about the circumstances in which it received the second page of Part 5 and how that page came to be incorporated into the ACB. But counsel for the second defendant confirms that its case is not that the second page is a forgery.[177] I am satisfied that the second page was duly incorporated into the ACB and constituted Mr Teng an authorised signatory of the Singfor Account.

126 Second, as the plaintiff points out,[178] although the second page of Part 5 is not countersigned by President Chen and Director Pu, the inclusion of Mr Huang and Mr Teng as authorised signatories is consistent with another part of the ACB which President Chen and Director Pu did countersign. As I have mentioned, Part 5 of the ACB is the signature card. But Part 3 of the ACB is where the plaintiff's customer names its directors, its authorised signatories and its authorised representatives not having signing authority. The Tab 7 version of Part 3 is completely blank.[179] President Chen and Director Pu nevertheless countersigned at the foot of the blank lists.[180] On Ms HF Chen's own evidence,

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174 Transcript, 29 March 2021, at p 32, line 23 to p 33, line 1.

175 Chiu's AEIC at para 1.

176 Chiu's AEIC at 118–173.

177 Transcript, 30 March 2021, at p 40, line 24 to p 41, line 14.

178 Transcript, 30 March 2021, at p 173, lines 3–21.

179 Chen Hsiu-Fang's AEIC at 238–239.

180 Chen Hsiu-Fang's AEIC at 239.

the plaintiff then typed certain details into Part 3, which is the Tab 8 version.[181] In the Tab 8 version, the same lists in Part 3 are completed with the names of six authorised signatories: Mr Teng, Mr Huang, Director Pu, President Chen, Mr Chyou and Mr Liu.[182] As the plaintiff submits,[183] the Tab 8 version thus confirms that the second defendant intended to name Mr Teng and Mr Huang as authorised signatories. The second page of Part 5 in the Tab 9 version thus complements the list of six authorised signatories in Part 3 by supplementing Part 5 in the earlier versions with the specimen signatures of Mr Huang and Mr Teng as the second defendant's fifth and sixth authorised signatories.

127 Third, as the second defendant itself says, President Chen and Director Pu are the witnesses who can testify as to whom the second defendant authorised as its signatories.[184] But, as the plaintiff points out,[185] the second defendant did not call either President Chen or Director Pu to testify that the second defendant did not authorise Mr Teng to be a signatory of the Singfor Account. Absent such evidence, and given that it is not the second defendant's case that Part 5 is a forgery or that there is anything sinister about the plaintiff completing the ACB for the second defendant,[186] I find that the second defendant did appoint Mr Teng as an authorised signatory for the Singfor Account.

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181 Transcript, 3 September 2020, at p 109, lines 6–8.

182 Chen Hsiu-Fang's AEIC at 260–262.

183 PRS at para 111.

184 Transcript, 30 March 2021, at p 47, lines 3–7.

185 Transcript, 29 March 2021, at p 34, lines 3–12.

186 Transcript, 30 March 2021, at p 46, lines 11–25.

128 The second defendant points out that the account opening documents that Ms HF Chen sent to the plaintiff include minutes of a board resolution.[187] The minutes record a resolution by the second defendant's board that, among other things, the Singfor Account be opened and that Mr Chyou and Mr Liu operate the account jointly. Mr Teng and Mr Huang are not named in these minutes.[188] Insofar as the second defendant relies on this document to submit that it did not intend to appoint Mr Teng as an authorised signatory in the ACB, I do not accept the submission. Although the minutes are signed, they are undated. Further, it is unclear what the context of these minutes was and what became of them. On Ms HF Chen's evidence, the plaintiff completed the ACB after she provided the minutes to them (see [126] above). Because the second defendant does not allege that there is anything sinister about the plaintiff completing the ACB for the second defendant, I give more weight to the complete ACB document than to the contents of these minutes.

129 In the alternative, the second defendant submits that Mr Teng's designation as an authorised signatory of the Singfor Account cannot be relied on as a representation that he was authorised to consent to the SFIP-1 Pledge. That is because the SFIP-1 Pledge was a pledge to secure a third party's debts and did not relate to the operation of the Singfor Account.[189]

130 In response, the plaintiff submits that the ACB governs the whole relationship between the plaintiff as banker and the second defendant as its customer because the Singfor Account was the only account that the second

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187 Chen Hsiu-Fang's AEIC at 251–253.

188 Transcript, 30 March 2021, at p 48, line 22 to p 49, line 3.

189 D2CS at para 217.

defendant ever opened with the plaintiff.[190] The plaintiff also relies on the circumstances in which the second defendant opened the Singfor Account. The second defendant opened the account in the context of Mr Huang and Mr Teng exploring an investment structure to invest in foreign securities and a credit structure to use leverage to enhance investment returns.[191] That was why the plaintiff proposed the structure that led to the SFIP-1 Unit Trust and the SFIP-1 Pledge.[192] As such, the plaintiff submits, the mandate in the ACB extends to authorising Mr Teng to consent to the SFIP-1 Pledge in order to secure the debts of the first defendant, a company that the plaintiff believed was beneficially owned by the second defendant.[193]

131 I do not accept the plaintiff's submission. The second defendant did not, by executing the ACB, represent that any of the authorised signatories listed in the ACB were authorised to consent to the SFIP-1 Pledge. An examination of the provisions of the ACB shows that the authority which the ACB conferred on the authorised signatories listed in it is to give instructions to the plaintiff on which the plaintiff is to act in relation to maintaining or operating the Singfor Account. Consenting to the SFIP-1 Pledge was not such an instruction: the SFIP-1 Pledge did not relate to the Singfor Account at all.

132 Thus, cl 2.1 of the ACB provides as follows:[194]

> The Bank is authorized to act on instructions given by the Client in accordance with the signing authority set out below (or as the same may be amended by the Client from time to time).

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190 Transcript, 29 March 2021, at p 20, lines 11–14.

191 Transcript, 29 March 2021, at p 23, line 7 to p 24, line 6.

192 Transcript, 29 March 2021, at p 30, lines 9–16; pp 31–32.

193 Transcript, 29 March 2021, at p 24, lines 14–25.

194 16 AB 8672.

133 Further, cl 2.4 provides as follows:[195]

> Until receipt by the Bank from the Client of written notification of the revocation of the appointment of any Authorized Representative … the Bank shall be entitled to *act on the Instructions of such Authorized Representatives in accordance with the authority granted by the Client* and the Client agrees to ratify, confirm and indemnify the Bank against all the acts and deeds of the Authorized Representatives in the exercise or purported exercise of the Authorized Representatives' powers, discretion and authority. *The Bank may at its sole discretion treat all Instructions given as fully authorized* and binding on the Client regardless of the circumstances prevailing at the time of the Instructions being given or the nature or amount of the transaction and notwithstanding any … fraud … or lack of authority in relation to the Instructions or notice of any actual or potential breach of trust. The Client agrees that the Client is under an express duty to the Bank to prevent any fraudulent, forged or *unauthorized Instructions*, or Instructions, which are in actual or potential breach of trust.
>
> [emphasis added]

134 Finally, cl 4.2.1(d) provides as follows:[196]

> The Client represents and warrants that at the date of this Account Mandate and for such time as the Account shall remain open as follows: …
>
> That any Authorized Representatives appointed by the Client are and shall be duly appointed as agents of the Client with all requisite *authority to give Instructions on behalf of the Client*, subject to any express limitations contained in the document appointing them or subsequently notified to the Bank in writing.
>
> [emphasis added]

135 I accept, as the plaintiff submits,[197] that the second defendant's subscription for units in the SFIP-1 Unit Trust falls within the scope of the mandate which the ACB confers on the authorised signatories. That is because:

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195 16 AB 8672.

196 16 AB 8673.

197 Transcript, 29 March 2021, at p 21, lines 10–12.

(a) the consideration for the subscription was discharged by transferring assets from the Singfor Account to the SFIP-1 Account; and (b) the plaintiff thereafter held the units allotted to it in the Singfor Account.

136 But I do not accept that the consequence of that is that Mr Teng's consent to the SFIP-1 Pledge also falls within the scope of the ACB mandate. That is so even though I accept that the SFIP-1 Unit Trust and the SFIP-1 Pledge were part of a single composite transaction intended to implement the SFIP-1 Structure, which includes the SFIP-1 Pledge. Clause 2.10(e) of the Trust Deed provides that the investor in the SFIP-1 Unit Trust (*ie* the second defendant) consents to the trustee executing a pledge to secure third-party obligations. As the plaintiff submits,[198] this shows that the second defendant's subscription to units in the SFIP-1 Unit Trust was factually connected to the Consent Letters. But that factual connection does not extend the representations made in the ACB to cover Mr Teng's conduct other than in giving instructions to the plaintiff on which it was to act in relation to maintaining or operating the Singfor Account.

137 I therefore hold that the second defendant's appointment of Mr Teng as an authorised signatory in the ACB does not constitute a representation that Mr Teng had any sort of authority to consent to the SFIP-1 Pledge on the second defendant's behalf.

(II) THE BOARD MINUTES

138 I now turn to consider the Board Minutes (see [118] above). Mr Teng and President Chen signed the Board Minutes. They record a resolution that, among other things, Mr Teng and President Chen be authorised to sign "all

198 Transcript, 29 March 2021, at p 30, line 17 to p 31, line 1.

documents" for and on behalf of the second defendant singly.[199] The plaintiff says that it relied on the Board Minutes in acting on the Consent Letters, as the minutes confirmed Mr Teng's authority to sign "all documents" singly and without limit.[200]

139 The second defendant submits that the chronology of events makes it improbable, if not impossible, that the plaintiff relied on the Board Minutes when it received the Consent Letters and when Volaw executed the SFIP-1 Pledge on 8 March 2008.[201] I accept this submission. The Board Minutes were backdated to 30 January 2008. It was only on 13 March 2008 – several days *after* Mr Teng issued the Consent Letters – that Ms HF Chen sent Edna Leung of the plaintiff a draft resolution authorising Mr Teng and President Chen to sign singly and without limit.[202] Further, the minutes have a signature verification stamp and a date stamp that reads "26 May 2008". As the second defendant submits, this suggests very strongly that the plaintiff received the document and verified the signatures on or about that date, well after Mr Teng issued the Consent Letters.[203]

(C) CONCLUSION ON AUTHORITY

140 In summary, I find that Mr Teng had actual but not ostensible authority to consent on the second defendant's behalf to Volaw executing the SFIP-1 Pledge. He therefore had actual, but not ostensible, authority to issue the Consent Letters for and on behalf of the second defendant. That finding suffices

199 23 AB 12761.

200 Transcript, 30 March 2021, at p 176, lines 5–7.

201 D2CS at para 220.

202 Chen Hsiu-Fang's AEIC at para 68(2).

203 D2CS at para 220.

to hold that the second defendant is bound by Mr Teng's consent to the SFIP-1 Pledge and therefore did itself consent to the pledge.

The Consent Letters were issued after the SFIP-1 Pledge was created

141 Having found that the second defendant consented to the SFIP-1 Pledge, I nevertheless find that Volaw executed the SFIP-1 Pledge without the second defendant's *prior* consent. That is because Volaw executed the SFIP-1 Pledge on 7 March 2008,[204] one day *before* Mr Teng issued the Consent Letters on 8 March 2008.[205]

142 Clause 8.2.16 of the Trust Deed obliged Volaw to secure the second defendant's consent to the SFIP-1 Pledge *before* Volaw granted any security over the assets of the unit trust:[206]

> ... the Trustee shall be empowered and authorised to ... grant security by way of ... pledge ... for its own obligations (or obligations of third parties not connected with the Trust) ... where the Trustee is not acting as principal in respect of obligations of the Trust *the unanimous consent of the Unit Holders shall be required prior to the Trustee entering into any ... pledge ...*
>
> [emphasis added]

143 I assume, without deciding, that the second defendant's subscription to the SFIP-1 Unit Trust was valid, as the plaintiff submits.[207] That means that Volaw's right to execute the SFIP-1 Pledge is governed by the terms of the Trust Deed and not by Jersey law on bare trusts. This assumption works in the second

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204 25 AB 14018.

205 26 AB 14267–14268.

206 25 AB 14033.

207 PCS at paras 82 and 167.

defendant's favour on this issue in that it imposes a stricter contractual restriction on Volaw.

144 The plaintiff submits that the second defendant did give prior consent to Volaw executing the SFIP-1 Pledge even though Mr Teng issued the Consent Letters on 8 March 2008, a day after Volaw executed the SFIP-1 Pledge on 7 March 2008. The plaintiff's Jersey law expert, James Gleeson, points out that cl 17.1 of the Trust Deed provides that "[a]ny notice, approval, consent or other communication under this Instrument shall be in writing ...". His opinion draws a distinction between the second defendant consenting to the SFIP-1 Pledge and the second defendant's consent to the SFIP-1 Pledge being recorded in writing. Thus, he says, it is "arguable" that it would suffice for the purposes of cl 8.2.16 of the Trust Deed for the second defendant's consent to be recorded in writing at or before the time Volaw executed the SFIP-1 Pledge even if the actual written consent originating from the second defendant came afterwards.[208] In his opinion, the second defendant's prior consent is recorded in writing in cl 2.10(e) of the Trust Deed and in a resolution by Volaw dated 7 March 2008.[209]

145 I do not accept that either cl 2.10(e) of the Trust Deed or Volaw's resolution amounts to a record in writing of the second defendant's prior consent to the SFIP-1 Pledge for the purposes of cl 8.2.16 read with cl 17.1 of the Trust Deed. At most, cl 2.10(e) and Volaw's resolution record the second defendant's intention to consent to the pledge or an obligation to do so *at some time in the future*. Neither of them records that the second defendant gave immediate and

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208 AEIC of James Michael Gleeson dated 7 August 2020, Exhibit JMG-1 ("Gleeson's 1st Report") at para 5.2.9.

209 Gleeson's 1st Report at paras 5.2.10–5.2.11.

unconditional consent to the SFIP-1 Pledge on 7 March 2008 itself, prior to Volaw executing the pledge.

146 It is common ground that the second defendant's subscription for units in the SFIP-1 Unit Trust took place only in April 2008, well after Volaw executed the SFIP-1 Pledge. Clause 2.10(e) of the Trust Deed provides as follows:

> *Upon subscription the Initial Investor acknowledges and agrees* to the Trustee … entering into a pledge agreement with [the plaintiff] in respect of the securing of obligations of a third party as permitted under Clause 8.2.16 and, further, *that as sole Unit Holder, the approval of all the Unit Holders as required by Clause 8.2.16 is hereby given.*
>
> [emphasis added]

The introductory words of this clause show that what the second defendant acknowledged and agreed was that Volaw would execute the SFIP-1 Pledge *upon subscription*. Those words could mean one of two things. First, that the second defendant's acknowledgment and agreement were deferred and would take effect only upon subscription taking place. Alternatively, they could mean that the acknowledgment and agreement were effective immediately but that Volaw was to execute the pledge only upon subscription. In either case, the clause does not constitute the second defendant's acknowledgment and agreement *before* 8 March 2008 to Volaw executing the SFIP-1 Pledge *before* subscription, as Volaw did.

147 As for Volaw's resolution, that was a resolution for Volaw to execute a pledge to secure the obligations of the first defendant. The resolution noted that "pursuant to the provisions of the … Trust Deed, the Trustee has the power to execute a pledge to secure the obligations of a third party provided consent from the Unit Holders is given and the meeting is advised that the Unit Holders is

[*sic*] *prepared* to give such consent" [emphasis added].[210] Once again, the word "prepared" here indicates a prospective consent, not an unconditional and immediate consent before 8 March 2008.

148 It is true that Volaw's resolution was followed by the Consent Letters, which say that the second defendant "hereby *confirm[s]* our agreement and consent" [emphasis added]. The plaintiff submits that the word "confirm" shows that the second defendant was, by the Consent Letters, merely confirming consent already given on 7 March 2008 as recorded in the resolution.[211] But that is not what the resolution says. The resolution records only that the unitholder was "prepared" to consent, *ie* in the future, not that it did consent. As the plaintiff itself puts it, this suggests that the second defendant had informed Volaw that "it would consent" to the SFIP-1 Pledge.[212] That consent came on 8 March 2008. The resolution does not record in writing that the unitholder did in fact consent on or before 7 March 2008.

149 The result of my findings is that Mr Teng, for on behalf of the second defendant, consented to the SFIP-1 Pledge one day too late for the purposes of cl 8.2.16 read with cl 2.10(e) of the Trust Deed. The lack of prior consent means that Volaw acted in breach of trust by executing the SFIP-1 Pledge.

150 As between the second defendant and Volaw, the combined effect of cl 2.10(e), Volaw's resolution and the Consent Letters may well be to bar the second defendant from suing Volaw for this breach of trust: see *Snell's Equity*

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210 26 AB 14215.

211 PCS at para 250.

212 PCS at para 249.

(John McGhee & Steven Elliott gen eds) (Sweet & Maxwell, 34th Ed, 2020) ("*Snell's Equity*") at para 30-031.

151 As between the second defendant and the plaintiff, the plaintiff's case is that the lack of prior consent does not defeat its security interest because of: (a) cl 9.3 of the Trust Deed; (b) Art 55 of the Trusts (Jersey) Law 1984; and (c) the *bona fide* purchaser rule. I first consider a preliminary point on the governing law for this issue.

Governing law

152 The plaintiff submits that cl 9.3 of the Trust Deed and Art 55 of the Trusts (Jersey) Law are relevant because it is Jersey law which governs the issue of priorities.[213] The second defendant submits that both provisions are irrelevant because it is Singapore law which governs the issue of priorities.[214] I accept the second defendant's submission.

153 In *The Republic of the Philippines v Maler Foundation and others and other appeals* [2014] 1 SLR 1389, the Court of Appeal set out the broad common law methodology for resolving a legal question with a foreign law element. The methodology has three stages: (a) the characterisation of the relevant issue; (b) the selection of the appropriate choice of law rule in the context of the relevant connecting factors; and (c) the identification of a system of law by the application of those connecting factors: at [81], citing *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] QB 825 at [26]; *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 WLR 387 ("*Macmillan (CA)*") at 391–392. At the first stage, it is not sufficient to

213 PRS at para 95.

214 D2RS at para 72.

characterise the nature of the *overall* claim. A claim may involve multiple issues, each of which could fall to be decided under a different system of law: at [84], citing *Macmillan (CA)* at 418.

154 The relevant issue now is whether the plaintiff took its security interest under the SFIP-1 Pledge subject to the second defendant's beneficial interest in the underlying assets. The general rule is that issues as to competing proprietary rights are determined by the law of the place where the property is situated: *Macmillan (CA)* at 399; Lynton Tucker, Nicholas Le Poidevin and James Brightwell, *Lewin on Trusts* vols 1 and 2 (Sweet & Maxwell, 20th Ed, 2020) ("*Lewin on Trusts*") at paras 12-039 and 44-144). So, as the second defendant submits, the relevant connecting factor is the *lex situs* of the assets in the SFIP-1 Account. The plaintiff does not dispute that the *situs* of these assets is Singapore. That is because the SFIP-1 Account is a liability to the second defendant on the books of the plaintiff's Singapore branch. A bank account is situated at the branch where it is kept because the bank's obligation to repay is performable primarily at that branch: *Dicey, Morris & Collins* vol 2 at para 22-029.

155 It is true that this issue may be unpacked into several subsidiary issues, each of which may be governed by a different system of law. Thus, as the plaintiff submits,[215] Jersey law governs the specific issue of whether Volaw acted in breach of trust. That subsidiary issue arises because the second defendant's case is that its interest takes priority over the plaintiff's interest for various reasons including the plaintiff having notice that Volaw was acting in breach of trust. Obviously, no question can arise as to whether the plaintiff had notice of Volaw's breach of trust unless it is found that Volaw did in fact act in breach of trust. That finding can be made only as a matter of Jersey law. But

[215] PRS at para 98.

Jersey law does not govern the broader issue of the consequences of that breach in the priorities between the competing proprietary rights. That issue, I accept, is governed by Singapore law.

Clause 9.3 of the Trust Deed and Art 55 of the Trusts (Jersey) Law

156 In my view, even if cl 9.3 of the Trust Deed and Art 55 of the Trusts (Jersey) Law were relevant, the plaintiff cannot rely on them.

157 The plaintiff submits that, under cl 9.3 of the Trust Deed, its rights under the SFIP-1 Pledge are not affected because it is a person who contracted with the Trustee without fraud.[216] Clause 9.3 provides as follows:[217]

> 9.3 It is hereby declared that so far as relates to the safety and protection of all persons contracting and dealing with the Trustee and except in the case of fraud by the persons so contracting or dealing with the Trustee:
>
> > 9.3.1 *no person contracting or dealing with the Trustee shall be required* or in any manner concerned or interested *to enquire or ascertain the terms of the Trust or whether any contract or dealing by the Trustee are proper or whether the same has been authorised by or in a manner required by these presents* or is otherwise proper or is for the benefit of the Trust Fund or of all or any one or more of the Unit Holders …
> >
> > 9.3.2 *no person shall be affected by actual knowledge or by direct or constructive or imputed notice that any such contract or dealing has not been authorised as aforesaid* or is otherwise improper or of any dealing by the Trustee with the Trust Fund or any part thereof not being for the benefit of the Trust Fund or of all or any one or more of the Unit Holders and all such dealings transactions and contracts shall so far as such person is concerned be deemed to be within the scope of these presents and to be valid and effectual accordingly.
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> [emphasis added]

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216 PCS at para 256.

217 25 AB 14102–14103.

158 The second defendant's Jersey law expert, Brian Green QC, relies on the Jersey law doctrine of privity of contract. He says that the plaintiff, as a non-beneficiary stranger to the Trust Deed which established the SFIP-1 Unit Trust, cannot enforce cl 9.3 of the Trust Deed against the second defendant.[218] In response, the plaintiff argues that the second defendant, by subscribing to units in the SFIP-1 Unit Trust on the terms set out in the Trust Deed, is bound by cl 9.3. So the second defendant cannot challenge the rights which a third party acquires as a result of its dealings with the trustee unless that third party is guilty of fraud.[219]

159 I do not accept the plaintiff's submission. Although the second defendant is of course bound by cl 9.3 of the Trust Deed, it is so bound only as between itself and those persons who, under Jersey law, can assert that right against the second defendant under that provision of the Trust Deed. There is no evidence that, under Jersey law, a non-beneficiary stranger to a contract such as the Trust Deed can assert a right under that contract as a defence against a party to the contract. The plaintiff therefore cannot rely on cl 9.3.

160 The plaintiff submits, in the alternative, that its rights under the SFIP-1 Pledge are not affected because it did not have actual notice of Volaw's breach of trust and therefore comes within Art 55 of the Trusts (Jersey) Law.[220] Article 55 provides:

> 55 Protection to persons dealing with trustee
>
> (1) A bona fide purchaser for value without actual notice of any breach of trust –

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218 AEIC of Brian Green dated 14 August 2020, Exhibit BG-3 ("Green's Reply Report") at para 14.

219 PCS at para 255.

220 Transcript, 30 March 2021, at p 171, lines 11–20.

> (a) may deal with a trustee in relation to trust property as if the trustee was the beneficial owner of the trust property; and
>
> (b) shall not be affected by the trusts on which such property is held.
>
> (2) No person paying or advancing money to a trustee shall be concerned to see that such money is wanted, or that no more than is wanted is raised, or otherwise as to the propriety of the transaction or the application of the money.

The second defendant submits that the plaintiff did not plead this provision and therefore cannot rely on it. The provision was raised for the first time in the expert reports of Mr Gleeson and Mr Nigel Sanders, who are the Jersey law experts for the plaintiff and the third defendant respectively.[221]

161 The plaintiff says that its failure to plead Art 55 should not be held against it because it is a defence responding to the defendant's case that Volaw acted in breach of trust; and the second defendant neither pleaded that breach of trust nor particularised the acts constituting a breach of trust.[222]

162 I find, however, that the second defendant's pleadings were sufficient to inform the plaintiff of the case it had to meet on this issue. That, after all, is the ultimate objective of pleadings: *V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422 at [36]. Although material facts must be pleaded, the legal conclusions to be drawn from them need not: *MK (Project Management) Ltd v Baker Marine Energy Pte Ltd* [1994] 3 SLR(R) 823 at [26].

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221 D2RS at para 72.

222 Transcript, 29 March 2021, at p 99, lines 20–25; p 100, lines 1–10; PRS at para 93.

163 The second defendant pleaded all the material facts necessary to submit that Volaw acted in breach of trust. It pleaded that cl 8.2.16 of the Trust Deed required the second defendant's prior consent.[223] It pleaded that Mr Teng issued the Consent Letters only after Volaw had executed the SFIP-1 Pledge.[224] It pleaded that the plaintiff was put on notice that Volaw "had executed the SFIP-1 Pledge before receiving the required 'prior' consent of [the second defendant]".[225] The plaintiff was given reasonable notice that part of the case for the defence that it would have to meet in this action was that Volaw acted in breach of trust.

164 Further, the plaintiff was not taken by surprise: in its reply to the second defendant's defence, it argued, "*Even if it is assumed that no prior consent was obtained* or that the [Consent Letters] did not constitute valid consent (which is denied), *this would constitute a breach of trust* by the trustee of the SFIP-1 UT, but would not necessarily mean that the trustee of the SFIP-1 UT lacked capacity to enter into the SFIP-1 Pledge …" [emphasis added].[226] The plaintiff itself in its submissions identifies breach of trust as the legal conclusion to be drawn from the second defendant's pleaded case that Volaw granted the SFIP-1 Pledge without the second defendant's prior consent.[227] Just as the second defendant cannot rely on the unpleaded evasion of law doctrine in Taiwanese law (see [103] above), the plaintiff cannot now rely on the unpleaded Art 55 of the Trusts (Jersey) Law.

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223 D&CC at para 57(4)(b).

224 D&CC at paras 57(4)(b) and 57(6).

225 D&CC at para 99(1).

226 R&DCC at para 85.7.

227 PRS at para 92.

The plaintiff was a* bona fide *purchaser for value without notice

165 In Singapore law, a *bona fide* purchaser for value of a legal interest without notice of a prior equitable interest takes free of that equitable interest: *MKC Associates Co Ltd and another v Kabushiki Kaisha Honjin and others (Neo Lay Hiang Pamela and another, third parties; Honjin Singapore Pte Ltd and others, fourth parties)* [2017] SGHC 317 ("*MKC Associates*") at [292]; *MCC Proceeds Inc v Lehman Bros International (Europe)* [1998] 4 All ER 675 at 688. I now consider the elements of this rule.

Purchaser for value

166 A purchaser for the purpose of the *bona fide* purchaser rule is not restricted to a person who buys the entire interest in any given property: it includes any person who acquires a legal interest in the property: Tan Yock Lin, *Personal Property Law* (Academy Publishing, 2014) ("*Personal Property Law*") at para 24.165, citing *LS Investment Pte Ltd v Majlis Ugama Islam Singapura* [1998] 3 SLR(R) 369. The plaintiff is the purchaser of a security interest over the assets in the SFIP-1 Account.

167 The requirement in this rule that a person be a purchaser "for value" is different from the requirement of consideration in contract law. Whereas consideration may be executory, a purchaser provides value not when he merely promises to pay but when he actually pays: *Personal Property Law* at para 24.166, citing *Hongkong and Shanghai Banking Corp Ltd v United Overseas Bank Ltd* [1992] 1 SLR(R) 579 at [37]; *The Law of Personal Property* (Michael Bridge *et al* eds) (Sweet & Maxwell, 2nd Ed, 2018) at para 30-102. A promise to pay does not amount to value for the purposes of this rule because the promisor loses nothing as a matter of property by reason of the promise alone: *Personal Property Law* at para 24.166. So where the purchaser acquires

notice of an equity after his promise to pay but before he actually pays, he will take subject to it: *Personal Property Law* at para 24.166.

168 It is common ground that the plaintiff was a purchaser for value of a security interest on 7 March 2008.[228] I therefore consider next the questions of good faith and notice.

Good faith and notice

169 Good faith and notice are separate elements of the rule (*Personal Property Law* at para 24.187). It is hard, however, to imagine a situation where a purchaser does not have notice yet acts in bad faith: *Snell's Equity* at para 4-021; *Lewin on Trusts* vol 2 at para 44-124. Here the same facts are relevant to both elements. I therefore analyse them together as the parties do.

170 The plaintiff as the purchaser bears the burden of proving good faith and the absence of notice: see *Snell's Equity* at para 4-018, citing *inter alia Attorney-General v Biphosphated Guano Co* (1878) 11 Ch D 327 at 337.

171 The second defendant's case is that the plaintiff had notice of the second defendant's beneficial interest in the assets underlying the SFIP-1 Pledge.[229] The plaintiff admits in reply that it had notice that the second defendant was the sole unitholder of the SFIP-1 Unit Trust.[230] As the second defendant clarified in its submissions,[231] the real issue in this context is whether the plaintiff had notice

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228 Transcript, 30 March 2021, at p 86, line 19 to p 87, line 2.

229 D&CC at para 93.

230 R&DCC at para 87.

231 D2CS at paras 188 and 266.

that the second defendant did not consent to the assets in the SFIP-1 Account becoming subject to the plaintiff's security interest under the SFIP-1 Pledge.

(1) Time of assessing good faith and notice

172 The first question is at what date I should assess good faith and notice. The plaintiff's security interest was created on 7 March 2008, when Volaw executed the SFIP-1 Pledge. Part of the second defendant's case, however, is that the plaintiff had notice of the second defendant's beneficial interest as a result of events which took place *after* 7 March 2008. In support of this aspect of its case, the second defendant submits that the plaintiff was a purchaser for value of a fresh security interest each time the second defendant transferred fresh assets into the SFIP-1 Account after 7 March 2008.[232]

173 The plaintiff[233] and the second defendant[234] cite authorities that agree that the relevant time to assess good faith and notice is the time of the transfer of the legal interest: *Macmillan Inc v Bishopsgate Investment Trust plc and others (No 3)* [1995] 1 WLR 978 ("*Macmillan (HC)*") at 1000; *Lewin on Trusts* vol 2 at para 44-137. The second defendant adds that in transactions involving two stages – *eg*, a contract to acquire a legal interest followed later by an actual transfer of the legal interest – a purchaser cannot avail himself of the *bona fide* purchaser defence if he has notice at any time before the transfer: *Lewin on Trusts* vol 2 at para 44-138.[235] *Snell's Equity*, cited by the plaintiff, adds that a purchaser cannot avail himself of the *bona fide* purchaser defence if he has

232 Transcript, 30 March 2021, at p 86, lines 19–21.

233 PCS at para 269.

234 D2CS at para 196.

235 D2CS at para 193.

notice after the conveyance is executed but before he pays the whole purchase price: at para 4-027.

174 The parties differ on the application of these propositions to the assets in this case. The second defendant submits that the relevant time is each time assets belonging to the second defendant were transferred into the SFIP-1 Account.[236] It argues that the plaintiff's security interest came into existence, attached to each asset and was perfected only when that asset was transferred into the SFIP-1 Account.[237] By this means, the second defendant argues that events even after 7 March 2008 are relevant to the plaintiff's good faith and to whether it had notice. In response, the plaintiff submits that the relevant time is the time it purchased its security interest. On the facts of this case, that is the time the plaintiff acquired a security interest over the present and future assets in the SFIP-1 Account. This was the date of the SFIP-1 Pledge: 7 March 2008. On the plaintiff's case, it is not relevant that the SFIP-1 Account contained no assets at that time.[238]

175 The relevant time to assess good faith and notice is the time the legal interest attaches to the property: *Personal Property Law* at para 24.188. This time may, in some situations, coincide with the time the interest is created. But where it does not coincide, "the focus being on the transfer, it is the attachment and hence notice then that matters": *Personal Property Law* at para 24.188.

176 The SFIP-1 Pledge is in strict legal terms a charge and not a pledge. A consensual security interest other than a pledge attaches to an asset if five

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236 D2CS at para 196.

237 D2CS at paras 196(b)–196(c); Transcript, 30 March 2021, at p 84, lines 1–5.

238 PCS at para 269.

conditions are met (Ewan McKendrick, *Goode on Commercial Law* (LexisNexis, 5th Ed, 2016) ("*Goode*") at para 23.07):

(a) There is a security agreement conforming to any statutory formalities;

(b) The asset to be given in security is identifiable as falling within the scope of the agreement;

(c) The debtor has power to give the asset;

(d) There is some current obligation of the debtor to the creditor, or to another, which the asset is designed to secure; and

(e) Any contractual conditions for attachment are fulfilled.

177 The fourth condition is important to understanding the SFIP-1 Pledge. Using the example of a charge securing a current account, *Goode* explains that there is attachment whenever the creditor has an advance outstanding. Further, so long as there are advances outstanding, the security interest is regarded as having attached retroactively, *ie* from the date of the security agreement (at paras 23.15 and 23.21, citing *Tailby v Official Receiver* (1888) 13 App Cas 523 at 533; *Re Lind* [1915] 2 Ch 345 at 374):

> 23.15 Until the creditor has made his advance, so as to impose on the debtor an obligation of repayment, no security interest can be said to attach. … *If there is no current indebtedness, there can be no attachment*; and if an advance is made and then repaid, attachment ceases, though it will revive with effect from the date of the security instrument if a new advance is made pursuant to that instrument. This is the true analysis of so-called continuing security of the kind exemplified by a charge in favour of a bank to secure a current account. So long as there is a debit balance on the account there is a security interest with continuous existence as from the date of the security agreement. But at those times when the account is in credit or has a nil balance, the security reverts to the inchoate status it possessed before the first drawing was made on the account.

> …
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> 23.21 … *when all the ingredients of attachment come together then, unless otherwise agreed, the security interest attaches as from the date of the security agreement.* In other words, the security agreement creates an inchoate security which is treated by the law in very much the same way as it treats an unborn child. Until birth, a child has no legal existence and cannot be the claimant in an action. After birth, it acquires legal status and can sue even for injuries it sustained before birth. The birth gives it rights in law which run back to the time of conception. So also with the inchoate security interest. It exists by virtue of the security agreement but requires the added components of interest and obligation to give it substance. …
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> [emphasis added]

This analysis suffices to dispose of the second defendant's argument that the plaintiff's security interest attached afresh as and when the second defendant transferred assets into the SFIP-1 Account. Once the plaintiff made advances to the first defendant, the plaintiff's security interest ran back in time to 7 March 2008.

178 The second defendant also argues that, even if the plaintiff's security interest did not attach each time the second defendant transferred fresh assets into the SFIP-1 Account,[239] the plaintiff purchased a security interest each time the plaintiff made fresh advances to the first defendant.[240] I do not accept the second defendant's characterisation. *Goode* takes the view that, when a person takes security over future property or for future advances, there is only one security interest. In the case of future property coming within the scope of the security, that security interest expands as that property comes in. In the case of future advances against that security interest, the quantum of the security interest varies according to the amount outstanding from time to time. This

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[239] Transcript, 30 March 2021, at p 85, line 18.

[240] Transcript, 30 March 2021, at p 84, lines 1–5; p 86, lines 9–21.

single-interest theory explains the retroactive effect of attachment: *Goode* at paras 23.23–23.24.

179 The retroactive effect of attachment generally gives the creditor priority based on the date of the security agreement (*Goode* at para 23.22):

> The retroactive effect of attachment ... means that where priority falls to be determined by the date of creation of competing interests, an attached security interest in favour of A is considered to have effect as from the date of the security agreement and will thus have priority over an interest granted to B and attaching after the date of A's security agreement and before attachment of A's interest. ...

180 The second defendant does not argue for an exception to this priority rule similar to the common law exception for tacking further advances to a first legal mortgage. Under that exception, a first legal mortgagee has priority over a second mortgagee for advances made without notice of the second mortgage but not for advances made after notice of the second mortgage unless the person holding the second mortgage consents: *Goode* at para 23.22, n 61 and para 24.20. In any event, the time of each advance made by the plaintiff after 7 March 2008 is not set out in the second defendant's pleadings or submissions.

181 I therefore hold, on the facts of this case, that the plaintiff's security interest under the SFIP-1 Pledge attached to the SFIP-1 Account once and for all with effect from 7 March 2008 and not as and when the second defendant transferred fresh assets into the SFIP-1 Account or as and when the plaintiff made fresh advances. Therefore, the only date I need to consider to assess whether the plaintiff acted in good faith or had notice is that single date: 7 March 2008.

(2) Law on notice

182 Notice may be actual or constructive. In *MKC Associates*, Woo Bih Li J (as he then was) distinguished between actual and constructive notice as follows (at [295]):

> … A person has *actual* notice of another's interest in that property if he has actual personal knowledge of it. On the other hand, *constructive* notice is notice which a reasonable man in the position of the person dealing with the property in question would have acquired if there were facts putting him on inquiry and he should have, acting reasonably, carried out inquiries to dispel or confirm the existence of another's adverse interest in the property; however, a purchaser is not required to act on the slightest suspicion as to the existence of a prior equitable interest (see *Halsbury's Laws of Singapore* vol 9(3) (LexisNexis, 2003) at paras 110.80–110.081).
>
> [emphasis in original]

Actual notice also includes wilful blindness of an equitable interest: *Snell's Equity* at para 4-028.

183 The test for constructive notice is whether a reasonable person in the purchaser's position either (a) should have appreciated that a property right in the asset probably existed, or (b) should have made inquiries or sought advice which would have revealed the probable existence of the right: *Papadimitriou v Crédit Agricole Corpn and Investment Bank* [2015] 1 WLR 4265 ("*Papadimitriou*") at [14]–[15]; *Snell's Equity* at para 4-035. In the latter scenario, facts known to the purchaser form the basis of the purchaser's need to make inquiries. As Lord Clarke explained in *Papadimitriou* at [20]:

> … on the one hand, the bank's knowledge of facts indicating the mere possibility of a third party having a proprietary right would not be enough to put the bank on inquiry but, on the other hand, it is not necessary for the bank to conclude that it probably had such a right. The test is somewhere in between. It may be formulated in this way. *The bank must make inquiries* if there is a serious possibility of a third party having such a

> right or, put in another way, *if the facts known to the bank would give a reasonable banker in the position of the particular banker serious cause to question the propriety of the transaction* …
>
> [emphasis added]

184 The second defendant argues that the plaintiff had actual or constructive notice of the six matters set out in [187] below. Based on notice of those matters, the second defendant submits that the plaintiff had notice that the second defendant did not consent to the plaintiff taking a security interest over the assets in the SFIP-1 Account.[241]

185 To the extent that the second defendant's submission suggests that notice of those six matters in turn establishes that the plaintiff had notice that the second defendant did not consent, I consider that the inquiry should not be framed in that way. The subject of the doctrine of notice is the pre-existing equitable interest (*Personal Property Law* at para 24.175). The case law formulates the tests for actual and constructive notice in terms of notice of the pre-existing equitable interest (see [182]–[183] above). To create two levels at which notice may be found, as the second defendant does, would mean that constructive notice of a fact – that fact being one which the purchaser would have discovered had it made inquiries – could itself be taken to have required the purchaser to make further inquiries which would have revealed the pre-existing equitable interest. That approach broadens the doctrine of notice beyond its proper bounds.

186 Another consideration relevant to constructive notice is that the court is concerned with property rights and not with an actionable duty to investigate: *Papadimitriou* at [33]. In *Sinclair Investments (UK) Ltd v Versailles Trade*

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[241] D2CS at paras 264–266.

Finance Ltd (in administrative receivership) and others [2012] Ch 453 at [99], the English Court of Appeal, quoting *Macmillan (HC)* at 1014, noted that the question of constructive notice should be approached on the basis that the purchaser, unless alerted to the possibility of wrongdoing, is entitled to proceed on the assumption that it is dealing with an honest counterparty:

> … a meticulous and detailed examination of every document, letter, record or minute to see whether it threw any light on the true ownership of the [relevant assets] which a careful reader—with instant recall of the whole of the contents of his files—ought to have detected. That is not the proper approach. Account officers are not detectives. Unless and until they are alerted to the possibility of wrongdoing, they proceed, and are entitled to proceed, on the assumption that they are dealing with honest men. …

(3) The second defendant's case

187 The second defendant pleads that the following six matters put the plaintiff on notice that the second defendant did not consent to the SFIP-1 Pledge:

(a) The SFIP-1 Pledge was illegal under Taiwanese law;[242]

(b) The second defendant lacked power or capacity to consent to the SFIP-1 Pledge;[243]

(c) The second defendant did not consent to the SFIP-1 Pledge, because Mr Teng had neither actual nor ostensible authority to consent in its behalf;[244]

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242 D&CC at para 109.

243 D&CC at para 95.

244 D&CC at paras 97 and 99(2)–99(3); D2CS at para 210.

(d) The first defendant did not borrow money from the plaintiff under the Facility for the corporate benefit of the second defendant or its affiliates;[245]

(e) The second defendant's subscriptions to the SFIP-1 Unit Trust were illegal under Taiwanese law;[246] and

(f) The second defendant did not subscribe to the SFIP-1 Unit Trust, because Mr Teng had neither actual nor ostensible authority to subscribe on its behalf.[247]

188 The second defendant also pleads that Volaw executed the SFIP-1 Pledge "before receiving the required 'prior' consent" of the second defendant as required by the Trust Deed.[248] The second defendant's submissions on this plea are subsumed under the second to fourth issues set out at [187] above. That is because the second defendant rightly does not argue that the timing of the Consent Letters, in itself, put the plaintiff on notice. Rather, it argues that the plaintiff had actual notice that Volaw executed the SFIP-1 Pledge without prior consent, and therefore in breach of trust, because the plaintiff knew that: (a) the second defendant lacked the capacity or power to make its assets available as security;[249] (b) Mr Teng lacked authority to provide the second defendant's

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245 D&CC at paras 82 and 83; D2CS at paras 225–226.

246 D&CC at para 100.

247 D&CC at para 97; D2CS at para 210.

248 D&CC at para 99(1).

249 D2CS at para 263(a).

assets on its behalf as security for the first defendant's debts;[250] and (c) Mr Teng was acting for his personal benefit.[251]

(4) Consent to the SFIP-1 Pledge

189 The first three matters of the six listed in [187] above can be dealt with briefly. Given my finding that Taiwanese law as pleaded did not prohibit the second defendant from consenting to the SFIP-1 Pledge (see [104] above), the plaintiff could not have had notice that the SFIP-1 Pledge was illegal or that the second defendant's consent to the SFIP-1 Pledge was illegal. Given my finding that the second defendant had the power and capacity to consent to the SFIP-1 Pledge (see [105] above), the plaintiff could not have had notice that the second defendant lacked that power or capacity. Given my finding that Mr Teng had actual authority to consent on the second defendant's behalf to the SFIP-1 Pledge (see [112] above), the plaintiff could not have had notice that Mr Teng lacked that authority.

(5) Mr Teng's and Mr Huang's personal benefit

190 On the fourth of the six matters, the second defendant relies on four groups of facts to submit that the plaintiff knew or was put on inquiry that the first defendant transferred the loans it drew under the Facility for Mr Teng's personal benefit and not for the second defendant's corporate benefit.[252] I find that the plaintiff neither knew nor was put on inquiry of this. I consider in turn the four groups of facts on which the second defendant relies.

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250 D2CS at para 263(b).

251 D2CS at para 263(c).

252 D&CC at para 68; D2CS at p 122, heading D and paras 225–226.

(A) FUND TRANSFERS TO THIRD PARTIES

191 First, the second defendant relies on loan disbursements that took place under the STAAP Structure, *ie, before* Volaw executed the SFIP-1 Pledge. Before 7 March 2008, the plaintiff's loan disbursements to the first defendant resulted in the following flow of funds:

(a) In September 2007, the first defendant transferred US$22m to the account of High Grounds with the plaintiff.[253]

(i) On the same date, High Grounds transferred US$20,005,000 out of that sum to a company called Top Vogue Global Ltd.[254]

(ii) In January 2008, High Grounds transferred US$300,000 out of the remaining sum to Oppenheimer & Co Inc, for further credit to an account belonging to Mr Teng.[255]

(iii) In March 2008, High Grounds transferred US$350,000 out of the remaining sum to an account belonging to Mr Teng.[256]

(b) In January 2008, the first defendant transferred US$3m to Top Vogue Global Ltd.[257]

253 21 AB 11756.

254 21 AB 11755.

255 23 AB 12617.

256 25 AB 13772.

257 23 AB 12646.

The second defendant argues that the plaintiff knew or should have known that the first defendant and High Grounds were not subsidiaries of the second defendant.[258]

192 It cannot be disputed that the plaintiff knew that the first defendant and High Grounds were initially beneficially owned by Mr Teng and Mr Huang. The plaintiff's Ms Wu and Edna Leung acquired the first defendant and High Grounds as special purpose companies in May 2007 and established the initial declarations of trust by these two companies' nominee shareholders.[259]

193 As the plaintiff submits,[260] these declarations of trust were consistent with an earlier investment structure that the plaintiff formulated for Mr Teng and Mr Huang, even before formulating the STAAP Structure. Mr Chiu, who was the Head of Private Banking at the plaintiff's Hong Kong branch at the material time,[261] gave evidence that, under that proposed structure, Mr Teng and Mr Huang were to be the investment managers of a private label fund in which the second defendant would invest. To implement that structure, the plaintiff acquired the first defendant and High Grounds, with Mr Teng and Mr Huang declared as their beneficial owners .[262]

194 However, the beneficial ownership of both companies changed in June 2007. On 25 June 2007, Ms Leung sent Nancy Lam, who was then the Head of Credit of the plaintiff's Hong Kong branch,[263] a preliminary credit request that

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258 D2CS at paras 227–239.

259 16 AB 8466–8467.

260 PCS at para 283.

261 Chiu's AEIC at para 9.

262 Chiu's AEIC at para 55.

263 AEIC of Nancy Lam dated 30 June 2020 at para 1.

Ms Leung and Ms Wu had prepared for her review.[264] It identified the borrowers as the first defendant and High Grounds and said that their beneficial owners were Mr Teng and Mr Huang.[265]

195 The next day, Ms Lam asked Ms Wu and Ms Leung why they proposed to lend money to a vehicle that belonged to the second defendant's major shareholders personally, rather than to a vehicle belonging to the second defendant as the sole and ultimate beneficial owner.[266] On the same day, Ms Wu and Ms Leung procured a change in the beneficial owners of the first defendant:[267] the nominee shareholders of the first defendant and High Grounds executed new declarations of trusts, by which they declared that they held the shares in those companies on behalf of the second defendant.[268] On 28 June 2007, it was confirmed to the Head of Compliance of the plaintiff's Hong Kong branch,[269] Michael Tang, that the beneficial owner "of the BVI (borrower) is [the second defendant]".[270] I therefore find that the plaintiff did make reasonable inquiry into the beneficial ownership of the first defendant and High Grounds. More than that, they ensured that the anomaly that they found was addressed by fresh declarations of trust in favour of the second defendant.

196 As the plaintiff submits,[271] this change was consistent with the reformulated investment structure. Mr Chiu gave evidence that the investment

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264 18 AB 9873.

265 18 AB 9636 and 9638.

266 18 AB 9872.

267 18 AB 9721–9722.

268 18 AB 9840 and 9850.

269 Lee's AEIC at para 17.

270 18 AB 9872.

271 PCS at para 283.

structure evolved such that the first defendant would be the borrowing vehicle and High Grounds would be the investing vehicle.[272] The plaintiff's banking expert, Anna Melis, gave evidence that this revised structure required the first defendant and High Grounds to be wholly owned subsidiaries of the second defendant.[273]

197 The second defendant's beneficial ownership of both High Grounds and the first defendant is consistent with information given in the original client information profiles for the High Grounds Account and the Surewin Account (see [15] above) in June 2007. Specifically, although Mr Teng and Mr Huang were named as the beneficial owners of both companies in the profiles, the profiles also noted that, to enhance business confidentiality and tax planning on the private label fund to be structured, the second defendant with "2 other fully owned offshore companies" (*ie*, the first defendant and High Grounds) would open accounts with the plaintiff's Hong Kong and Singapore branches.[274] From a legal perspective, it is unclear why these profiles listed Mr Teng and Mr Huang as the beneficial owners of the first defendant and High Grounds while describing those companies as "fully owned" by the second defendant. The second defendant's banking expert, Terence Liew, agreed in cross-examination that, based on the original client information profiles, the plaintiff would have understood that the beneficial owners of each company was changed to rectify the situation.[275]

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272 Chiu's AEIC at para 55.

273 AEIC of Anna Monique Melis dated 14 August 2020, Exhibit AMM-2 ("Melis's Reply Report") at para 6.4.

274 17 AB 9457 and 9472.

275 Transcript, 9 September 2020, at p 49, line 6 to p 50, line 16.

198 The second defendant argues that the plaintiff should have verified the beneficial ownership of the first defendant. It highlights emails in which the plaintiff's Global Head of Compliance,[276] Karen Egger, asked for independent documentation of the second defendant's ownership of the first defendant. On 10 August 2007, Ms Egger asked Mr Tang to "independently verify and document [the second defendant's] ownership of [the first defendant]".[277] She then emailed Ms Wu, Mr Lee and Frederick Link (the Group General Counsel)[278] and copied, among others, Mr Tang, Ms Lam and Ms Leung:[279]

> As a higher risk transaction, standards of enhanced due diligence apply. I have asked for the ownership of [the first defendant] by [the second defendant] to be independently validated and documented. One way to do this would [be] to see [the first defendant] on [the second defendant's] balance sheet. An alternative would be production by [the second defendant] of the registered or bearer shares of [the first defendant]. …

199 As the second defendant points out,[280] there is no evidence that the plaintiff used either of these methods. But it did document ownership using the nominee shareholders' declarations of trust in favour of the second defendant.[281] Following Ms Egger's email to her, Ms Wu emailed Mr Tang to ask, "What does Karen want? To prove the ownership by share? or to prove the beneficary

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276 Transcript, 21 August 2020, at p 132, lines 2–3.

277 20 AB 10705.

278 Lee's AEIC at para 17.

279 20 AB 10694.

280 D2CS at para 233.

281 18 AB 9840.

[*sic*] by other doc. like declation [*sic*] of trust?"[282] Mr Tang replied that a declaration of trust was required to prove the second defendant's ownership:[283]

> Since the shares will be registered in the name of the nominee shareholders, you would need to produce "declaration of trust" to evidence the underlying shareholders of [the first defendant]. We need supporting doc. to show [the first defendant]is 100% owned by [the second defendant], so the share certificate and the declaration of trust are both required to show the ownership of [the first defendant].
>
> If you're telling me there is no documentation to prove the ownership of [the first defendant], this will be the end of the story.

This declaration of trust was duly secured and provided to the plaintiff within a few days.[284]

200 On 24 August 2007, Ms Egger emailed Mr Tang, Mr Link, Ms Wu, Ms Leung and others to "confirm that [she was] now satisfied that [the plaintiff had] met [its] compliance obligations". She added, "Please however keep in mind that this is a high risk account and high risk transaction. As such, each and every movement and any changes during the entire life of the relationship must be subject to the same level of scrutiny as applied to the initial acceptance."[285]

201 The evidence shows that, from June to August 2007, during the plaintiff's internal approval process for the STAAP Structure, Ms Lam, Mr Tang and Ms Egger all raised queries about the beneficial ownership of the first defendant. The discrepancy in the beneficial ownership was rectified. Their

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282 20 AB 10716.

283 20 AB 10716.

284 20 AB 10714.

285 20 AB 11239.

queries were answered to their satisfaction. I find that the first defendant and High Grounds were, in fact, the second defendant's subsidiaries.

202 Still, the second defendant argues that the plaintiff ought to have realised that the second defendant could not simply acquire any offshore company, such as the first defendant and High Grounds, as a subsidiary.[286] It gives three reasons.

203 First, the plaintiff had a copy of the second defendant's articles of incorporation. As translated, it provides that subsidiaries may be established only "with the submission of the relevant resolution of the board of directors to the competent authority for approval".[287] The plaintiff did not ask whether the FSC had approved the second defendant's acquisition of the first defendant and High Grounds.[288] I do not consider it reasonable to expect the plaintiff to ask that question. There were no circumstances which made it reasonable for the plaintiff to do so. The plaintiff was at this time dealing directly with the two most senior executives in the second defendant and its two majority shareholders. They were entitled to proceed on the assumption that these two men were honest men and that the second defendant had complied with all of its internal and external obligations.

204 Second, Art 146 of the TIA, read with Art 3(1) of the Regulations Governing Foreign Investments by Insurance Companies 1993 ("the Foreign Investment Regulations"), provided that Taiwanese insurance companies could not incorporate or invest in foreign insurance or insurance-related companies

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286 D2CS at para 234.

287 15 AB 8034.

288 D2CS at para 234(a).

unless the FSC gave approval. The second defendant says that the plaintiff should have realised that something was amiss if the first defendant had only nominee shareholders and if its beneficial ownership could be redirected simply through a fresh declaration of trust.[289] I do not accept that the plaintiff should have drawn this conclusion. The need for investments to be approved does not in itself limit the ways in which investments may be made.

205 Third, the plaintiff had the memorandum and articles of association of the first defendant. They provided that, for the purposes of s 9(4) of the BVI Business Companies Act 2004 (No 16 of 2004) (BVI), the first defendant "has no power to … carry on business as an insurance … company … unless it is licensed under an enactment authorising it to carry on that business".[290] To apply that provision to this situation, the second defendant relies[291] on Mr Chiu's evidence in cross-examination that he would consider the first defendant's investment of the second defendant's policyholders' monies to be a part of the second defendant's insurance business.[292] But that evidence does not establish that *the first defendant* was carrying on business *as an insurance company*, let alone that it was doing so as a matter of BVI law or that the plaintiff knew the relevant BVI law.

206 I do not accept the factual premise of the second defendant's submission that the first defendant and High Grounds were not the second defendant's subsidiaries, let alone its further submission that the circumstances put the

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289 D2CS at para 234(b).

290 15 AB 8209.

291 D2CS at para 234(c).

292 Transcript, 26 August 2020, at p 8, line 10 to p 9, line 14.

plaintiff on notice of something amiss in the second defendant acquiring and establishing these two companies as subsidiaries in this way.

207 As for Mr Teng's personal receipt of some of the loan monies under the STAAP Structure, that does not suffice to put the plaintiff on notice of the second defendant's beneficial interest in the assets underlying the SFIP-1 Unit Trust structure. The facts known to the plaintiff at the time of the transfers, as analysed above, did not alert the plaintiff to the possibility of wrongdoing, in particular to the possibility that the loan monies were being misappropriated for Mr Teng's personal benefit. The plaintiff was entitled to proceed on the assumption that it was dealing with an honest man.

(B) LOANS OFF THE BALANCE SHEET

208 Second, the second defendant submits that the plaintiff knew that the loan monies were for Mr Teng's and Mr Huang's personal benefit because it knowingly assisted them to avoid disclosing the loans in the second defendant's consolidated report.[293] In response, the plaintiff submits that keeping leverage off a company's balance sheet, where that does not violate relevant audit or accounting rules and standards, does not in itself indicate impropriety.[294]

209 Hsiao Pei-Ju is an auditor from KPMG. He audited the second defendant's foreign investments on the FSC's directions[295] and gave evidence at trial. He agreed that whether one company's accounts ought to be consolidated with another's depends on the corporate structure and the applicable laws.[296]

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293 D2CS at para 256.

294 PCS at paras 299 and 302.

295 AEIC of Hsiao Pei-Ju dated 1 July 2020 at paras 7–9.

296 Transcript, 28 August 2020, at p 119, lines 3–8; p 123, lines 9–12.

There is no evidence of any violation of audit or accounting rules and standards or laws applicable to the preparation of the second defendant's consolidated financial reports. So keeping the loans to the first defendant off the second defendant's balance sheet does not suffice to put the plaintiff on inquiry that something was amiss.

(C) CONCEALMENT OF THE CREDIT STRUCTURE

210 Third, the second defendant argues that the plaintiff, through Ms Wu, assisted Mr Teng and Mr Huang to conceal the existence of the loans and the SFIP-1 Pledge from employees in the second defendant[297] and from its auditors.[298]

211 Most of the evidence on which the second defendant relies for this aspect of its case consists of conduct by the plaintiff's staff after Volaw executed the SFIP-1 Pledge on 7 March 2008. The second defendant made clear in its submissions that it relies on this conduct on the basis that good faith and notice are to be assessed at points in time after 7 March 2008.[299] Because I have rejected that basis, only two items of evidence are relevant.

212 On 24 August 2007, shortly before the STAAP Structure was put in place, Ms Wu emailed Ms Leung and an employee of CM Advisors Ltd, which was the subsidiary to which the plaintiff had delegated management of the STAAP investments, as follows:[300]

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297 D2CS at paras 257–258.

298 D2CS at para 259.

299 Transcript, 30 March 2021, at p 80, line 7 to p 82, line 2; p 89, lines 5–16.

300 21 AB 11290.

> …You two will be [the second defendant's] contact windows on investment and on operation in 'Fund account'. There will be investment person or operation person from [the second defendant] e-mail you or call you. Please just leave all credit information with our bank. Please do not release credit related information to thsoe [*sic*] person not in highest level. …

213 On 21 February 2008, Ms Wu emailed the second defendant's Ms HF Chen:[301]

> I think there is mistake on requirement of [the STAAP Account number]. [The Singfor Account number] is [the second defendant's] account, which is the account should be confirmed. [The STAAP Account] is just a managed account by Mandate Manager. The reporting level should be on [the second defendant's] account only. If you report both, there will be double counted on [the second defendant's] assets on summary basis.

214 The second defendant suggests that the second email was prompted by its auditors sending the plaintiff a request for audit confirmation on the SFIP-1 Account. It says that Ms Wu – instead of informing Ms HF Chen that the SFIP-1 Account was an account held in Volaw's name as she should have – perpetuated the false impression that the plaintiff was managing assets owned by the second defendant under a discretionary mandate.[302] This submission appears to be based on a confusion of the similar bank account numbers of the STAAP Account and the SFIP-1 Account.

215 In any event, the second defendant's case here is not that the plaintiff was complicit in fraudulent acts. Rather, the second defendant's case is that Ms Wu's and Ms Leung's knowledge is attributable to the plaintiff.[303] Ms Wu's

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301 24 AB 13219.

302 D2CS at para 257(b).

303 Transcript, 30 March 2021, at p 65, line 22 to p 67, line 6.

two emails set out in [210] above do not show knowledge of any facts that would have put the plaintiff on inquiry as to anything being amiss.

(D) ANOTHER PLEDGE

216 The final fact that the second defendant relies on is that, in October 2013, Mr Teng instructed the third defendant to pledge the first defendant's assets under the SFIP-1 Unit Trust to secure loans to a company beneficially owned by Mr Teng and known as Eaglemount Holdings Ltd.[304] Later that month, the third defendant executed the pledge.[305] The second defendant says that the plaintiff knew of the pledge.[306] Any such knowledge is irrelevant to the SFIP-1 Pledge because it comes after the date on which actual or constructive notice is to be assessed, which is 7 March 2008.

(6) Illegality of the subscriptions under Taiwanese law

217 The second defendant argues that the plaintiff knew or was put on inquiry that it was illegal under Taiwanese law for the second defendant to subscribe to all of the units in the SFIP-1 Unit Trust. It says that the plaintiff did not act in good faith "in failing to follow up on obvious problems".[307] For the following reasons, I find that the second defendant's subscriptions to 100% of the units in the SFIP-1 Unit Trust did violate Art 146-4 of the TIA but that the plaintiff nevertheless acted in good faith in acquiring its security interest.

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304 51 AB 29210–29211.

305 51 AB 29228–29234.

306 D2CS p 143, heading iii.

307 D2CS at para 209.

(A) ARTICLE 146-4 OF THE TIA

218 Under Art 146-4 of the TIA, an insurance company's foreign investments are limited to, among other things, "foreign securities".[308] Article 5 of the Foreign Investment Regulations defines "foreign securities" to include "[s]ecurities representing interests in offshore funds". Art 8 defines "offshore funds" to include "securities investment funds" and "[s]uch other securities as may be approved by the competent authority".[309] It is common ground that the competent authority is the FSC.[310]

219 The second defendant's case is that the subscriptions to the SFIP-1 Unit Trust were illegal because (a) they were a "foreign investment" within the meaning of Art 146-4 of the TIA that did not fall within the categories of foreign investments permitted under Art 146-4 of the TIA and the Foreign Investment Regulations; and (b) the second defendant acquiring 100% of the units in the SFIP-1 Unit Trust breached Art 8 of the Foreign Investment Regulations.[311]

220 In response, the plaintiff's case is that the subscriptions to the SFIP-1 Unit Trust did not violate Art 146-4 because the SFIP-1 Unit Trust was an investment vehicle to which the restrictions on foreign investments in the TIA do not apply.[312] The plaintiff did not pursue this point in its closing submissions.

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308 Tseng's 1st Report at paras 49–51.

309 Huang's 1st Report at para 36; Tseng's 1st Report at paras 64–65; Tseng's Supplementary AEIC, Exhibit TWR-4 ("Tseng's Responses to Written Questions") at para 10.

310 Huang's 1st Report at para 33; Tseng's Responses to Written Questions at para 9; Wang's Responses to Written Questions at para 11.

311 D&CC at para 105.

312 R&DCC at para 95.

Instead, its unpleaded submission is that the subscriptions were legal because the FSC had a copy of the SFIP-1 Mandate and tacitly approved it.[313]

221 The parties' experts disagree as to the permissible form of the FSC's approval under Art 8 of the Foreign Investment Regulations. According to the plaintiff's Taiwanese law expert, Prof Huang, it "may be possible, in principle", for the FSC to give approval after an investment is made and to do so orally or even impliedly. This is because Art 146-4 of the TIA does not require the FSC's approval to be express approval in writing given prior to making the foreign investment.[314] But he adds that he would nevertheless expect that an insurance company "would normally be required to obtain the FSC's approval before entering into the proposed foreign investment"; that "typically both the application and approval ... would be made and given in writing"; and that, "for the principle of stability and clarity of administrative disposition, the implicit approval of the FSC would have to be clear from the circumstances and conveyed to the insurance company".[315] Prof Huang's heavily qualified evidence thus reflects his own reservations on the plaintiff's case that the FSC may give implied approval.

222 The second defendant's experts, Prof Tseng and Prof Wang, take the view that the FSC's approval must be prior, express approval in writing. Approval cannot be inferred from the fact that the FSC does not object when a company reports its foreign investments to the FSC.[316] Given the structure of

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313 PCS at paras 155–158.

314 Huang's 2nd AEIC, Exhibit YKH-5 ("Huang's Responses to Written Questions") at para 1.

315 Huang's Responses to Written Questions at para 1.

316 Tseng's Responses to Written Questions at para 10; Wang's Responses to Written Questions at para 12.

Art 146-4 read with the Foreign Investment Regulations and the Guidelines on the Scope and Content of Foreign Investments Conducted by Insurance Companies, the FSC's approval under Art 146-4 is not approval of specific transactions on a case-by-case basis, but rather approval of the types of foreign investments that all insurance companies may enter into.[317] To observe the principle of fair treatment, the FSC must convey its approval to the insurance industry as a whole through an official order.[318] If there is no official order authorising the category of investments into which the SFIP-1 Unit Trust falls, the subscriptions to the units of the SFIP-1 Unit Trust are not within the scope of permitted foreign investments.[319] Prof Tseng gives examples of such orders that the FSC has issued.[320] She further explains that, "[a]s a matter of administrative practice, a supervisory financial institution in Taiwan will not rely on 'implied approval' or 'tacit approval' in the regulation of entities".[321]

223 I accept the evidence of the second defendant's experts. It takes into account the legislative scheme, the regulatory context, the underlying purpose of each and the FSC's actual practice. Prof Huang does not explain how the principle of stability and clarity of administrative disposition would allow a regulated insurance company to invest in unapproved securities on the basis that it will then wait and see if the FSC impliedly approves the investment after the fact.

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317 Tseng's Responses to Written Questions at para 10; Wang's Responses to Written Questions at para 12.

318 Tseng's Responses to Written Questions at para 10.

319 Tseng's Responses to Written Questions at para 13.

320 Tseng's Responses to Written Questions at para 10.

321 Tseng's Responses to Written Questions at para 10.

224 Because the subscriptions to the SFIP-1 Unit Trust do not fall either within the category of "securities investment funds" or "[s]uch other securities as may be approved by the competent authority", I find that the subscriptions were illegal.

(B) GOOD FAITH AND NOTICE

225 The second defendant submits that the plaintiff designed and facilitated the SFIP-1 Structure with Canaras to circumvent Taiwanese law restrictions on the second defendant's subscriptions to the SFIP-1 Unit Trust. The plaintiff shut its eyes to possibility that such circumvention was illegal.[322]

226 In response, the plaintiff submits that, when Volaw executed the SFIP-1 Pledge, the plaintiff had reason to believe and did believe that the SFIP-1 Structure, including the second defendant's subscription to the SFIP-1 Unit Trust, was legal under Taiwanese law.[323] It submits that the plaintiff obtained Taiwanese legal opinions before approving the STAAP Structure, and that Mr Link formed the view that the SFIP-1 Structure appeared to be legal based on those opinions.[324]

227 In 2007, even before the STAAP Structure was approved, the plaintiff obtained three Taiwanese legal opinions from Chien Yeh Law Offices ("Chien Yeh"). On 31 July 2007, Chien Yeh issued its first opinion,[325] which addressed foreign investment by Taiwanese insurance companies. On 9 August 2007,

322 D2CS paras 207–208.

323 PRS at para 42.

324 PRS at para 106.

325 19 AB 10389.

Chien Yeh issued a second opinion,[326] which reviewed the draft STAAP Mandate for compliance with Taiwanese law. On 14 August 2007, Chien Yeh issued a third opinion[327] to amend and expand on the first opinion.

228 The second defendant submits that there is no evidence that the plaintiff told Chien Yeh a number of facts that were material for a meaningful opinion.[328] In response, the plaintiff submits that Chien Yeh's legal opinions show the plaintiff gave Chien Yeh the information necessary for it to give its advice.[329]

229 I accept the plaintiff's submission.

230 First, the plaintiff informed Chien Yeh that the company in question was an insurance company.[330] Thus the first opinion identified its topic as "the scope and types of foreign investment made by insurance enterprises of Taiwan" and referred to Art 146-4 of the TIA as the applicable legislation.[331]

231 Second, the plaintiff informed Chien Yeh that the insurance company might invest in foreign securities investment trust funds.[332] Thus the first opinion referred to the bond or fund managers complying with "laws and regulations in the registered country of foreign bonds or foreign securities investment trust funds".[333]

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326 19 AB 10392.

327 19 AB 10395.

328 D2CS at para 157(b).

329 PRS at para 48.

330 Transcript, 30 March 2021, at p 205, lines 14–15.

331 19 AB 10389 at chapeau and para 1.

332 Transcript, 30 March 2021, at p 205, lines 14–17.

333 19 AB 10390–10391 at para 5.

232 Third, the plaintiff informed Chien Yeh that the fund manager wished to borrow or to mortgage or pledge the assets in the investment trust fund to secure third-party debts.[334] The second defendant says that there is no evidence that the plaintiff told Chien Yeh any of the following material facts: (a) that the second defendant's wholly owned subsidiary would borrow from the plaintiff; and (b) that the second defendant would consent to the private label fund pledging the investment portfolio to secure the subsidiary's loans.[335] But the first and third opinions show that, although the plaintiff did not specify that the borrower would be a subsidiary, it obtained advice on consent to a pledge of the investment portfolio to secure loans to *any* company, which would obviously include an affiliate such as a subsidiary.

233 The relevant part of the first opinion reads:[336]

> … while a Taiwanese insurance enterprise makes foreign investment in compliance with the investment types and investment amount stipulated under the Insurance Act, the Regulations and other relevant rules and regulations, the subject insurance enterprise can invest in foreign bonds or *foreign securities investment trust funds in which the bond manager or fund manager is allowed, under consents of bondholders or fund investors and in compliance with the laws of its registered country, to borrow/mortgage/pledge for third parities* [*sic*] *by using assets on bond/fund.*
>
> [emphasis added]

234 The third opinion replaced this sentence with more detailed advice. That advice shows that the plaintiff had informed Chien Yeh that the investment

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334 Transcript, 30 March 2021, at p 206, lines 6–8.

335 D2CS at para 157(b).

336 19 AB 10390–10391 at para 5.

structure might involve a pledge over all the assets of the fund to secure the plaintiff's loans to any third party:[337]

> Accordingly, the subject insurance enterprise can invest in foreign bonds or foreign securities investment trust funds in which the bond manager or fund manager is allowed, under consents of bondholders or fund investors and in compliance with the laws of its registered country, to grant a security interest, mortgage or pledge over the assets of the fund in support of a loan to be provided by a bank to a third party. Moreover, once the relevant laws of Taiwan as described above and the registered country are followed, *the insurance enterprise, as the bondholders or fund investors, may grant a consent to the bond manager or fund manager to grant a security interest, mortgage or pledge over the assets of the fund in support of a loan to be provided by a bank to any third party, related or not.* The identity and qualification of the said third party is not limited, and there are no restrictions on the use of proceeds from the loan made to the third party and secured by assets of the fund.
>
> [emphasis added]

235 Fourth, before Chien Yeh issued its third opinion, the plaintiff provided Chien Yeh a copy of the STAAP Mandate, which showed that the insurance company was likely to be the sole investor in the fund.[338] This addresses the second defendant's argument that there is no evidence that the plaintiff informed Chien Yeh of the following facts: (a) that a private label fund would hold an investment portfolio intended to belong to the second defendant; and (b) that the second defendant would invest and wholly own 100% of the private label fund.[339]

236 Specifically, cl 4 of the STAAP Mandate provided that the plaintiff was authorised "to employ in [its] absolute discretion the most suitable structure in

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337 19 AB 10395.

338 PCS at para 219.

339 D2CS at para 157(b).

order to facilitate the implementation of the investment strategy, indicatively including *a dedicated fund structure*" [emphasis added].[340] The second defendant's banking expert, Mr Liew, testified that he understood "dedicated" in cl 4 to mean that the fund would have "a single owner".[341] Clause 4 further provided, "In case such a fund is employed, all investment parameters and provisions of this Mandate will be implemented within the fund …".[342]

237 Chien Yeh advised on the STAAP Mandate in its second opinion. Although it advised the plaintiff that other clauses in the draft STAAP Mandate did not comply with Taiwanese law or were unclear,[343] it made no comment on cl 4. Despite referring to Art 146-4 of the TIA in its first opinion, in none of the three opinions did Chien Yeh suggest that the second defendant's subscription to 100% of the fund would breach Art 146-4 of the TIA. Rather, Chien Yeh confirmed that the STAAP Mandate complied with Taiwanese law except as stipulated in its second opinion.[344]

238 So the opinions themselves also address the explanation, which the second defendant relies on, that the lawyer from Chien Yeh gave in Taiwanese criminal proceedings in 2015.[345] The lawyer testified that: (a) Ms Wu only made an abstract enquiry on whether, where a Taiwanese insurance company invested in an offshore fund, the assets of that fund could be pledged to a third party;[346]

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340 20 AB 10975.

341 Transcript, 9 September 2020, at p 65, lines 20–23.

342 20 AB 10975.

343 19 AB 10392 at para 1, 10393–10394 at para 4.

344 19 AB 10394.

345 D2CS at para 157(c).

346 61 AB 34607.

and (b) Ms Wu did not say that the fund would be established solely using the assets of the insurance company.[347] Even if Ms Wu did not give Chien Yeh all the necessary facts, the opinions show that the plaintiff through other personnel did.

239 The person on the plaintiff's side of the transaction who was principally responsible for reviewing the legal opinions and determining whether the STAAP and SFIP-1 transactions were legal was Mr Link.[348] His review of the transaction was not cursory. After receiving Chien Yeh's first opinion, Mr Link asked Chien Yeh to address the fact that the pledge would be used to secure a loan to a third party and to confirm that "there are no restrictions on the use of proceeds from the loan made to the third parties and secured by assets of the fund".[349] Mr Link had a conference call with the lawyer from Chien Yeh to resolve all his questions. That led to Chien Yeh's third opinion.[350] After reviewing all three opinions, Mr Link concluded that the STAAP transaction was not illegal and was properly documented.[351]

240 Still, the second defendant submits that the plaintiff should not have relied on Chien Yeh's opinions when implementing the SFIP-1 Structure because the opinions were issued for the STAAP Structure and before the SFIP-1 Structure was formulated. The second defendant submits that the plaintiff should have sought a fresh Taiwanese legal opinion on whether the SFIP-1

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347 61 AB 34608–34609.

348 Lee's AEIC at para 23; Transcript, 25 August 2020, at p 109, lines 17–21.

349 20 AB 10689.

350 20 AB 10689; 20 AB 10926.

351 20 AB 11121.

Structure was legal, including the proposal for the second defendant to subscribe for all of the units in the SFIP-1 Unit Trust.[352]

241 But as the plaintiff submits,[353] the two structures were identical in all respects which were legally material. The only difference was that the SFIP-1 Structure used a unit trust rather than a private label investment fund. In particular, cl 6 of the SFIP-1 Mandate was materially similar to cl 4 of the STAAP Mandate. Clause 6 of the SFIP-1 Mandate provided that the plaintiff was "authorised to employ in its absolute discretion the most suitable structure in order to facilitate the implementation of the investment strategy, indicatively including a dedicated unit trust structure …. In case such a unit trust is employed, all investment parameters and provisions of this Mandate will be implemented within the unit trust …".[354] In an email dated 20 March 2008, Mr Link gave his approval that the SFIP-1 transaction appeared to be legal based on the Chien Yeh opinions and a Jersey legal opinion.[355] As there were no facts known to the plaintiff that would give it cause to question the propriety of the SFIP-1 transaction, I accept that it was reasonable for the plaintiff not to seek a fresh legal opinion specifically on the SFIP-1 Structure.

242 Further, Mr Link was cautious about the SFIP-1 Structure. However, that was not because he thought it was illegal. In his email dated 20 March 2008, he expressed satisfaction that the SFIP-1 Structure appeared to be legal under Taiwanese law. His only concern was that it carried reputational risk for the

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352 D2CS at para 158(c).

353 PCS at para 220.

354 27 AB 14952–14953.

355 26 AB 14688–14689.

plaintiff.[356] After those concerns were addressed, he and other personnel from the plaintiff approved the reputational risk aspects of the SFIP-1 Structure.[357] This establishes that the plaintiff and its advisers were not wilfully blind to reputational risk, let alone to illegality.

243 The second defendant submits that the plaintiff knew that the second defendant's subscription to 100% of units in the SFIP-1 Unit Trust was illegal.[358] At some point before the SFIP-1 Structure was even formulated, the plaintiff obtained a Taiwanese legal opinion. The plaintiff has not disclosed that opinion in this action. That opinion appears to have advised the plaintiff that a Taiwanese insurance company could own only up to 10% of the units in a unit trust.[359] In an email dated 13 February 2008 to the plaintiff, Mr Levinson of Canaras referred to this opinion's contents:[360]

> … For the unit trust structure, EFG Compliance has expressed concern about the client's investment in the trust. I understand that Taiwan regulation limits a regulated insurance company to holding 10% of the shares of a unit trust … EFG Compliance requested that the opinion specify that the insurance company could own more than 10% of the value of the trust. The attorney was not able to give this opinion …

244 The plaintiff has not disclosed that opinion in this action. Its position is that the opinion is not relevant to the matters in question in this action. Specifically, that opinion relates to an investment structure that the plaintiff initially explored and decided to abandon in favour of the SFIP-1 Structure.[361]

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356 26 AB 14688–14689.

357 26 AB 14688.

358 D2CS at para 264(c); Transcript, 30 March 2021, at p 69, lines 21–24.

359 D2CS at para 66.

360 24 AB 13029–13030.

361 Transcript, 30 March 2021, at p 217, line 18 to p 218, line 115; 59 AB 33383–33389.

The second defendant itself accepts this.[362] The abandoned structure involved the second defendant investing in collateralised debt obligations ("CDOs") held through a unit trust structure.[363] Ms Lam testified that she had read the undisclosed opinion.[364] She said that it was specific to the CDO structure and that she therefore cannot recall whether it addressed only unit trusts investing in CDOs or unit trusts in general.[365] Mr Levinson testified that the plaintiff abandoned the CDO structure because of issues including the 10% cap on ownership under Taiwanese law.[366] I find that the plaintiff's knowledge of this undisclosed opinion did not put it on inquiry as to whether the second defendant's subscriptions were illegal.

(7) Mr Teng's authority to subscribe to the SFIP-1 Unit Trust

245 The second defendant argues that the plaintiff knew or was put on inquiry as to whether Mr Teng had authority to subscribe for units in the SFIP-1 Unit Trust on the second defendant's behalf.[367] I accept that Mr Teng had no actual authority but find that the fact on which the second defendant relies did not put the plaintiff on inquiry.

(A) NO ACTUAL AUTHORITY

246 The plaintiff and the third defendant submit that Mr Teng had actual authority to subscribe for units because of the provisions of the TCA set out in

362 D2CS at paras 65–69.

363 AEIC of Richard David Levinson dated 30 June 2020 at paras 8 and 14.

364 Transcript, 27 August 2020, at p 115, lines 9–23.

365 Transcript, 27 August 2020, at p 119, lines 22–25.

366 Transcript, 25 August 2020, at p 50, lines 1–6.

367 D2CS at p 112, heading C.

[111] above.[368] In response, the second defendant's pleaded case is that Mr Teng could not have authority to do that which it was illegal for the second defendant to do.[369] As I have found, the second defendant's subscriptions for units in the SFIP-1 Unit Trust violated Art 146-4 of the TIA (see [223] above).

247 The second defendant's expert Prof Tseng takes the view that an act expressly prohibited by law, including an act prohibited by Art 146-4 of the TIA, cannot constitute "affairs pertaining to the business of the company" within the meaning of Art 57 of the TCA.[370] In support of that interpretation, she cites Art 18-2 of the TCA, which provides that "[a] company may conduct any business that is not prohibited or restricted by the laws and regulations".[371] Prof Tseng also cites the decision of the Taiwan Supreme Court in 44-Tai-Shang-Zi-1566 (1956). That decision held that, where a company's business and operation are not that of providing guarantees, the acts of responsible persons in the company in guaranteeing loans in the company's name does not fall within the scope of carrying out the business and operation of the company.[372]

248 The plaintiff's expert Prof Huang and the third defendant's expert Prof Wu Yen-Te take the opposite view based on legislation and case law.[373] First, Prof Huang emphasises that, under Art 58 of the TCA, "[e]ven if the chairman had acted *ultra vires* ... where the transaction ... is with a *bona fide* third party acting in good faith, the company cannot seek to invalidate the

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368 PCS at paras 36–37; D3CS at para 36.

369 D&CC at para 96(1A).

370 Tseng's 1st Report at paras 92 and 109.

371 Tseng's AEIC, Exhibit TWR-3 ("Tseng's Reply Report") at para 87.

372 Tseng's Reply Report at para 85.

373 Wu's AEIC, Exhibit YTW-2 ("Wu's Reply Report") at paras 20–21.

transaction" [emphasis omitted].[374] But there is no evidence or argument that Art 58 of the TCA applies. Rather, the plaintiff argues that Art 58 makes sense only if the chairman has general authority to represent the company, even in matters that would be considered outside his authority or fraudulent.[375] But a provision that acting *ultra vires* is no defence against a *bona fide* third party does not necessarily imply that the actor has authority to do even acts that the company cannot legally do.

249 Second, Prof Huang cites two Taiwan High Court judgments in which the court held that, where a counterparty acts *bona fide*, a company "could not deny the [transaction's] validity solely based on the fact that there was no board resolution or [that] the board resolution was defective" or forged.[376] But those two judgments are not on point. Based on Prof Huang's summaries of those cases, they do not involve doing acts that the company was prohibited from doing. In fact, one of the judgments[377] relied on the company's articles of incorporation which provided that the company *could* provide the kind of guarantee in dispute.

250 Third, Prof Wu and Prof Huang cite the Taiwan Supreme Court decision of 106-Tai-Shang-Zi-113 (2017). It held that, given Art 208-3 and Art 57 read with Art 208-5 of the TCA, "regarding all affairs pertaining to the business of the company, the chairman of the company has the power to conduct on behalf of the company, and it is not limited to the registered business in the Articles of Incorporation. ... [Art 18-2 was amended] to simplify the registration of

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374 Huang's 1st Report at para 103.

375 Transcript, 30 March 2021, at p 180, lines 3–10.

376 Huang's 1st Report at paras 112–113.

377 98-Chong-Shang-Zi-439 (2009).

company business item and grant a broader space for companies to operate business".[378] But that decision does not show that the TCA authorises a chairman of a company to cause it to engage in activities prohibited by law. It only shows that a chairman has authority to act in matters outside the registered business set out in the company's articles.

251 Prof Huang considers that the weight of recent Taiwan authority and commentaries supports a "broader interpretation" of what constitutes "affairs pertaining to the business of the company".[379] In his opinion, it would "be part of the business of [the second defendant] to try to enhance or at least maintain the funds of [an] insurance enterprise by making foreign investments and where necessary, consenting to pledges or other security granted in relation to such foreign investments".[380] Prof Huang's reply report suggests, however, that his opinion was based on both actual and apparent authority under Taiwan law: "Teng had substantial actual and apparent authority under Taiwan law and would have authority to act for and on behalf of [the second defendant] regarding all 'affairs pertaining to the business' of [the second defendant]".[381] Taiwan law governs only the question of Mr Teng's actual authority to subscribe for the units (see [107] and [115] above), not his apparent authority to do so.

252 I therefore prefer Prof Tseng's evidence. Based on her evidence and the authorities she cites, I find that acts prohibited by law do not constitute "affairs pertaining to the business of the company".

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[378] Huang's 1st Report at para 106; Wu's Reply Report at para 25.

[379] Huang's 1st Report at paras 106–107, 110.

[380] Huang's 1st Report at para 111.

[381] Huang's AEIC, Exhibit YKH-4, Sub-Exhibit TYT-2 ("Huang's Reply Report") at para 54.

(B) FAILURE TO USE LETTERHEAD

253 The second defendant points out that the letter that Mr Teng signed instructing the plaintiff to subscribe for units in the SFIP-1 Unit Trust for the second defendant was issued on plain paper, not on the second defendant's letterhead.[382] The second defendant's banking expert, Mr Liew, takes the view that the plaintiff should have questioned why a document purportedly signed by a company's chairman for and on behalf of the company was not set out on its letterhead.[383]

254 I find that the use of plain paper was insufficient to put the plaintiff on inquiry. The absence of the company letterhead does not in itself suggest that Mr Teng lacked authority any more than the use of the letterhead would have suggested the converse.

Conclusion on priorities

255 The second defendant's challenge to the proprietary aspect of the SFIP-1 Pledge fails. Although Volaw executed the SFIP-1 Pledge before the second defendant gave its consent through Mr Teng, the plaintiff was a *bona fide* purchaser of its security interest without notice that the second defendant had yet to give its consent. No doubt the plaintiff could have made more extensive inquiries than it did in its internal approval processes, in which it obtained documentation and multiple legal opinions. But on the facts before it, as at 7 March 2008, I find that it did all that it was reasonable and all that it was required in equity to do.

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382 D2CS at para 223; 27 AB 15004.

383 AEIC of Terence Liew dated 14 August 2020, Exhibit TL-2 ("Liew's 1st Report") at para 8.25.

Foreign illegality

The rule in Foster v Driscoll

256 The second defendant's next challenge to the SFIP-1 Pledge is a contractual challenge. It submits that the SFIP-1 Pledge ought to be held invalid as a contract under the rule in *Foster v Driscoll and others* [1929] 1 KB 470 ("*Foster*"). Under that rule, a contract will "be held invalid on account of illegality if the real object and intention of the parties necessitates them joining in an endeavour to perform in a foreign and friendly country some act which is illegal by the law of such country notwithstanding the fact that there may be, in a certain event, alternative modes or places of performing which permit the contract to be performed legally": at 521–522. The effect of the rule is that the Singapore courts will regard a contract as being contrary to Singapore's public policy and refuse to enforce it if the parties' intention and the object contemplated by the contract is a breach of international comity: *Peh Teck Quee v Bayerische Landesbank Girozentrale* [1999] 3 SLR(R) 842 ("*Peh Teck Quee*") at [45].

257 For the purposes of the rule in *Foster*, it is immaterial whether the contract is governed by Singapore law or by a foreign law: *Ang Jian Sheng Jonathan and another v Lyu Yan* [2021] 1 SLR 1091 at [30], citing *Dicey, Morris & Collins* vol 2 at para 32-193. Further, the intention and object need not be shared by the contracting parties. The rule applies where the party seeking to enforce the contract intended it to be performed in an unlawful way: *Royal Boskalis Westminster NV v Mountain* [1999] 1 QB 674 at 692.

258 The second defendant submits that the plaintiff executed the SFIP-1 Pledge with the real object and purpose of helping the second defendant to commit two acts that are illegal under Taiwanese law: (a) subscribing to 100%

of the units in the SFIP-1 Unit Trust, in violation of Art 146-4 of the TIA; and (b) providing the second defendant's assets as security for the debts of the first defendant in violation of Art 16 of the TCA and Art 143 of the TIA.[384]

259 The second defendant does not contend that these two illegal acts were performed in Taiwan. Rather, it argues that the rule in *Foster* applies so long as the parties contemplate performing acts that are illegal under foreign law and their intention or object is to breach that foreign law.[385] It says that, because the rule in *Foster* is a principle of Singapore's public policy, it is immaterial whether the impugned contract requires the illegal acts in question to be performed in the jurisdiction in which they are illegal.[386]

260 To support these propositions, the second defendant relies on a passage in *Peh Teck Quee*. There the Court of Appeal observed that, until an appropriate case raises the issue of the relationship between the rule in *Foster* and the rule in *Ralli Brothers v Compañia Naviera Sota y Aznar* [1920] 2 KB 287, the two rules should be regarded as separate (at [55]). This was partly because (at [53]):

> … the test formulated by G P Selvam JC [in *Singapore Finance Ltd v Soetanto* [1992] 1 SLR(R) 645 at [11]] drew on both the *Ralli* and *Foster* principles as it required proof of knowing violation of the *lex loci solutionis* at the time of contracting by the party seeking enforcement. [Toh Kian Sing in an article] said that this was dissimilar to the *Foster v Driscoll* principle as unlike the two-step test in *Singapore Finance Ltd v Soetanto*, *the* Foster v Driscoll *principle applies so long as the parties contemplate performance of acts which are illegal by the laws of a friendly country, whether or not it is the contractually stipulated place of performance*, whereas the *Ralli Bros v Compania Naviera Sota y Aznar* principle applies only when there is illegality at the *lex loci solutionis*.

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384 D2CS at para 164.

385 Transcript, 30 March 2021, at p 116, lines 16–24.

386 Transcript, 30 March 2021, at p 113, lines 10–13; p 119, lines 1–16.

> [emphasis added]

261 *Peh Teck Quee* does not support the second defendant's argument. As the plaintiff points out,[387] at [48] of *Peh Teck Quee* the Court of Appeal rejected the submission that the rule in *Foster* applied to render unenforceable an obligation to pay a debt in Singapore, a payment which the debtor argued was illegal under Malaysian law. The Court of Appeal explained:

> … *The performance of the obligation sought to be enforced did not involve the doing of an act in a foreign state* as the repayment was being sought in Singapore. It was not the intention or in the contemplation of the parties when they entered into the facility agreement to carry out an adventure to break the laws of Malaysia.
>
> [emphasis added]

262 The authorities instead support the plaintiff's submission that the rule in *Foster* applies only where the act in question is to be performed in a country in which it is illegal.[388] The contract in *Foster* contemplated the importation of whisky into the US, which was an act to be performed in the US and which was illegal under US law (at 501–521). The contract in *Regazzoni v K C Sethia (1944) Ltd* [1958] AC 301 was for the export of jute bags in India for resale in South Africa through a third country. The export was an act to be performed in India and export to South Africa was illegal under Indian law (at 317). The authors of *Halsbury's Laws of Singapore* note that the parties must intend "the doing of an act in a foreign country contrary to its law. There is no breach of international comity if the forum regards an act as valid under the law of the place where the act was done …": *Halsbury's Laws of Singapore* vol 6(2) (Butterworths Asia, 2020) at para 75.365.

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387 PRS at para 37.

388 PRS at para 33.

263 Further, given my finding that the plaintiff did not know that the second defendant's subscriptions were illegal (see [225]–[244] above), the plaintiff could not have had the intention and object of helping the second defendant to breach Taiwanese law. Because the second defendant has not established that this case comes within the rule in *Foster*, it is not necessary for me to consider the plaintiff's argument[389] that the second defendant has failed to plead a defence based on that rule.

The rule in Euro-Diam

264 In the alternative – even if the parties' intention and the objective of the SFIP-1 Pledge was not to commit acts which are illegal under Taiwanese law – the second defendant submits that the SFIP-1 Pledge is so closely connected to and tainted by acts which are illegal under Taiwanese law that the Singapore courts should decline to enforce it.[390]

265 In *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1 ("*Euro-Diam*"), the English Court of Appeal had to determine whether a claim on a contract that was not itself illegal but which had "a connection with some other illegal transaction" should succeed (at 15). Staughton J formulated a two-stage test to make that determination (at 23–24). The first stage considers whether the transaction from which the taint is said to arise would be enforceable under the law of the forum, applying the correct connecting factor. If it would not be enforceable, the second

389 PRS at paras 31–32.

390 D2CS at para 165.

stage considers whether the illegality of that transaction is sufficiently connected to the claim before the forum that the claim should be unenforceable.

Stage one: Enforceability of the transaction from which the taint is said to arise

266 The second defendant submits that the taint in this case arises from: (a) the second defendant subscribing to all the units in the SFIP-1 Unit Trust and (b) the second defendant providing its assets to the plaintiff to use as security or consenting to such use.[391] As I have found that the second defendant's consent to Volaw pledging the assets in the SFIP-1 Account as security for the first defendant's debts was not illegal (see [104] above), I shall focus only on the second defendant's act of subscribing for all of the units in the SFIP-1 Unit Trust in applying the first stage of the test in *Euro-Diam*.

267 The taint in this case is said to arise from acts, not contracts. There is a fundamental difficulty with applying the first stage of the *Euro-Diam* test to acts. A contract may be characterised as enforceable or unenforceable. But an act is simply a fact: it is neither enforceable nor unenforceable. It therefore carries no meaning to consider whether the second defendant's act of subscribing for all of the units in the SFIP-1 Unit Trust would be enforceable in Singapore.

268 Further, I consider it artificial to adopt Staughton J's approach where it is alleged that a claim is tainted by an act. The taint in *Euro-Diam* was likewise said to arise from an act rather than a contract. The plaintiff in that case sued the defendant on a contract of insurance in respect of a consignment of diamonds which the plaintiff had shipped to a consignee in West Germany and which were

391 D2CS at para 177.

then stolen. The taint was said to arise from two acts. First, the consignee's agent who received the diamonds was residing and carrying on business in West Germany in breach of West German law. Second, the plaintiffs deliberately undervalued the diamonds in the invoice which accompanied the consignment in order to deceive the West German customs authorities. Staughton J applied the first stage of his test by considering a hypothetical contract to reside and carry on business in West Germany in breach of West German law and a hypothetical contract to deceive the West German customs authorities. Having converted the acts into contracts in this way, he held that these contracts would be unenforceable in England, both being illegal by the law of the place of performance (at 24).

269 This approach to acts is highly artificial. In any event, this approach is not open to me on the parties' submissions. Neither the plaintiff nor the second defendant frames the question on the first stage as turning on the enforceability in Singapore of a hypothetical contract by the second defendant to subscribe for all of the units in the SFIP-1 Unit Trust or a hypothetical contract by the second defendant to provide its assets for or to consent to the SFIP-1 Pledge.

270 The taint in this case arises only under Taiwanese law. In *Euro-Diam*, Staughton J identified three factors which could connect the taint to the claim: the forum, the proper law of the contract and the place of performance (at 21). The plaintiff submits that these connecting factors are to be applied to the SFIP-1 Pledge.[392] It submits that none of these connecting factors point to Taiwan or Taiwanese law: the forum is Singapore, the proper law of the SFIP-1 Pledge is Singapore law and the pledge was not performed in Taiwan.[393]

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392 PCS at para 199.

393 PCS at para 197.

271 But, as the second defendant argues,[394] these connecting factors are to be applied not to the contract which gives rise to the claim but to the transaction which allegedly taints the claim. In *EFG Bank v Teng*, the claim arose from the Facility and Mr Teng's indemnity: at [61]. But, as the second defendant points out,[395] the taint in that case was said to arise from the STAAP Pledge and the SFIP-1 Pledge: at [75]. That is why George Wei J applied the connecting factors to those two pledges, holding that there was no connection: the forum was Singapore, the proper law of the pledges was Singapore law and the pledges were not to be performed in Taiwan: at [74].

272 The three connecting factors identified by Staughton J can be applied easily where the taint is said to arise from a contract, as in *EFG Bank v Teng*. But where the taint is said to arise from an act rather than a contract, the connecting factor of the proper law of the contract no longer has any meaning whatsoever. Further, the place of performance is now simply the factual place in which the act was actually performed, rather than the place in which the contract stipulated or contemplated its performance.

273 The second defendant submits that first stage of the *Euro-Diam* test is satisfied on two grounds. First, the second defendant submits that the relevant "proper law" to consider on the facts of this case is the law governing its capacity to subscribe for all of the units in the SFIP-1 Unit Trust, *ie* Taiwanese law.[396] Second, in contrast to its submissions on the rule in *Foster* (see [259]

394 D2CS at para 177.

395 D2RS at para 65.

396 D2CS at para 177.

above), the second defendant submits that the place of performance of the subscriptions was Taiwan.[397]

274 In response, the plaintiff submits that the first stage is not satisfied on two grounds. First, the relevant proper law is Jersey law, being the law governing the second defendant's subscriptions to the SFIP-1 Unit Trust. Second, the place of performance of the subscriptions was not Taiwan. It was either Jersey, because the subscriptions were for units in a Jersey trust,[398] or Singapore, because the second defendant's consideration for the subscriptions came from its account with the plaintiff's Singapore branch.[399]

275 To identify the relevant connecting factors, it is necessary to identify the relevant issue (see [153] above). The issue as formulated in *Euro-Diam* is the enforceability in Singapore of the transaction which is said to taint the claim before the Singapore court. As explained above, the concept of enforceability is not meaningful where the taint is said to arise from an act. This brings into question whether the first stage of the *Euro-Diam* test is necessary. The second defendant cites *Baker, Michael A (executor of the estate of Chantal Burnison, deceased) v BCS Business Consulting Services Pte Ltd* [2020] 4 SLR 85 ("*Michael Baker*"). In that case, the court did not cite *Euro-Diam* or apply the first stage of the *Euro-Diam* test. Instead, after finding that the acts alleged to be illegal were indeed illegal where they were performed and that the trust was not unenforceable on the rule in *Foster* (at [258]–[259]), the court transposed the principles in *Ting Siew May v Boon Lay Choo and another* [2014] 3 SLR 609 ("*Ting Siew May*") and *Ochroid Trading Ltd and another v Chua Siok Lui*

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397 D2CS at para 177.

398 PRS at para 73; Transcript, 30 March 2021, at p 230, line 24 to p 231, line 2.

399 Transcript, 30 March 2021, at p 231, lines 18–22.

(trading as VIE Import & Export) and another [2018] 1 SLR 363 ("*Ochroid Trading*") to the context of foreign illegality.

276 A question more meaningful than the enforceability of the transaction is whether there is any foreign illegality. It is undisputed that the TIA applies to the second defendant's subscriptions as a matter of Taiwanese law. The only question under Taiwanese law is whether the subscriptions fall within a permitted category of investments (see [219]–[223] above). I have resolved that question in the second defendant's favour. So there is foreign illegality.

277 The first stage of the *Euro-Diam* test serves no purpose in cases where the claim is said to be tainted by acts rather than by contracts, other than to complicate the analysis. Staughton J considered a hypothetical contract with the object of deceiving the West German customs authorities in West Germany. He identified the relevant connecting factor to be the place of contractual performance, found that place to be West Germany, and concluded that the hypothetical contract would have been illegal in West Germany and therefore unenforceable in England. An alternative approach would have been simply to find that there was foreign illegality because the acts said to taint the claim were breaches of West German tax and residency laws.

278 On the facts of this case, there is foreign illegality, *ie* illegality under Taiwanese law. I consider that that finding suffices to allow me to proceed directly to the second stage of the *Euro-Diam* test.

Stage two in Singapore: Ting Siew May

279 The plaintiff[400] and the second defendant[401] agree that the second stage of the *Euro-Diam* test no longer represents the law in Singapore. As formulated by Staughton J, it requires applying the principles in *Bowmakers Ltd v Barnet Instruments Ltd* [1945] 1 KB 65 ("*Bowmakers*") and *Beresford v Royal Insurance Co Ltd* [1938] AC 586 ("*Beresford*"). In *Teng v EFG Bank*, the Court of Appeal observed that *Euro-Diam* raises "significant difficulties" and would need to be re-examined in the light of *Ting Siew May* and *Ochroid Trading*. Both those decisions have authoritatively rejected the *Bowmakers* and the *Beresford* principles in Singapore's law of domestic contractual illegality: at [22]–[25].

280 The plaintiff and the second defendant also agree that the second stage of the *Euro-Diam* test should be replaced with the proportionality approach set out in *Ting Siew May*. Accordingly, the question now is whether refusing to enforce the tainted contract would be a proportionate response to the foreign illegality, based on the factors in *Ting Siew May*.[402]

281 The second defendant cites *Michael Baker* to illustrate how the proportionality approach has been applied to foreign illegality. That case concerned the enforceability of an oral trust under which the trustee acquired intellectual property rights from a New Zealand company and held any proceeds generated from the rights on trust for the settlor. Those rights were originally owned by Californian companies controlled by the settlor. When the Californian companies went into bankruptcy, the rights were sold to the New Zealand

400 PCS at para 140.

401 D2CS at paras 170 and 173.

402 PCS at para 143; D2CS at paras 173 and 176.

company with the approval of the US Bankruptcy Court. The settlor provided the funds for the New Zealand company to purchase the rights. But the settlor falsely declared to the US Bankruptcy Court that the New Zealand company had an arm's length relationship with the Californian companies: at [245] and [249]. Her false declarations constituted the illegal acts that were said to taint the oral trust: at [261]. The court held that it would be disproportionate to refuse to enforce the oral trust: at [263].

282 I accept that the proportionality approach in *Ting Siew May* should apply to foreign illegality as it does to domestic illegality. Like the trust in *Michael Baker* (at [252] and [262]), the SFIP-1 Pledge is linked to foreign illegality. The SFIP-1 Pledge forms an integral part of the SFIP-1 Structure. That structure contemplated that the second defendant would subscribe for and hold all the units in the SFIP-1 Unit Trust in breach of Taiwanese law. As the second defendant submits,[403] the subscriptions resulted in the second defendant's assets being transferred to the SFIP-1 Account as the consideration. Without that transfer, the plaintiff would not have any security interest to vindicate in this action.

283 The factors relevant to assessing proportionality include the following (*Ting Siew May* at [70]):

(a) the object, intent, and conduct of the parties;

(b) the nature and gravity of the illegality;

(c) whether allowing the claim would undermine the purpose of the prohibiting rule;

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[403] D2CS at para 178.

(d) the remoteness or centrality of the illegality to the contract; and

(e) the consequences of denying the claim.

284 I find that refusing enforcement of the SFIP-1 Pledge would be a disproportionate response to the illegality under Taiwanese law in the second defendant subscribing for all of the units in the SFIP-1 Unit Trust. I address each factor in turn.

(1) The object and intention of the parties

285 On the first factor, the plaintiff did not have the intention and object of facilitating the second defendant's subscriptions in violation of Taiwanese law. It did not know that the second defendant's subscriptions were illegal (see [225]–[244] above). Further, I accept the plaintiff's submission[404] that the plaintiff designed the SFIP-1 Structure, including the SFIP-1 Unit Trust, with the intention and object of assisting the second defendant to achieve its investment objectives in compliance with Taiwanese law or, at the very least, without violating Taiwanese law.

286 Moreover, the plaintiff's concern about Taiwanese law was not that the second defendant would violate Taiwan's laws on subscription for units in a unit trust, but that the second defendant would violate the prohibition in Taiwanese law against the second defendant pledging its assets to secure the debts of a third party. In an email dated January 2008, Ms Wu informed Mr Chiu that "Insurance Company can not [*sic*] sign pledge letter and that is the reason why we have to use structure".[405] Similarly, Ms Lam knew in or around January

404 PCS at para 216.

405 23 AB 12787.

2008 that the second defendant could not pledge its assets to secure the debts of others.[406]

(2) The conduct of the parties

287 The conduct of the parties also weighs in favour of upholding the plaintiff's security interest. The second defendant says that the plaintiff failed to do proper due diligence to protect its own interests, ignored red flags and concealed the existence of the STAAP and SFIP-1 Structures and the Pledges.[407] I do not accept this submission for the reasons I have given in addressing these allegations in the context of the *bona fide* purchaser rule at [187]–[255] above.

288 First and foremost, Art 146-4 of the TIA imposed a duty on the second defendant. It imposed no duty whatsoever on the plaintiff. The responsibility for ensuring that the second defendant complied with the TIA therefore lay with the second defendant itself. To this end, as the second defendant's Taiwanese law experts agree, the second defendant was obliged by law to maintain an effective system of internal controls to ensure that its activities, including its foreign investments, complied with Taiwanese law.[408]

289 Despite this, as the plaintiff submits,[409] the second defendant failed to maintain proper internal controls to prevent Mr Teng from abusing his dominance over the second defendant and its senior executives to perpetrate his fraud on both the second defendant and the plaintiff. The second defendant's

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406 Transcript, 26 August 2020, at p 109, lines 11–21; p 111, lines 7–10.

407 D2CS at para 179(e).

408 Wang's Responses to Written Questions at para 20; Tseng's Responses to Written Questions at para 21.

409 PCS at para 215.

own witness Mr Liao testified that the second defendant's internal control systems and legal compliance systems were weak.[410] When asked if Mr Teng could do what he wanted and senior executives would comply with his instructions, Mr Liao could only say that he thought "some" of these senior executives would check that the conduct in fact complied with the law.[411]

290 Finally, the second defendant's own legal department approved the STAAP Mandate in August 2007 and the SFIP-1 Mandate in April 2008 as being compliant with Taiwanese law.[412] As Mr Chyou for the second defendant testified, the legal department "was aware of the investment restrictions" in the TIA.[413] Despite that, like Chien Yeh in its second opinion (see [237] above), the legal department was not concerned that the fund structure might violate Art 146-4 of the TIA.

(3) Nature and gravity of the illegality

291 The second and third proportionality factors overlap because they concern how directly the prohibition of the act in question relates to the main policy objective of the law in question: see *Ting Siew May* at [83]–[84]. There is, however, a caveat I must add on the third factor. This factor is of obvious relevance in the context of domestic illegality. There is a strong policy imperative for the Singapore courts to advance the policy objectives of the Singapore legislature. The third factor cannot apply unmodified or unattenuated in the context of foreign illegality, at least if it goes beyond merely applying the

410 Transcript, 2 September 2020, at p 51, line 25 to p 52, line 2.

411 Transcript, 2 September 2020, at p 52, lines 4–9.

412 19 AB 10615–10623; 15 AB 8267.

413 Transcript, 1 September 2020, at p 84, lines 10–15.

principles of comity. Nevertheless, as the plaintiff submits,[414] it would be an odd result for a Singapore court not to enforce the SFIP-1 Pledge on the proportionality approach set out in *Ting Siew May* if a Taiwanese court would not have been bound to hold it void *ab initio* if it had been governed by Taiwanese law.

292 The plaintiff therefore submits that Art 146-4 of the TIA is merely an enforcement provision and does not render the second defendant's subscriptions void *ab initio*. On that basis, the plaintiff submits that a Singapore court enforcing the SFIP-1 Pledge would not undermine the purpose of Art 146-4 of the TIA.[415] In response, the second defendant submits that the legislative purpose of Art 146-4 of the TIA is so strict that subscriptions which contravene that provision are "a grave and serious affront" to that purpose and are therefore void *ab initio* under Taiwanese law.[416]

293 The parties' Taiwanese law experts agree that breach of an enforcement provision under Taiwanese law may lead to sanctions on the party in breach without impugning any transaction entered into as a result of the breach. In contrast, breach of a validity provision not only leads to sanctions but also renders the transaction entered into as a result of the breach void *ab initio*.[417] It is undisputed that no Taiwanese case has decided whether Art 146-4 of the TIA is a validity or an enforcement provision.

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414 PCS at paras 205–206.

415 PCS at paras 205–206.

416 D2RS at para 68(a).

417 Huang's 1st Report at paras 13–14; Tseng's 1st Report at para 74; Wang's Reply Report at para 11.

294 In the arbitration, the second defendant's expert Prof Wang took the position that Art 146-4 is no more than an enforcement provision.[418] In this action, he does not take resile from that position. Instead, he now opines that it is Art 143 of the TIA or Art 16 of the TCA which may render the second defendant's subscriptions void *ab initio*.[419] So I need not consider his evidence on this point further. Only Prof Tseng opines that Art 146-4 is a validity provision.[420]

295 Under Art 71 of the Taiwan Civil Code 1929, "any juridical act in violation of any imperative or prohibitive provisions shall be rendered void except that such voidance is not implied in the provision".[421] Prof Tseng and Prof Huang agree that, to determine whether a provision is a validity or an enforcement provision, one should consider the legislative purpose of the provision, balanced against conflicting interests such as the types of legal interests involved, certainty of transaction, and whether the prohibition is directed to both or only one party to the transaction.[422]

296 In Prof Tseng's view, the legislative purpose of Art 146-4 is to "impose restrictions that would guide the usage of [policyholders' funds] in the public interest".[423] Any reasonable party dealing with a company in the highly regulated insurance industry should verify whether a proposed investment is

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418 8 AB 4215; 13 AB 6836 at p 208, lines 3–11.

419 Wang's 1st Report at paras 89–91.

420 Tseng's 1st Report at para 76.

421 Tseng's 1st Report at para 72.

422 Tseng's 1st Report at paras 74–75; D2CS at para 131(c); Huang's Responses to Written Questions at para 4.

423 Tseng's 1st Report at para 76(b).

permitted by Taiwanese law. So certainty of transaction recedes as a conflicting interest.[424]

297 In response, Prof Huang takes the view that the legislative purpose of the provision is not determinative. That is because the legislative purpose of a provision is "an abstract, superordinate legal concept" that can be interpreted in different ways.[425] Prof Huang says that, on Prof Tseng's approach, the TIA's legislative purpose of protecting policyholders is broad enough for every single prohibition in the TIA to go to validity.[426] Prof Tseng and Prof Wang do not, however, identify any Taiwanese decision which has held a provision of the TIA to be a validity provision.[427]

298 Prof Tseng's conclusion turns on two points: (a) the legislative purpose of Art 146-4; and (b) the view that counterparties dealing with a Taiwanese insurance company ought to verify that the insurance company is acting in compliance with Taiwanese law. The force of the former point is diminished by Prof Huang's counterargument at [297] above. The force of the latter point too carries limited weight to the extent that Prof Tseng's opinion is based on her formulation of the legislative purpose of Art 146-4. To the extent that it is based on some other reason, that other reason is not articulated in her evidence.

299 Further, Prof Huang points out that, in the cases in which the FSC has imposed sanctions for breach of Art 146-4, those sanctions were imposed only on the insurance company. The FSC did not take the position that the transaction

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424 Tseng's 1st Report at paras 76(c)–76(f).

425 Huang's Responses to Written Questions at para 4.

426 Huang's Responses to Written Questions at para 4.

427 Tseng's Responses to Written Questions at para 37; Wang's Responses to Written Questions at para 44.

was void *ab initio*.[428] Indeed, it appears to me that, where an insurance company's investment in contravention of Art 146-4 has appreciated in value, construing Art 146-4 as rendering the investment automatically void *ab initio* would operate to the prejudice of policyholders. For all these reasons, I do not accept that Art 146-4 is a validity provision.

300 For completeness, I should note that I do not accept one of the plaintiff's arguments. The plaintiff argues that Art 146-4 is an enforcement provision because the TIA does not expressly provide that a transaction in breach of Art 146-4 is void *ab initio*.[429] It is true that, as Prof Huang observes, Art 168 of the TIA provides only that breach of Art 146-4 shall render the insurance company liable to an administrative fine or revocation of its business permit.[430] This contrasts with Art 169, which provides that over-insurance in breach of Art 72 shall both render the company liable to an administrative fine and "become void" to the extent of the over-insurance.[431] But I accept Prof Tseng's and Prof Wang's explanation that the purpose of Art 169 is to clarify the extent to which a transaction is void. Art 169 creates an exception to the default rule in Taiwanese law on the extent of invalidity.[432] I therefore do not rely on the absence of express words of avoidance in Art 146-4 to arrive at my conclusion that it is no more than an enforcement provision.

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428 Huang's 1st Report at para 92.

429 PCS at para 177.

430 Huang's 1st Report at paras 88–89.

431 Huang's 1st Report at para 18.

432 Wang's Responses to Written Questions at para 52(a); Tseng's Responses to Written Questions at para 43.

301 Because the second defendant has not established that Art 146-4 is a validity provision, the second and third proportionality factors do not weigh against enforcing the SFIP-1 Pledge.

(4) Remoteness or centrality of illegality

302 The plaintiff argues that the illegality here was remote because: (a) it relates not to the SFIP-1 Pledge but to the second defendant's subscriptions under the Trust Deed, which is a different contract governed by a different law; and (b) the SFIP-1 Pledge was an arm's length transaction under which the plaintiff took security for loans genuinely extended to the first defendant.[433] The third defendant similarly submits that the acts of the second defendant, as a stranger to the SFIP-1 Pledge, cannot taint the SFIP-1 Pledge.[434] In response, the second defendant argues that the illegal subscriptions were central to the SFIP-1 Pledge because they were the mechanism by which the second defendant's assets were transferred into and ring-fenced within a unit trust and pledged by Volaw to the plaintiff.[435]

303 In *Ting Siew May*, the Court of Appeal observed that a key indication as to whether the illegality is too remote from the contract is whether an overt and integral step in carrying out the unlawful intention was taken in the contract itself: at [56], [67] and [85]. In that case, the illegal purpose was held not to be too remote from the contract which the plaintiff was seeking to enforce. The objectionable part of the transaction, *ie*, the stating of a false date in an option, "resided within the [o]ption itself and not outside it": at [85].

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433 PCS at para 208.

434 D3CS at para 87.

435 D2RS at para 68(b).

304 It is true, as the second defendant submits, that the subscriptions are the *sine qua non* of the SFIP-1 Pledge. But I do not accept that that makes the subscriptions central to the SFIP-1 Pledge for the purposes of this factor. No step related to the subscriptions was taken under the pledge which Volaw executed. Suppose the second defendant had, independently of the plaintiff, subscribed to all the units in a unit trust contrary to Art 146-4. Assume further that the second defendant then approached the plaintiff, with the subscriptions as a *fait accompli*, seeking a loan to the first defendant secured by a pledge of all the assets of the unit trust to be granted by the trustee. The second defendant's illegal act in subscribing to the units without the approval of the FSC would not be central to the contract between the trustee and the plaintiff. The illegality would be too remote because it would not even be illegality on the part of a party to the contract that created the plaintiff's security interest.

305 The primary difference between that hypothetical scenario and the facts of this case is that the plaintiff structured and established the SFIP-1 Unit Trust and the SFIP-1 Pledge for the second defendant and at its request as a single composite transaction. The plaintiff therefore contemplated from the outset that the second defendant would be the sole unitholder of the SFIP-1 Unit Trust. However, the first proportionality factor has already taken into account the plaintiff's conduct and intention in this sense (see [285] above). I do not consider that these factors should be counted twice in the analysis.

(5) Consequences of denying the plaintiff's claim

306 The consequence of holding the pledge to be unenforceable is that the plaintiff will have no security for the outstanding sum due from the first

defendant.[436] The plaintiff submits that this is unjust because it would allow the second defendant's breach of the TIA and the second defendant's failure to prevent its own chairman from perpetrating a fraud on both the plaintiff and the second defendant to transform the plaintiff *ex post* from a secured creditor into an unsecured creditor.[437]

307 In *Ting Siew May*, the court found that the consequences of denying enforcement of the contract were not so great as to render it a disproportionate response to the illegality. Denying the claim meant that the respondents lost their entitlement to buy the property under the option. Even if there had been evidence that they would lose an increase in the value of the property or would lose the opportunity to buy another property, "this would not entail the denial of compensation for substantial expenses incurred or work already done by the [r]espondents": at [92].

308 In contrast, denying the plaintiff's claim means that it will be unable to apply security worth US$194.57m[438] to reduce the sum of US$199.66m[439] that is due and owing from the first defendant. It would simply be another unsecured lender of the first defendant, a company which no longer exists having been struck off the BVI companies register six years ago.

Conclusion on foreign illegality

309 The consequence of allowing the plaintiff's claim is that the creditors of the second defendant, including entirely innocent policyholders, must bear the

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436 D2CS at para 179(e).

437 PCS at para 226.

438 Osborn's AEIC at para 12.

439 SOC at para 20.

loss occasioned by the fraud rather than the plaintiff. But I do not consider this outcome to be disproportionate as between the plaintiff and the second defendant.

310 As the plaintiff points out,[440] the prime mover behind the STAAP Structure and the SFIP-1 Structure was Mr Teng, the second defendant's chairman. He was a thoroughly dishonest individual whom the second defendant failed to exercise the necessary control over, despite its ability to do so and despite its obligation under the TIA to do so.

311 The plaintiff is wholly unlike the respondents in *Ting Siew May*. Those respondents knowingly backdated an option with the clear purpose of using the falsely dated option to contravene the law (at [102]). The plaintiff in this case did not know that the second defendant would contravene the law, as I have found, and allowed the first defendant to draw on the Facility on the strength of the security which Volaw had provided to it by way of the SFIP-1 Pledge.

Conclusion

312 For all of these reasons, I grant the plaintiff the declaration that it seeks in this action. I hereby declare that the SFIP-1 Pledge is valid and enforceable.

313 As the defendant's counterclaim is simply the obverse of the plaintiff's claim, it follows that the counterclaim must be dismissed. On the counterclaim, therefore, I dismiss the second defendant's prayer for a declaration that the assets in the SFIP-1 Account are not subject to the SFIP-1 Pledge. Further, because the plaintiff's interest under the SFIP-1 Pledge takes priority over the second defendant's interest, I dismiss the second defendant's prayers for: (a) a

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[440] Transcript, 30 March 2021, at p 239, lines 12–17.

declaration that the third defendant holds the assets in the SFIP-1 Account on trust for the second defendant; and (b) an order that the third defendant terminate its trust relationship with the second defendant and return the assets to the second defendant.

314 My decision to allow the plaintiff's claim and to dismiss the second defendant's counterclaim suffices to address the third defendant's position in this action.

315 Because the plaintiff's claim succeeds and the second defendant's counterclaim fails, the plaintiff's counterclaim to the counterclaim does not arise for decision.

316 The only remaining matter to deal with are the costs of this action. I now invite each party to ascertain the other parties' positions on costs by correspondence and to reach agreement on costs as far as possible. To the extent that no agreement can be reached, the parties are to file and serve on each other, within two weeks of the date on which this judgment is handed down, written submissions on costs not exceeding 7,500 words (excluding title page and footnotes).

317 Each party's written submissions should address: (a) who should receive the costs of the action and who is to pay those costs; (b) whether the court is to assess the costs of the action on the standard basis or the indemnity basis; (c) whether that party wishes those costs to be taxed or fixed; and (d) in the latter event, the quantum of those costs.

318 Each party is to justify its submissions on the quantum of costs by reference to: (a) the costs schedules which have been filed, including the costs

schedule filed by that party itself; (b) the applicable costs guidelines in Appendix G of the Supreme Court Practice Directions entitled "Guidelines for Party-and-Party Costs Awards in the Supreme Court of Singapore; (c) any formal offers to settle or offers of compromise without prejudice save as to costs which have been made and which carry costs consequences; and (d) any taxation precedents which may be comparable and relevant. The written submissions should also address any interlocutory matters for which costs were not fixed but were ordered instead to be in the cause, to be reserved or to be a particular party's costs in any event.

Vinodh Coomaraswamy
Judge of the High Court

Alvin Yeo SC, Chou Sean Yu, Lionel Leo, Yu Kanghao, Alvin Tan, Dennis Saw and Daryl Kwok (WongPartnership LLP) for the plaintiff;
William Ong, Fay Fong, Melissa Mak, Wong Pei Ting and Dion Loy (Allen & Gledhill LLP) for the second defendant;
Chew Kei-Jin, Stephanie Tan and Lee Ji En (Ascendant Legal LLC) for the third defendant;
The first defendant absent and unrepresented.