STX Corporation and Another v Herry Beng Koestanto and Others and Another Matter [2008] SGHC 150

Case Number : OS 1889/2007, Suit 64/2008, SUM 735/2008, 652/2008, 725/2008

Decision Date : 10 September 2008

Tribunal/Court : High Court

Coram : Lee Seiu Kin J

Counsel Name(s) : Christopher Anand Daniel and Nicholas Narayanan (Nicholas & Co) for the plaintiff; Andrew Ang Chee Kwang (PK Wong & Associates LLC) for the defendant

Parties : STX Corporation; STX Energy Co Ltd — Herry Beng Koestanto; Aria Sulhan Witoelar; Ashbury Finance Ltd

Civil Procedure – Injunctions

10 September 2008

Lee Seiu Kin J:

1 STX Corporation ("STX"), a company incorporated in the Republic of Korea ("Korea"), is the first plaintiff in Originating Summons No 1889 of 2007 ("the OS") and the plaintiff in Suit No 64 of 2008 ("the Suit"). STX Energy Co Ltd ("SE"), the second plaintiff in the OS, is a subsidiary of the Plaintiff and is also incorporated in Korea.

2 The first defendant ("Herry") and second defendant ("Aria") in both the OS and the Suit are Indonesian nationals. Ashbury Finance Ltd ("Ashbury"), the third defendant in the OS, is a company incorporated in the British Virgin Islands.

3 STX and SE filed the OS on 31 December 2007 applying for a worldwide Mareva injunction against Herry, Aria and Ashbury. Their counsel appeared *ex parte* before me on 2 January 2008 and obtained an order in the usual form prohibiting the three defendants from dealing with their assets up to the amount of US$5.3m. On 9 January 2008 Herry, Aria and Ashbury filed Summons No 105 of 2008 to discharge the injunction. This was heard on 20 February 2008, at the end of which I varied the injunction by restricting its application to two accounts in Goldman Sachs (Singapore) and discharging the remaining orders made on 2 January 2008. I also ordered STX and SE to apply, in an arbitration between them and Herry, Aria and Ashbury, for security for the claim within one month of the filing of the defence in that arbitration. On 19 February 2008 STX and SE filed Summons No 735 of 2008 ("SUM 735/2008") applying to increase the amount of the injunction by a further US$1m.

4 Meanwhile on 29 January 2008, STX filed the writ of summons in the Suit. In that action STX is claiming against Herry and Aria for the sum of US$1,114,070, plus interest and costs, being the balance due under a settlement agreement between the parties. STX filed Summons No 652 of 2008 ("SUM 652/2008") on 13 February 2008 for a Mareva injunction for the sum claimed plus interest and costs. On 18 February 2008, in Summons No 725 of 2008 ("SUM 725/2008"), Herry applied for a stay of the action on the ground of *forum non conveniens*. And on 4 March 2008 STX and SE applied in Summons No 995 of 2008 ("SUM 995/2008") for judgment.

5 On 17 March 2008, I heard SUM 735/2008 in the OS and SUM 725/2008, SUM 995/2008 and SUM 652/2008 in the Suit in that order. The following orders were made:

(a) SUM 735/2008: The order of 20 February 2008 was discharged and the Mareva injunction of 2 January 2008 reinstated but with the date for compliance changed to 27 March 2008. The amount under injunction was increased to US$5.8m.

(b) SUM 725/2008: The application by Herry and Aria for a stay of the Suit was dismissed with costs.

(c) SUM 995/2008: The application by STX for summary judgment in the Suit was dismissed with costs.

(d) SUM 652/2008: The application by STX for a Mareva injunction was allowed, in the sum of US$1.2m.

6 The defendants filed three appeals on 3 April 2008. In Civil Appeal No 38 of 2008 ("CA 38/2008"), Herry, Aria and Ashbury appeal against my decision in SUM 735/2008 of the OS. In Civil Appeal No 37 of 2008 ("CA 37/2008"), Herry and Aria appeal against my decision in SUM 725/2008 of the Suit. In Civil Appeal No 39 of 2008 ("CA 39/2008") Herry and Aria appeal against my decision in SUM 652/2008 of the Suit. I now give my grounds of decision in relation to these three summonses.

7 The application by STX and SE for an *ex parte* Mareva injunction in the OS against the three defendants was supported by the affidavit of Park Hong Joo filed on 31 December 2007. The background to the matter are set out in [3] to [51] of that affidavit as follows:

I. Background to business relationship

3. The 1st Plaintiff (a company incorporated in the Republic of Korea) heads a group of companies that provide, amongst other things, energy-related services, including the supply of coal and fuel to power plants, through the 2nd Plaintiff (also a company incorporated in the Republic of Korea). Annexed and marked **PHJ-1** is a copy each of the web-site print-outs of the Plaintiffs.

4. The 1st and 2nd Defendants are Indonesian individuals, who control the 3rd Defendant. The 3rd Defendant is a company incorporated in the British Virgin Islands.

5. The 1st Defendant represented himself to be the President Director and Chief Executive Officer of PT Borneo Indobara ("BI"), a company incorporated in the Republic of Indonesia. BI is a coal-mining company.

6. BI had wished to develop the export sales of its steam coal in the Republic of Korea. On 23 February 2006, the 1st Plaintiff entered into an Exclusive Distributorship Agreement with BI, to act as the sole and exclusive distributor of BI's steam coal in the Republic of Korea. The agreement was to last, in the first instance, until 31 December 2008, and thereafter be extended automatically for a 1 year period, unless notice of an intent to terminate for default of the other party was served by either of the parties in writing, at least 30 days prior to the relevant expiry date. Annexed and marked **PHJ-2** is a copy of the Exclusive Distributorship Agreement.

7. Thereafter, the 1st Plaintiff and the 1st Defendant discussed the acquisition of shares in BI by the 1st Plaintiff. On 6 June 2006, a Memorandum of Understanding was entered into between

the 1st Plaintiff and BI for due diligence to be conducted by the 1st Plaintiff for the purposes of the 1st Plaintiff possibly purchasing up to 95% of BI's shares. The 1st Defendant signed the Memorandum of Understanding on behalf of BI. Annexed and marked **PHJ-3** is a copy of the Memorandum of Understanding.

8. The 1st Defendant then informed the 1st Plaintiff that, although BI would give the 1st Plaintiff exclusivity until the end of October 2006, BI was also in negotiation with the Sinar Mas Group from Indonesia for the sale of BI's shares. The 1st Defendant, effectively, stated that the 1st Plaintiff would have the right of first refusal for BI's shares. Annexed and marked **PHJ-4** is a copy of the 1st Defendant's letter dated 7 June 2006 to the 1st Plaintiff, stating the foregoing.

9. From June 2006 to early November 2006, the 1st and 2nd Defendants negotiated with the Plaintiffs in Indonesia and in Korea on the terms of a Memorandum of Understanding. On 9 November 2006, the 1st Plaintiff and BI entered into another Memorandum of Understanding, stating, amongst other things, that (a) the 1st Plaintiff confirmed its intention to acquire up to 77.5% of BI's shares at a price of US$63.55 million, (b) the 1st Plaintiff will remit to an escrow account or have a stand-by letter of credit issued in the sum of US$3 million to indicate its seriousness ('assurance monies'), and (c) a Heads of Agreement will be signed by the parties by 1 December 2006. This Memorandum of Understanding was set out in a document entitled "Minutes of Meeting (On 9th November, 2006)". The 1 st Defendant signed this document on BI's behalf. Annexed and marked **PHJ-5** is a copy of this document.

10. On 1 December 2006, the 2nd Plaintiff entered into a Heads of Agreement with the 1st Defendant and BI. In this Heads of Agreement, the 1st Defendant represented that he was the representative of 92% of the shareholders of BI and that he was also representing BI. The Heads of Agreement reflected the main terms of the Memorandum of Understanding and made the acquisition conditional upon, amongst other things, a sale and purchase agreement being entered into, save that the mode of providing the assurance monies was specified as payment into an escrow account. The Heads of Agreement was then amended (by way of a document entitled Addendum to Heads of Agreement of December 1, 2006) to change the mode of providing the assurance monies from payment into an escrow account to by way of a stand-by letter of credit. Annexed and marked **PHJ-6** and **PHJ-7** are copies of the Heads of Agreement and the Addendum to Heads of Agreement of December 1, 2006, respectively.

11. On 9 May 2007, the Plaintiffs entered into a document entitled "Acquisition of Shares/Binding Term Sheet" with the 1st and 2nd Defendants. In this document, the 1st and 2nd Defendants represented, amongst other things, that:

(i) BI, PT Roundhill Capital ("RCI"), PT Roundhill Watala ("RW") were companies incorporated under the laws of the Republic of Indonesia;

(ii) Scarlet Energy Ltd ("Scarlet") was a company incorporated in the British Virgin Islands;

(iii) RW and PT Bumi Kencana Eka Sakti ("BKES") (another company incorporated in the Republic of Indonesia) each owned 50% of the shares of RCI. [I should point out that BKES is an affiliate of the Sinar Mas Group].

(iv) RCI, in turn, owned 95% of the shares of BI;

(v) Scarlet and Corporate United Investments Limited ("CUI") (another company incorporated in the British Virgin Islands) each owned 50% of the shares of China Coal Investments Limited ("Chinacoal") (a company incorporated in Labuan, Malaysia). (I should point out that Chinacoal is, like BI, a coal-mining company). [I should point out that CUI is also an affiliate of the Sinar Mas Group]; and

(vi) The 1st and 2nd Defendants together owned 100% of the shares in RW and 100% of the shares in Scarlet, represented by the 1st Defendant.

12. The Acquisition of Shares/Binding Term Sheet recorded, amongst other things, that:

(i) The Plaintiffs wished to purchase 90% of the shares in RW and Scarlet for the sums of US$42.75 million ("Purchase Price") and US$2, respectively;

(ii) The Plaintiffs were to advance "a refundable non-forfeitable commitment fee" ("Commitment Fee") in the sum of US$5 million by way of transfer to the 1st Defendant's designated bank account. The Commitment Fee was to be credited towards the Purchase Price at the closing of the sale and purchase;

(iii) Clause 4.4:

"If for any reason the actions or transactions contemplated hereby do not occur or close, as the case may be, by the agreed dates as specified herein or in the CSPA (as defined in paragraph 6.3 below), the [1st and 2nd Defendants] will at the request of [the Plaintiffs], be jointly and severally liable to repay the Commitment Fee (plus interest ("Interest") at SIBOR + 3.5% from the date of its receipt by [the 1st Defendant]) to [the Plaintiffs] within 30 banking days of such request. If the Commitment Fee is not repaid within 30 banking days of such request, then [the 1st Defendant], without limiting and in addition to his aforementioned liability, will cause [BI], without further payment by [the Plaintiffs], to deliver coal mined from [BI's] Sembamban pit ("Commitment Coal") to [the Plaintiffs'] order of a total value ("Value") at the time of each delivery equal to the Commitment Fee (plus interest). Commitment Coal will be delivered FOBT vessel geared and grabbed loading port Muara Satui. The value of any shipment of Commitment Coal will be the total documented price per tonne paid for [BI's] last delivery to an arms length third party of coal of like quality and quantity and on like delivery terms, less US$1.00 per tonne, or as [the 1st Defendant] and [the Plaintiffs] may otherwise agree. Notice of order, delivery dates and schedules for such coal will be given by [the Plaintiffs] to [BI] no less than two months in advance of delivery and [the 1st Defendant] will cause [BI] to give priority to such deliveries. Detailed terms and conditions of such deliveries will be subject to those other terms and conditions contained in the then most recent coal purchase and sale contracts entered into by [the Plaintiffs] and [BI]. The quality specifications for Commitment Coal will be as follows:

CV	*5,500 (ADB) (reject<5,300)*

TM	*32% (reject <36%)*
Ash	*4% (reject above 5%)*
Sulphur	*0.2% (reject above 0.3%)"*

13. On 11 May 2007, the Acquisition of Shares/Binding Term Sheet was entered into in a notorial deed form. The terms remained, essentially, the same. Annexed and marked **PHJ-8** and **PHJ-9** are copies of the Acquisition of Shares/Binding Term Sheet and the notorial deed form of that document, respectively.

II. Payment by the Plaintiffs to the Defendants of US$5 million

14. On or about 9 May 2007, the 1st Defendant sent an instruction to the Plaintiffs to transfer the *"refundable, non-forfeitable Commitment Fee in the amount of US$5 million"* to the following designated account over which he stated that he had "direction and control":

ASHBURY FINANCE LTD.

CITIBANK NEW YORK

ABA NO:021XXXXXX

ACCT NAME: GOLDMAN SACHS INTERNATIONAL

ACCT NO: 40XXXXXX

IN FAVOUR OF ACCOUNT NO:018-XXXXX-X

Annexed and marked **PHJ-10** is a copy of the 1st Defendant's instruction dated 9 May 2007.

15. On or about 11 May 2007, pursuant to the 1st Defendant's instruction, the 2nd Plaintiff transferred the Commitment Fee to the account designated by the 1st Defendant. Annexed and marked **PHJ-11** is a copy of a swift message dated 11 May 2007 showing this.

III. Conditional Sale and Purchase of Shares Agreement

16. On 17 June 2007, the Plaintiffs and the 1st and 2nd Defendants entered into a Conditional Sale and Purchase of Shares Agreement ("CSPA"). Annexed and marked **PHJ-12** is a copy of the CSPA.

17. The CSPA provided, amongst other things, that the 1st and 2nd Defendants were to sell 90% of the shares in RW and Scarlet to the Plaintiffs for the Purchase Price of US$42.75 million (Article 1.1 (definition of "Sale Shares") and Article 2.4).

18. Article 2.5(a) provided that the Commitment Fee had been paid by the Plaintiffs to the 1st and 2nd Defendants *"as a refundable commitment fee and deposit against the Purchase Price as provided for under the Binding Terms Sheet and [the 1st and 2nd Defendants] hereby*

acknowledge their receipt thereof and agree to refund the Commitment Fee in accordance with Article 2.7".

19. Article 2.7 was in the following terms (with my emphasis):

> *"Refund of Commitment Fee.* ***If for any reason, the transactions contemplated hereunder do not occur or are not completed by the Closing Date, [the 1st and 2nd Defendants] shall be jointly and severally liable to repay to [the Plaintiffs] on demand but in any event no later than 30 Banking Days from the demand by [the Plaintiffs] the Commitment Fee plus interest ("Interest") accrued at a rate of SIBOR plus 3.5% per annum calculated from (and including May 14, 2007 to (but excluding) the date of full payment thereof by [the 1st and 2nd Defendants]****. If the Commitment Fee is not repaid within such 30 Banking Days, then HBK,* ***without limiting and in addition to his aforementioned liability****, shall cause [BI], without further payment or any action on the part of [the Plaintiffs], to deliver coal mined from [BI's] Sebamban pit ("Commitment Coal") to [the Plaintiffs] (or their designee) in a quantity of a total value ("Value") equal to the Commitment Fee plus Interest. Commitment Coal shall be delivered FOBT vessel geared and grabbed loading port Muara Satui. The Value of the shipment of the Commitment Coal shall be based on the total documented price per tonne paid [BI] for its most recent delivery to a third party on an arms' length basis for coals of equal quality and quantity and on comparable terms, less US$1.00 per tonne or as [the 1st Defendant] and [the Plaintiffs] may otherwise agree. Notice of order, delivery dates and schedules for the Commitment Coal shall be given by [the Plaintiffs] to [BI] no less than two months in advance of the scheduled delivery thereof and [the 1st Defendant] will cause [BI] to give priority to such deliveries of the Commitment Coal. Other terms and conditions of such deliveries of the Commitment Coal will be subject to those other terms and conditions contained in the then most recent coal purchase and sale contract entered into by [the Plaintiffs] (or any of their affiliates) and [BI]. The quality specifications for Commitment Coal will be as follows:*
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> | | |
> |---|---|
> | *CV* | *5,500 (ADB) (reject<5,300)* |
> | *TM* | *32% (reject <36%)* |
> | *Ash* | *4% (reject above 5%)* |
> | *Sulphur* | *0.2% (reject above 0.3%)"* |

20. The date fixed for the closing of the transaction was **20 July 2007 ("Closing Date")** or such other date as the parties mutually agreed or designated by the Plaintiffs as provided for in the CSPA (Article 1.1 (definition of "Closing Date") and Article 2.5(b) (i)).

21. The sale and purchase of the shares by the Plaintiffs was subject to certain conditions, which were conditions precedent that had to be fulfilled on or prior to the Closing Date. This was provided for in Article 3, which was in the following terms (with my emphasis):

> *"Conditions Precedent to Obligations of [the Plaintiffs]*
>
> ***3.1 The sale and purchase of the Sale Shares by [the Plaintiffs] shall be subject to the fulfillment, on or prior to the Closing Date, of all of the conditions set forth below***

("Conditions Precedent"):

(a) The representations and warranties made by [the 1st and 2nd Defendants] in this Agreement and the statements made in the Recitals shall be true and accurate in all material respects when made and shall be true and accurate in all material respects as of the Closing Date as if made on the Closing Date.

(b) [The 1st and 2nd Defendants] have obtained all consents and approvals required under all applicable laws and agreements for the sale and purchase of the Sale Shares and to give effect to the transactions contemplated hereunder and, in particular, without limitation, all necessary approvals, consents or waivers have been obtained from:

(i) the spouses of each of [the 1st and 2nd Defendants];

(ii) the appropriate corporate authorities of each of [RW and Scarlet] under Law No. 1 of 1995, the articles of association of each of [RW and Scarlet], including but not limited to the shareholders' resolution of each of [RW and Scarlet] approving the sale and transfer of the Sale Shares as contemplated in this Agreement; and

(iii) BKPM for conversion of RW to a PMA company on mutually acceptable terms and conditions and approval of the necessary shareholders' resolutions and the necessary amendments of the articles of association of RW to give effect thereto; and

(iv) The holders of any preemptive rights or first rights to match or first rights to purchase the Sale Shares whether of BKES or any other party.

(c) Completion by no later than 44 days after the date hereof of successful due diligence in connection with the transaction contemplated hereunder, nothing material having come to the attention of [the Plaintiffs] that in [the Plaintiffs'] sole opinion requires further due diligence inquiries;

(d) Each of [the 1st and 2nd Defendants] [have] executed resolutions as shareholder of RW and Scarlet, respectively, adopting amendments to each of the articles of association of RW and Scarlet in form and substance acceptable to [the Plaintiffs] that reflects the changes arising from the completion of transactions contemplated by this Agreement.

(e) Each of [the 1st and 2nd Defendants] has entered into shareholders agreements with [the Plaintiffs] as shareholders of RW and Scarlet, respectively, in form and substance acceptable to [the Plaintiffs] that set forth various matters including but not limited to the management and operation of RW and Scarlet, respectively, changes arising from the completion of transactions contemplated by this Agreement, provisions to be included in amendments to the articles of association of each [of RW and Scarlet] and provisions that may not be included in amendments to the articles of association [of each of RW and Scarlet], which agreements shall take effect as of and from the Closing Date.

(f) RW has entered into a shareholders agreement with BKES and Scarlet has entered into a shareholders agreement with CUI, each in form and substance

acceptable to [the Plaintiffs] which agreements set forth various matters including but not limited to the management and operation of RCI and China Coal, respectively. The Parties agree that such agreements shall take effect from the Closing Date and replace Addendum 2 and the Mutual Agreement as amended. or as the Parties may otherwise agree.

(g) There have been no amendments or changes to the Related Agreements and no other agreements or documents in connection therewith have been entered into by, between or among [the 1st and 2nd Defendants], RW, RCI, BKES, [BI], China Coal, Scarlet or CUI between the date hereof and the Closing Date.

(h) [The 1st and 2nd Defendants] have taken all necessary steps to cause persons nominated by [the Plaintiffs] to be appointed as members of the boards of directors and commissioners of each of RW, RCI, [BI], China Coal and Scarlet in place of each of the members nominated or appointed by [the 1st Defendant], [the 2nd Defendant], RW or Scarlet.

(i) Each of the closing deliveries as specified in Article 5.2 has been delivered to [the Plaintiffs].

(j) [The Plaintiffs] have obtained all necessary Government Approvals from the Authorities of Korea within 44 days of the date hereof which are required in connection with the transaction contemplated hereby.

3 . 2 ***All Conditions Precedent set forth herein must have been met or fulfilled (unless otherwise waived at the sole discretion of [the Plaintiffs]) on or prior to the Closing Date*** *and in any event, despite any language to the contrary herein, the balance of the Purchase Price is not payable by [the Plaintiffs] unless the Conditions Precedent not waived have been timely met or fulfilled.* ***If the Conditions Precedent are not met, fulfilled or waived by the Closing Date, the Buyers may without any further action or formal notice terminate its obligations hereunder and the SLC and shall be entitled to the repayment of the Commitment Fee as provided herein."***

22. The closing deliveries specified in Article 5.2, which are referred to in Article 3.1 (i), and **which had to be delivered by the 1st and 2nd Defendants to the Plaintiffs at the Closing Date (unless previously delivered)** were:

"(a) Resolutions of extraordinary general meeting of shareholders of each of [RW and Scarlet] to approve the sale of the Sale Shares to [the Plaintiffs], amendments to the articles of association of each of [RW and Scarlet] and the consummation of the transactions contemplated hereby;

(b) A copy of the articles of association of RW, as amended, incorporating the resolutions adopted at the extraordinary general shareholders meeting of RW as referred to in Article 5.2(a) and legal evidence that proves submission of such amended articles of association to the Ministry of Justice and Human Rights of the Republic of Indonesia for approval;

(c) A copy of the articles of association of Scarlet, as amended, incorporating the resolutions adopted at the extraordinary general shareholders meeting of Scarlet as

referred to in Article 5.2(a);

(d) A certified copy of the shareholders registry of each of [RW and Scarlet] showing registration of the name of [the Plaintiffs] therein as holder of the Sale Shares without any encumbrance thereon;

(e) A letter of resignation signed by each member of the board of directors and commissioners of RW and Scarlet (except for one director for each of RW and Scarlet) effective as of the Closing Date and unanimous written resolutions of shareholders of RW and Scarlet appointing each of the persons nominated by [the Plaintiffs] as members of the board of directors of RW and Scarlet, respectively and of the board of commissioners of RW, effective as of the Closing Date;

(f) Share certificates representing the Sale Shares as issued by RW and Scarlet;

(g) Evidence that all consents and approvals referred to in Article 3.1(b) have been obtained, including but not limited to BKPM's approval of conversion of RW to a PMA company;

(h) A standard form of notorial deed of transfer executed by [the 1st and 2nd Defendants] for the transfer of the RW Sale Shares to [the Plaintiffs];

(i) Such document of transfer as may be required under the laws of the British Virgin Islands to effect the transfer to [the Plaintiffs] of the Scarlet Sale Shares

(j) Financial statements of each of RW, Scarlet, RCI, [BI], and China Coal for the period ended June 30, 2007; and

[k] Evidence to the satisfaction of [the Plaintiffs] that the Pledges have been released/discharged."

23. The Pledges referred to in Article 5.2(h) are pledges of the all the shares of RW and Scarlet to secure a loan extended by China Coal as a lender to BI. The 1st and 2nd Defendants had agreed in the CSPA (Recital B) to discharge the pledges prior to the Closing Date.

24. Under Article 2.3 of the CSPA, the Plaintiffs had agreed to issue a stand-by letter of credit in a sum up to US$45 million to assist the 1st and 2nd Defendants, through RW and Scarlet, to purchase the shares of BKES and CUI in RCI and China Coal, respectively. Pursuant to this, a document entitled "Ashbury Agreement" was entered into on or about 17 June 2007 between the 2nd Plaintiff and the Defendants. Annexed and marked **PHJ-13** is a copy of this document. The effect of the Ashbury Agreement was that the 1st and 2nd Defendants intended to use the 3rd Defendant to pay for BKES' and CUI's shares in RCI and China Coal, respectively, from funds drawn from the stand-by letter of credit issued by the 2nd Plaintiff.

25. On the same day, a further document, entitled "Conditions for STX's Letter of No Objection Under the SLC", was entered into between the 2nd Plaintiff and the Defendants. This document dealt with the issue of the stand-by letter of credit, stating, amongst other things, certain conditions to be satisfied before the 2nd Plaintiff was obliged to give a letter of no objection to its bank to issue the stand-by letter of credit. Annexed and marked **PHJ-14** is a copy of this

document.

26. Also on the same day, the 1st Defendant entered into an Undertaking and Guarantee to (a) procure RW (as and when it became the owner of 100% of the shares in RCI) to cause BI to enter into an exclusive mining services agreement with the 2nd Plaintiff or its designee and (b) to procure RW and Scarlet to cause BI and China Coal (as and when Scarlet became the owner of 100% of the shares in China Coal) to enter into an exclusive assignment agreement with the 2nd Plaintiff. This was done pursuant to Article 8.4 of the CSPA. Annexed and marked **PHJ-15** is a copy of the Undertaking and Guarantee.

27. On or about 21 June 2007, the stand-by letter of credit was issued, to expire on 23 July 2007. Annexed and collectively marked **PHJ-16** are copies of swift messages showing this.

28. On or about 2 July 2007, the 2nd Plaintiff made an offer to, amongst other things, purchase all the shares in RW, thereby providing a basis on how the stand-by letter of credit was to be used.

IV. Non-fulfillment of the conditions precedent obligations of the 1st and 2nd Defendants in the CSPA and demand for repayment of the Commitment Fee and interest

29. Apart from confirmation, on or about 20 June 2007, that approval had been obtained for the conversion of RW from an ordinary company to a foreign investment company, which was a condition precedent under Article 3.1(b)(iii) of the CSPA (which confirmation is annexed and marked **PHJ-17**), the 1st and 2nd Defendants did not satisfy any of their Condition Precedent obligations under the CSPA. In particular the 1st and 2nd Defendants had not taken steps to ensure that RW and Scarlet had entered into appropriate shareholders' agreements with BKES and CUI, respectively, in terms acceptable to the Plaintiffs, which would ensure the Plaintiffs' proper participation in the management of RCI and Chinacoal, respectively. This was extremely important to the Plaintiffs, as it was only through such participation that the Plaintiffs would have any control over the coal produced by BI and Chinacoal. This was contrary to one of the conditions precedent in the CSPA (Article 3.1(f)). Indeed, there were meetings between the Plaintiffs' representatives and the 1st and 2nd Defendants after the CSPA was signed and before the expiry of the stand-by letter of credit, at which the Plaintiffs asked for developments on the 1st and 2nd Defendants' discussions with the Sinar Mas Group (of which BKES and CUI were affiliates) in this respect. The Defendants did not have any satisfactory responses.

30. The Plaintiffs did not receive any of the deliverables as of the Closing Date of 20 July 2007. Under Article 3.2 of the CSPA, the Plaintiffs were entitled to terminate their obligations under the CSPA and repayment of the Commitment Fee without any further action or formal notice.

31. On or about 14 August 2007, the 2nd Plaintiff informed the 1st Defendant of the decision not to proceed with the CSPA. Annexed and marked **PHJ-18** is a copy of the 2nd Plaintiff's letter of 14 August 2007. The Plaintiffs underlined the failure of the 1st and 2nd Defendants to provide any satisfactory solution for the apparent impasse with the Sinar Mas Group.

32. On or about 30 August 2007, the Plaintiffs demanded the refund of the Commitment Fee of US$5 million plus interest, under Article 2.7 of the CSPA. In this regard, I wish to point out that the interest specified in Article 2.7 of the CSPA is SIBOR plus 3.5%, and it was specified to run

from (and including) 14 May 2007. The SIBOR is presently 4.4%, and so presently, the interest amount is US$250,166.67 (7.9% from May 14 2007 to 28 December 2007). The Plaintiffs also demanded payment of another sum of US$1,114,076 owing to the Plaintiffs on another matter. I should point out that the sum of US$1,114,076 was the sum still owing from a sum of US$1,464,076 that the 1st Defendant had agreed (on or about 27 March 2007) to pay to the Plaintiffs as compensation for shipment of coal on the MV Subic Bay. The 1st Defendant had paid the sum of US$350,000 on or about 7 June 2007.

33. Around this time, we understood that the 1st and 2nd Defendants had agreed to sell their shares in RW and Scarlet to the Sinar Mas Group. On not receiving any response, on 13 September 2007, the Plaintiffs wrote to the 1st Defendant, stating, amongst other things, that, if there was no response from the 1st Defendant by 17 September 2007, the Plaintiffs would ask the Sinar Mas Group to pay to the Plaintiffs directly, from the sum payable for the shares to the 1st and 2nd Defendants, the sums owing to the Plaintiffs by the 1st and 2nd Defendants.

34. Still there was no response and we sent a chaser on 19 September 2007.

35. It was only on 20 September 2007 that the 1st Defendant responded. He stated that the sum of US$1,114,076 would be paid by the end of November 2007 and that the Commitment Fee repayment will be by way of coal delivery. The latter was surprising to us because the 1st and 2nd Defendants should have retained the Commitment Fee pending completion of the transaction, if they were acting honestly. The option of receiving repayment by way of coal delivery was an additional right that the Plaintiffs had and could not be imposed on us by the 1st and 2nd Defendants.

36. On 4 October 2007, we replied that we would allow until the end of November to receive payment of the sum of US$1,114,076.

37. On the Commitment Fee, we pointed out that, in light of the 1st and 2nd Defendants' Agreement with the Sinar Mas Group (and so lack of control over BI), we could not rely on the coal delivery. We again demanded the Commitment Fee and interest under Article 2.7 of the CSPA and pointed out the clear words of that Article allowing **us** to choose between being repaid in cash or with coal.

38. Again, not receiving any response, we sent a chaser to the 1st Defendant on 16 October 2007, granting until 19 October 2007 for a reply and stating that, if we did not receive one, we would commence legal action.

39. On 23 October 2007, we sent another chaser, as we had received an e-mail from one Aris Munandar (an affiliate of the 1st and 2nd Defendants) that the 1st Defendant was in the United States of America until 22 October 2007. We gave the 1st Defendant until 25 October 2007 to reply.

40. Finally, on 25 October 2007 the 1st Defendant replied, stating that repayment of the Commitment Fee will be by way of coal delivery.

41. On 26 October 2007, we wrote to the 1st Defendant, reiterating that, under Article 2.7 of

the CSPA, we had the right to seek repayment of the Commitment Fee in cash. We again pointed out that, with the 1st and 2nd Defendants not appearing to control BI, repayment by coal delivery might not be a viable alternative. However, without prejudice to our right to be repaid in cash, we were willing to consider coal delivery if fail-safe measures could be put in place, including commitment to fulfill coal deliveries from all parties, including the Sinar Mas Group. We asked for a response by 31 October 2007.

42. On receiving no response, we wrote to the 1st and 2nd Defendants on 31 October 2007, stating, amongst other things that, without prejudice to our right to seek repayment in cash, in view of the 1st and 2nd Defendants' pending sale of their shares in RW and Scarlet to the Sinar Mas Group, we were willing to consider repayment by coal delivery on the following conditions being satisfied before proceeding to negotiate a coal sales agreement:

(a) Confirmations letters from the 1st and 2nd Defendants that they will guarantee performance by BI of a coal sales agreement;

(b) Confirmation letter from the Sinar Mas Group that they would acknowledge and approve the entering of a coal sales agreement;

(c) Written confirmation that the 1st and 2nd Defendants will pay in cash any part of the Commitment Fee and interest outstanding when they have been paid by the Sinar Mas Group for their indirect shareholding in BI and related off-shore companies, along with an acceptance letter from the Sinar Mas Group;

(d) Unconditional personal security of the 1st and 2nd Defendants for performance of coal deliveries; and

(e) Confirmation about the quality of the coal delivery.

43. Despite the foregoing conditions being reasonable, on or about 5 November 2007, Aris Munandar replied for the 1st and 2nd Defendants, but did not accept all the conditions.

44. In particular, there was no acceptance of any personal guarantee by the 1st and 2nd Defendants of coal delivery and repayment in cash of any outstanding part of the Commitment Fee and interest when the 1st and 2nd Defendants got paid by the Sinar Mas Group for the sale of their shares.

45. On 7 November 2007, we chased for the documents that the 1st and 2nd Defendants refused to provide (as set out above).

46. On or about 15 November 2007, we sent a draft of a Deed of Fiduciary Security over Receivable to Aris Munandar, with copies to the 1st and 2nd Defendants. We allowed them until 21 November 2007 to sign the Deed. We made it clear that this had to be done prior to us entering into any coal sales agreement.

47. In response to the 1st and 2nd Defendants' request to extend the time to sign the Deed, we extended the time to 26 November 2007.

48. On 29 November 2007, we reminded the 1st Defendant about payment of the sum of US$1,114,076. We sent another reminder on this on 30 November 2007. Annexed and collectively marked **PHJ-19** are copies of the correspondence and documents referred to in paragraph 32 to this paragraph.

49. We have not received any response from the 1st and 2nd Defendants since. The 1st Defendant has also not made payment of the sum of S$1,114,076.

V. Commencement of Arbitration

50. In view of the position that the 1st and 2nd Defendants have put us in, we have commenced arbitration in Singapore with the Singapore International Arbitration Centre ("SIAC") under Article 10 of the CSPA, on 3 December 2007, for recovery of the Commitment Fee and interest.

51. We have had an administrative conference call with the solicitors for the 1st and 2nd Defendants and the SIAC. As an indication of the manner in which the 1st and 2nd Defendants are acting in bad faith, their solicitors have indicated to the SIAC that they intend to take a jurisdictional objection to the power of the SIAC to appoint an arbitrator. Annexed and collectively marked **PHJ-20** are copies of the Notice of Arbitration and subsequent correspondence between the parties and the SIAC. It is noteworthy that the 1st and 2nd Defendants have yet to even make payment of the advance on costs to the SIAC.

[emphasis in original]

8 Therefore the nub of the matter was this: SE had entered into a sale and purchase agreement for shares in PT Borneo Indobara ("PTBI") and had paid to Herry a commitment fee of US$5m. It was specifically agreed that Herry and Aria would be jointly and severally liable to repay this commitment fee, plus interest, if "for any reason the … transactions contemplated … do not occur or close … by the agreed dates". Under the agreement, such repayment may be made in kind at the option of SE, by delivery of an equivalent value in coal. The sale and purchase transaction did not materialise and on 30 August 2007 SE sent a written demand for the refund of the commitment fee plus interest. At that point the contractual interest amounted to about US$250,000. Herry and Aria initially did not respond to that demand despite a number of reminders. It was only on 20 September 2007 that Herry sent a letter to STX, in which he stated that he would make payment in the following unqualified manner:

> "As for Commitment Payment, we will fulfill our obligation accordingly to the agreement that we have signed upon, by delivering BIB Coal to you as the form of the payment."

The plaintiffs noted that the alternative of repayment by way of delivery of coal was at the option of SE and not the defendants. The plaintiffs were doubtful as to the ability of the defendants to undertake this alternative as they were no longer in control of PTBI. Accordingly the plaintiffs reiterated their demand for refund in their letter of 4 October 2007, which was followed by two reminders on 16 and 23 October 2007. Herry replied on 25 October 2007 stating that in the "mutual agreement … refund of Commitment Fee [may be by] coal delivery". The plaintiffs replied on 26 October 2007, reiterating that repayment by way of coal delivery was at their option and that in any event they did not see how Herry could be in a position to fulfil such delivery as he no longer controlled PTBI. They stated that they were not prepared to consider this option unless Herry came

up with a proposal that could satisfy them as to its feasibility. The plaintiffs requested for a reply by 31 October 2007. When that did not come, the plaintiffs wrote a letter on that date setting out the terms whereby they would accept the alternative of delivery by coal. Among those terms was the requirement for a confirmation from the Sinar Mas Group acknowledging and approving this. The defendants' representative, Aris Munandar, sent a reply dated 5 November 2007 which did not specifically agree to the conditions. On 15 November 2007 the plaintiffs sent a draft deed of fiduciary security over receivables to Aris Munandar, with copies to Herry and Aria, making clear that this deed had to be executed by 21 November 2007 prior to entering into any coal sales agreement. Upon the defendants' request the deadline was extended to 26 November 2007. Another sum of about US$1.1m relating to another transaction but concurrently demanded by the plaintiffs had also not been paid by this date. The plaintiffs alleged that the defendants had moved the US$5m commitment fee through New York and London and that, in view of the lack of good faith manifested in their refusal to respond in timely manner to the plaintiffs' letters of demand, there was a real risk that the defendants would dissipate their assets in Singapore. There was also the defendants' failure to pay the US$1.1m despite their promises to do so. This feet dragging by the defendants in the arbitration proceedings[note: 1] also show their attempt to delay proceedings to recover the commitment fee which had been clearly stated to be refundable.

9 Before me, counsel for the plaintiffs stated that the defendants had indicated that they had a counterclaim of about US$13m, despite previously admitting liability. Satisfied that the plaintiffs had made out their case and upon the usual undertaking as to damages, I granted the injunction on 31 December 2007.

10 On 9 January 2008 Herry filed Summons No 105 of 2008 ("SUM 105/2008) to set aside the injunction of 31 December 2007. I heard this application on 20 February 2008, at the end of which I declined to set aside the injunction but varied it by restricting its application to two specific Goldmans Sachs accounts (upon confirmation by Goldman Sachs that Herry, Aria and/or Ashbury had control over these accounts and the monies therein were unencumbered). I discharged the remaining orders of the injunction of 31 December 2007.

11 On 19 February 2008 the plaintiffs applied in SUM 735/2008 for an increase in the amount of the injunction sum. Meanwhile on 13 February 2008, the plaintiff in the Suit, STX, applied in SUM 652/2008 for an injunction for the sum of US$1.2m. On 18 February 2008 the defendants in the Suit applied in SUM 725/2008 for a stay of proceedings on the grounds of *forum non conveniens*. These applications (together with SUM 995/2008 in the suit which is not the subject of any appeal) were heard by me on 17 March 2008.

SUM 735/2008 in OS1889/2007

12 In SUM 735/2008 in the OS, STX applied for the amount under injunction to be increased by US$1m. The ground for this application was that Herry, Aria and Ashbury had been delaying the arbitration proceedings and substantial contractual interest and costs had accrued as a result. Meanwhile Herry, Aria and Ashbury had not filed any affidavit of assets and Herry had only filed an affidavit disclosing the details of certain accounts in the Singapore branch of Goldman Sachs. However Herry gave contradictory accounts in the various affidavits he filed, at first stating that he had only two accounts, then later disclosing more accounts. In view of this, and my further finding that they had failed to comply with my orders, I decided to reinstate the original order of 2 January 2008 and required Herry, Aria and Ashbury to file affidavit of assets by 27 March 2008 unless they were able to provide, by that date, an unconditional banker's guarantee or other security acceptable to STX in the amount of US$5.8m (an increase of US$0.8m from the original US$5m). I ordered costs against the defendants to be taxed if not agreed.

SUM 652/2008 in S64/2008

13 In SUM 652/2008 in the Suit, STX applied for a Mareva injunction in the sum of US$1.2m. The cause of action in the Suit is based on a written agreement dated 27 March 2007 in which Herry and Aria undertook to pay STX a sum of US$1,464,076 by way of compromise and compensation for losses suffered by STX under a contract between STX and PTBI. At the material time Herry was the president director and Aria the chief executive officer of PTBI. The statement of claim alleged that Herry had acknowledged the sum owing by making part payment of US$350,000 on 6 June 2007 leaving a balance of US$1,114,070. Herry further acknowledged this outstanding sum by way of a letter to STX dated 20 September 2007 in which he promised to make full payment by the end of November 2007. However Herry and Aria failed to make any further payments despite a letter of demand on 24 January 2008. STX had exhibited these documents in affidavits filed on its behalf.

14 The grounds for the application for the Mareva injunction were similar to those in the OS and, being satisfied that STX had made out its case of a risk of dissipation of assets by Herry and Aria, I granted an order in terms of the application in the sum of US$1.2m. I also gave a similar condition that if Herry and Aria could provide a banker's guarantee in that sum, then the injunction would be discharged. I ordered costs to be in the cause.

SUM 725/2008 in S64/2008

15 In SUM 725/2008 in the Suit, Herry and Aria applied for a stay of the action on the ground of *forum non conveniens*. Counsel for the defendants in the Suit stated that the defence is that they were the wrong parties being sued as they had signed the settlement agreement of 27 March 2007 as agents of PTBI and did not assume any personal liability. He submitted that in the event STX obtains judgment, it would be against PTBI and STX would have to commence further proceedings in Indonesia resulting in a multiplicity of proceedings. He pointed out that the parties have no connection with Singapore. Counsel for STX pointed out that the issue of multiplicity of proceedings was not raised by the defendants on affidavit.

16 However the arbitration clause in the underlying contract between STX and PTBI contained an arbitration clause that provides for arbitration in Singapore under UNCITRAL rules and does not specify the governing law. The Suit pertains to agreements between Korean and Indonesian parties under contracts in which the governing law is not specified. The defendants have assets in Singapore. In the circumstances, I did not agree that the action should be stayed on the ground of *forum non conveniens*. I accordingly dismissed the application with costs to STX fixed at $2,000.

[note: 1]Article 10 provides as follows:

> 10.1 It is agreed that in the event of any controversy, claim, difference, dispute or question (collectively, a "Dispute") arising under or in connection or relation to this Agreement or any difference regarding its existence, validity or termination or with respect to any alleged breach hereof, the Parties shall seek to resolve the Dispute amicably through discussions between them. Only if the Parties fail to resolve such Dispute by amicable arrangement with 30 days of first notice thereof by any Party may a Party initiate arbitration as set forth below.
>
> 10.2 Subject to Article 10.1, any Dispute shall only be referred to and finally resolved by arbitration in Singapore in English in accordance with the Arbitration Rules of the Singapore Arbitration Centre ("SIAC Rules") then in force which rules are deemed to be incorporated by

reference into this clause. The decision of any board of arbitration constituted under the SIAC Rules shall be final, binding and incontestable and shall be used as a basis for the enforcement thereof in any jurisdiction. Any decision, award or judgment of the board of arbitration may, without limitation, be brought to the relevant Indonesian court for enforcement in Indonesia in accordance with the New York Convention on the Enforcement of Foreign Arbitral Awards.