IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 148

Suit No 630 of 2012
(HC/AD No 3 of 2015)

Between

(1) NEPTUNE CAPITAL GROUP LTD
(2) CHINA DATA SYSTEM INVESTMENTS PTE LTD
(3) INFINITE RESULTS HOLDING CORP
(4) POWERLITE VENTURES LTD
(5) SKYLINE AGENTS LTD
(6) PETER CHEN HING WOON
(7) GE LEI
(8) QUAH SU-LING

… *Plaintiffs*

And

(1) SUNMAX GLOBAL CAPITAL FUND 1 PTE LTD
(2) LI HUA

… *Defendants*

JUDGMENT

[Injunctions] – [Cross-undertaking in damages]
[Damages] – [Measure of damages]
[*Res judicata*]

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Neptune Capital Group Ltd and others
v
Sunmax Global Capital Fund 1 Pte Ltd and another

[2016] SGHC 148

High Court — Suit No 630 of 2012 (HC/AD No 3 of 2015)
Judith Prakash J
3 February 2015; 8 April, 26 May 2016

28 July 2016 Judgment reserved.

Judith Prakash J:

Introduction

1 Owing to certain undertakings they had given to the plaintiffs, the defendants in this action were unable to dispose of certain publicly-listed shares between 2 August 2012 and 7 October 2013. During that period, the prices of the shares plunged drastically. Subsequently, the plaintiffs' claims were struck out and the defendants obtained judgment against the plaintiffs on their counterclaims. Among the orders made in favour of the defendants was an order that there be an inquiry as to the damages sustained by the defendants under the order of court dated 30 July 2012 and the undertaking given by the defendants pursuant to the order of court dated 2 August 2012. This judgment deals with the inquiry as to damages.

The parties

2 The eight plaintiffs in this action comprised five companies and three individuals bearing various nationalities. During the bulk of the proceedings, the eighth plaintiff, Ms Quah Su-Ling ("Ms Quah"), directed the proceedings on behalf of all the plaintiffs. She gave instructions to the plaintiffs' then solicitors, M/s Tan Rajah & Cheah. After the plaintiffs' claims were struck out, M/s Tan Rajah & Cheah ceased to act for the plaintiffs and Ms Quah represented herself. Subsequently, late last year, the second plaintiff, China Data System Investments Pte Ltd ("China Data"), appointed its own counsel to act for it in relation to the inquiry as to damages.

3 There were two defendants to the action: a Singapore company called Sunmax Global Capital Fund 1 Pte Ltd ("Sunmax") and, secondly, its managing director, Mr Li Hua ("Mr Li") who is also known as Tony Li.

The injunction and undertaking

4 The plaintiffs started this action on 29 July 2012. They immediately applied for an injunction to restrain Sunmax and Mr Li, whether by themselves or through their agents, from parting with, selling, charging, transferring or in any other way disposing of the shares listed in the schedules annexed to the plaintiffs' application. The shares listed in Schedule 1 were shares in the possession or control of Sunmax ("Schedule 1 shares") whilst the shares listed in Schedule 2 were in the possession or control of Mr Li ("Schedule 2 shares").

5 According to the affidavit of Ms Quah in support of the injunction, the plaintiffs had procured or provided to the defendants various shares in

publicly-listed companies as collateral for advances extended to the first to fifth plaintiffs by Sunmax. These shares belonged to the sixth to eighth plaintiffs as well as to other persons who were not parties to the action. The approximate value of the shares based on their closing prices on 27 July 2012 was $68.4m. According to Ms Quah, in breach of the agreements between the parties, Mr Li had threatened to forthwith "dump" all the shares held by Sunmax as collateral. It was the plaintiffs' position that it had been previously agreed that the first to fifth plaintiffs had until 31 July 2012 to make repayment of all the outstanding sums due and therefore any collateral could not be realised before the end of that day. If the shares were dumped, there would be irreparable harm to the plaintiffs.

6 After considering the affidavit and the arguments of counsel for the plaintiffs and upon the plaintiffs giving the usual undertaking as to damages, I made, *inter alia*, the following orders:

(a) an order restraining Sunmax from selling or disposing of the Schedule 1 shares until 1 August 2012 or until further order ("Order 1"); and

(b) an order restraining Mr Li from selling or disposing of the Schedule 2 shares until further order ("Order 2").

7 Orders 1 and 2 were served on the defendants, forthwith. Thereafter, negotiations took place between the parties. As a result of these negotiations, counsel for the parties saw me again on 2 August 2012. By consent, on the basis of an undertaking (the "Voluntary Undertaking") by the defendants that they would not part with, sell, charge, transfer or in any other way dispose of

the Schedule 1 shares and the Schedule 2 shares except as authorised in writing by Ms Quah or her solicitors, Orders 1 and 2 were discharged.

8 It was as a result of the Voluntary Undertaking that the defendants were unable to sell the Schedule 1 or Schedule 2 shares except as authorised by Ms Quah or as permitted by the court.

The course of the proceedings

9 The plaintiffs filed their statement of claim in the action on 25 September 2012 and on 17 October 2012, the defendants responded with their defence and counterclaim. By their counterclaim, the defendants prayed for, amongst others, the following orders:

(a) That against the first to fifth plaintiffs, it be declared that Sunmax was entitled to sell, assign, transfer or deal with certain shares;

(b) That against the sixth to eighth plaintiffs, it be declared that Mr Li was entitled to sell, assign, transfer or deal with certain shares; and

(c) An inquiry be made as to the damages sustained by Sunmax and Mr Li by reason of the injunction under Orders 1 and 2 and the Voluntary Undertaking given subsequently.

10 It may be helpful at this stage to mention that amongst the shares comprised in Schedule 1 were 8 million shares in Liongold Corp Ltd ("Liongold") and amongst the shares comprised in Schedule 2 were 6 million shares in Asiasons Capital Ltd ("Asiasons") and 5.2 million shares in Liongold.

Summons 5031

11 Shortly before their defence was filed, the defendants filed an application ("Summons 5031") for, among other things, Orders 1 and 2 to be set aside and for the Voluntary Undertaking to be discharged. The plaintiffs strenuously resisted this application, leading to a number of affidavits being filed on both sides.

12 The first hearing of Summons 5031 took place on 16 November 2012 but arguments could not be completed and the hearing was adjourned. On 1 March 2013, the plaintiffs issued seven cashier's orders to pay various amounts outstanding under various agreements entered into between Sunmax and the first to fifth plaintiffs. The defendants accepted six of these cashier's orders but they returned one cashier's order in the sum of $4,658,498.28, being the amount which had been tendered by China Data, the second plaintiff, to settle its indebtedness to Sunmax. Sunmax took the position that there was no longer any amount due and payable to it by China Data because on 22 December 2011, Sunmax had exercised its rights under an Escrow Agreement dated 29 October 2010 ("the Escrow Agreement"), and had appropriated 8 million Liongold shares, the subject of the Escrow Agreement, in settlement of the debt owed by China Data. It should be noted here that the legal owner of the 8 million Liongold shares was not China Data, but a BVI company named Whitefield Management Ltd ("Whitefield") and this company was accordingly a party to the Escrow Agreement.

13 On the same day, the plaintiffs applied for a mandatory injunction to compel Sunmax to return the Schedule 1 shares to them since the indebtedness had been discharged. On 11 March 2013, I ordered the return of

the Schedule 1 shares to the plaintiffs save for the 8 million Liongold shares since the ownership of the latter shares was disputed.

14 In May 2013, during the hearing of an application by the plaintiffs against Mr Li, Mr Li's counsel proposed that the 8 million Liongold shares and the Schedule 2 shares be sold on the basis that the proceeds would be paid into an interest-bearing account pending the disposal of Summons 5031. The plaintiffs, however, did not accept this proposal ("the First Sale Proposal").

15 Summons 5031 was heard again on 22 July 2013 and 6 August 2013. The matter was then adjourned for decision. Initially, the date of decision was fixed as 10 September 2013 but subsequently the date for decision was changed to 14 October 2013.

16 In the meantime, the defendants proposed to the plaintiffs on 10 September 2013 that Mr Li be allowed to sell his 6 million Asiasons shares. The plaintiffs' response was to ask why this request was being made. Counsel for the defendants replied that there had been a change of circumstances in the share market, in particular, the price of the Asiasons shares had spiked and, in order to mitigate the risks of a falling market, Mr Li proposed to sell the shares and pay the proceeds into court. The plaintiffs did not respond to this proposal ("the Second Sale Proposal"). On 18 September 2013, Mr Li filed a summons asking for liberty to sell the Asiasons shares. Although an urgent date was requested, the application could only be heard on 7 October 2013 and, unfortunately, on Friday, 4 October 2013 the price of the Asiasons shares fell drastically from its earlier level of $2.70 per share. On Monday, 7 October 2013, the Asiasons share price was $0.10 per share. The Liongold share price crashed as well: from $1.50 per share to $0.16 per share.

17 On 7 October 2013, I granted Mr Li permission to sell his Asiasons shares on the basis that the proceeds from the sale thereof were to be paid into court pending the outcome of Summons 5031. On 14 October 2013, I granted the defendants' application in Summons 5031 and discharged Orders 1 and 2 and the Voluntary Undertaking.

The entry of judgment in favour of the defendants

18 While the parties were making submissions in relation to Summons 5031, the main action was proceeding in the normal way. At a pre-trial conference held on 15 August 2013, the parties were given directions to file and exchange their respective affidavits of evidence-in-chief ("AEICs") by 18 November 2013. Further, trial dates from 7 to 30 January 2013 were allocated for the hearing of the action.

19 The plaintiffs failed to exchange AEICs on 18 November 2013. Instead, they applied for an extension of time to file and exchange their AEICs and for the trial dates in January 2014 to be vacated. As a consequence the January dates were vacated and hearing dates from 18 February 2014 to 7 March 2014 were given instead. On 11 February 2014, the plaintiffs filed another application for vacation of trial dates. I heard this application the next day and vacated the trial dates but fixed new trial dates between 8 and 25 July 2014. I also ordered that there should be no further vacation of dates and gave deadlines for the fulfilment of various procedural requirements relating to the trial. The AEICs were to be filed or exchanged by 2 May 2014. The plaintiffs, however, did not meet this deadline.

20 A further pre-trial conference was held on 5 June 2014. The senior assistant registrar ("SAR") ordered that the plaintiffs were to set down the action for trial by 4 pm on 12 June 2014, failing which the plaintiffs' claims were to be struck out and the defendants were to be at liberty to enter judgment against the plaintiffs on the terms prayed for in the defendants' counterclaim.

21 On 13 June 2014, as the plaintiffs had failed to set down the action for trial by the deadline fixed on 5 June 2014, judgment was entered against the plaintiffs by the defendants. Among the orders made by the judgment were the following:

(a) The plaintiffs' statement of claim filed on 25 September 2012 and the actions therein were struck out;

(b) As against the first to fifth plaintiffs, it was declared that Sunmax was entitled to sell, assign, transfer or deal with the following shares:

(i) 39.2 million Asiasons shares;

(ii) 8 million Liongold shares;

(iii) 200 million Inno-Pac shares; and

(iv) 5 million Liongold shares.

(c) As against the sixth to eighth plaintiffs, it was declared that Mr Li was entitled to sell, assign, transfer or deal with the following shares:

(i) 5.2 million Liongold shares;

(ii) 6 million Asiasons shares; and

(iii) 9,357,142 ITE Electric shares.

(d) An inquiry be made as to the damages sustained by the defendants by reason of the injunction under the order of court dated 30 July 2012 and the undertaking given by the defendants pursuant to the order of court dated 2 August 2012.

The inquiry into damages

22 Consistently with the rather unusual course taken by the main proceedings, the inquiry into damages was prolonged by unexpected developments.

23 On 8 October 2014, the SAR ordered the parties to file and exchange their AEICs for the inquiry into damages on 14 November 2014 and fixed the hearing of the inquiry on 3 February 2015. No AEICs were exchanged on 14 November 2014, however, as the plaintiffs were not ready and the defendants were not prepared at that stage to make a unilateral filing. Finally, in late January 2015, Mr Li filed his AEIC on behalf of Sunmax and himself.

24 At the hearing of the inquiry on 3 February 2015, Ms Quah appeared in person. Neither she nor any other plaintiff had filed any affidavit. Mr Li took the stand and Ms Quah cross-examined him on his affidavit. Thereafter, Ms Quah and the defendants filed and exchanged written submissions and subsequently I asked the parties to address me on some additional legal points. This process was completed on 24 April 2015 and judgment was reserved. In the meantime, Ms Quah was adjudged bankrupt and the defendants applied

for, and obtained, leave of court to continue with the assessment of damages proceedings against her notwithstanding the bankruptcy.

25 On 20 July 2015, the court was informed that China Data had just appointed M/s Straits Law Practice LLC ("Straits Law") to act as its solicitors in connection with the action. Straits Law asked for permission to file submissions on behalf of China Data within the next four weeks. This request was acceded to but in mid-August 2015 Straits Law informed the court that China Data was going to apply to set aside the judgment against it and asked for the deadline for filing the submissions regarding damages to be suspended. This request was also granted.

26 China Data did file an application to have the judgment against it set aside. I heard this application and dismissed it on 12 February 2016. Consequently, the assessment of damages could proceed. Written and oral submissions were given. The oral hearing took place on 26 May 2016. The only plaintiff who participated in these additional submissions was China Data. Ms Quah took no further part in the assessment proceedings.

The defendants' claims

27 Sunmax assesses the damages payable to it in respect of the 8 million Liongold shares as being $9,032,000 whilst Mr Li assesses the damages payable to him in respect of the 5.2 million Liongold shares as being $5,870,800. In respect of the 6 million Asiasons shares, Mr Li assesses the damages payable to him as being $6,330,000.

Summary of the parties' positions

28 I will summarise the plaintiffs' respective submissions in turn.

29 Ms Quah put forward the following points:

(a) The restraint on the sale of the Schedules 1 and 2 shares was obtained with the mutual consent of both the defendants as recorded in the Voluntary Undertaking.

(b) On 1 March 2013, the plaintiffs forwarded to the defendants seven cashier's orders for a total amount of $24,921,503.39 in full payment of the amounts outstanding to the defendants. However, on 5 March 2013, Sunmax on its own volition returned $4,658.428.28 to China Data on the basis that the 8 million Liongold shares belonged to it. Thus, Sunmax's loss in respect of the 8 million shares was caused by their own refusal to accept the amount tendered by the plaintiffs. At that time, the value of the shares was about $9,080,000 based on the closing price of $1.139 per share on 11 March 2013.

(c) As regards the Schedule 2 shares, the original agreement was for Mr Li to hold on to the share certificates and not to deal with the shares. However, in breach of this agreement, Mr Li had transferred the shares to himself and his wife. Since Mr Li was not entitled to deal with the shares in any event, the damages claimed are not applicable.

(d) The value of a share at any one time is entirely speculative and if the defendants had placed all the shares or a sizable proportion of them in the market for sale at any one time, such action might have had

a detrimental effect on the share value in price of the shares in the open market. The defendants should not be permitted to draw a line on a chart and point to one figure as the purported price of all the shares as each tranche of shares sold would invariably affect the price of the next tranche sought to be sold.

30 China Data's submissions encompassed some of the points raised by Ms Quah but also asked the court to consider the way in which the 8 million Liongold shares had been acquired in the first place and find that Sunmax was in the position of an equitable mortgagee and had dealt with the shares in breach of the duties imposed on such mortgagee. I summarise their arguments as follows:

(a) The defendants are not entitled to damages in respect of the 8 million Liongold shares because they were not entitled to have taken those shares on 26 January 2012.

(b) The documents entered into resulted in the creation of an equitable mortgage and the defendants were therefore subject to a prohibition against self-dealing which they breached when they took the shares. Further, they were never entitled to take the shares because the requisite event of default to trigger their powers as mortgagees had not arisen.

(c) Loss cannot be attributed to China Data since the Voluntary Undertaking was entered into upon the defendants' own initiative and this was an intervening event which broke the chain of causation.

(d) Loss cannot be attributed to China Data as it was caused by the defendants' breach of a compromise agreement reached between the parties on 24 July 2012.

(e) Loss cannot be attributed to China Data since the defendants have not shown that they would have sold the Liongold shares at the relevant share price but for the injunction order.

(f) Alternatively, the defendants failed to mitigate their losses by refusing China Data's offer to redeem the share by repaying the debt.

31 The defendants take the position that many of the plaintiffs' arguments cannot be proffered by them because the entry of the judgment has decided these issues and therefore the doctrine of *res judicata* applies. The defendants say that they are entitled to damages because they suffered losses due to the injunction order and their undertaking. Causation is clear. Further, there was no failure by the defendants to mitigate their losses.

Analysis

What is the position when no express cross-undertaking in damages has been provided by the plaintiffs?

32 The facts of this case were somewhat unusual in that although the plaintiffs had, when applying for injunctive relief on 30 July 2012, given a cross-undertaking to indemnify the defendants in damages should it turn out that the injunction was wrongly granted, this cross-undertaking applied only to Orders 1 and 2 which I granted that day. When these orders were discharged on 2 August 2012 in the light of the defendants' Voluntary Undertaking, no further cross-undertaking in damages was expressly provided by the plaintiffs.

Ms Quah's submissions alluded to this point when she contended that no damages should be awarded because the defendants had mutually consented to provide the voluntary undertakings but she did not make any legal arguments. Thus, I asked for further submissions on the following questions:

> (a) Can a person recover losses incurred by his compliance with an interlocutory injunction or a voluntary undertaking in the absence of a cross-undertaking in damages?
>
> (b) Can a cross-undertaking in damages be implied where none was given in respect of an interlocutory injunction or voluntary undertaking?
>
> (c) Given that Orders 1 and 2 were discharged on 2 August 2012, does the scope of the cross-undertaking in damages given on 30 July 2012 encompass losses accruing from the Voluntary Undertaking given to the court on 2 August 2012?
>
> (d) If so, does the fact that Order 1 had lapsed prior to the Voluntary Undertaking have any bearing on whether a cross-undertaking in damages should be implied in respect of the Schedule 1 shares?

33 The defendants duly filed submissions on this point. Although no submissions were received from Ms Quah, after China Data appointed solicitors, they filed submissions on the point on China Data's behalf. The initial position taken by China Data was that in Singapore a cross-undertaking in damages could not be implied and therefore since no express cross-undertaking had been given by it, the court had no power to order it to pay

damages to the defendants. However, after I dismissed China Data's application to set aside the judgment, counsel for China Data correctly recognised that because of the wording of the judgment which expressly stated that an inquiry be held as to the damages sustained by the defendants, it would be difficult to argue that there was no undertaking as to damages given by the plaintiffs. He therefore dropped the point.

34 Accordingly, definitive answers to the questions posed by me need not be given in this judgment. It may, however, be useful to set out, briefly, the legal position that the questions relate to and my views.

35 In relation to the first question, parties are agreed that the established position is that in the absence of a cross-undertaking in damages (be it expressed or implied) a defendant who is ultimately victorious at the final hearing has no recourse to recover losses he may have incurred from complying with an interlocutory injunction or a voluntary undertaking. All parties here accept that this is the legal position in Singapore. Where the parties differ is on the second question, which is whether a cross-undertaking in damages must always be express or whether it will be implied whenever an interlocutory injunction or voluntary undertaking is given.

36 The defendants say that the Singapore position is the same as the English which is that a cross-undertaking in damages will be implied whenever an interlocutory injunction or voluntary injunction undertaking is given unless the contrary is expressed. The position that China Data originally took was that Singapore had not hitherto adopted the same course as the English and it should not. Instead, it proposed that we follow the Australian

stand which is that a cross-undertaking in damages must always be express and cannot be implied.

37 The basis of the defendants' submission that Singapore law is no different from English law on this issue is that *Singapore Civil Procedure 2015, Vol I* (GP Selvam gen ed) (Sweet & Maxwell) at para 29/1/43, states the position under Singapore law as follows:

> Where the defendant gives an undertaking which avoids the need for the court to grant an injunction, an undertaking in damages by the plaintiff (sometimes call a "cross-undertaking") is to be implied unless the contrary is agreed and expressed at the time (Practice Note [1904] W.N.203; *Oberrheinische Metallwerke GmbH v Cocks* [1906] W.N.127; *W v. H (Family Division: Without Notice Orders)* [2001] 1 All E.R. 300 at 319, HC (Eng) …

38 As stated in the cited paragraph, English law on this matter evolved from the issue by the Chancery Division of the High Court of England of a Practice Note in 1904. This Practice Note recorded that the judges of the Chancery Division had resolved that whenever an undertaking to the court was given in lieu of an interlocutory injunction, there should be inserted in the order a cross-undertaking in damages by the applicant unless the contrary was agreed and expressed at the time. The Practice Note reflected a longstanding practice in the Chancery Division prior to 1904 as was noted by Munby J in the 2001 case also cited in the above extract. The current practice in the Chancery Division is reflected in para 5.28 of the *Chancery Guide* which reads:

> Often the party against whom an injunction is sought gives to the court an undertaking which avoids the need for the court to grant the injunction. In these cases, there is an implied undertaking in damages by the party applying for the injunction in favour of the other …

39 The English position seems also to have been adopted in Hong Kong (see *Lam Ping Wan, Sun Growth Securities Ltd v Ip Lam On* [2000] HKCU 530).

40 China Data submitted that it had not been firmly established that the English position had been carried out in practice in Singapore. It cited a local author, Daniel Koh, who stated in his text *Law and Practice of Injunctions in Singapore* (Sweet & Maxwell, 2004) that if a defendant chooses to give a voluntary undertaking to a court to desist from committing the alleged wrongful act pending the trial, the plaintiff does not automatically furnish any cross-undertaking as to damages (at p 19). However, no authority whether by way of practice direction or case was cited for this assertion.

41 China Data also drew my attention to Australian cases, to wit, *Gustin v Taajamba Pty Ltd* [1994] NSWCA 117 and *Evans & Associates v European Bank Ltd* (2009) 255 ALR 171 at [35] ("*Evans*") which indicated that the practice in those courts was that the undertaking had to be given expressly either by the party or his legal representative and that if it was not so given it could not be included in the formal order. Before dropping the point, China Data had submitted that the reasoning of the court in *Evans* casts doubt as to whether the English position should be unquestioningly adopted. It argued that while it is logical for a plaintiff to give an undertaking in damages when applying for an injunction, the same cannot be said of a cross-undertaking in damages in response to a defendant's voluntary undertaking. In the former situation, the plaintiff is requesting an order from the court and so should furnish an undertaking to be fair to the defendant. In the latter situation, the parties' positions have completely changed. An injunction has already been

granted – it is now the defendant who is making a request to furnish a voluntary undertaking in order to avoid the injunction. Since it is to the benefit of the defendant to furnish such an undertaking, the plaintiff no longer needs to give a cross-undertaking in damages.

42 As I earlier observed, it is not necessary for me to make a definitive ruling on this issue. I would like to state, however, that I am not convinced by China Data's reasoning and I consider that the English practice is more equitable and more principled. The learned editors of *Singapore Civil Procedure 2015* in para 29/1/43 were stating – indeed, restating for the latest edition, the passage having already been included in the book's first edition in 2003 – the practice in Singapore as they believed it to have been long understood and applied, bearing in mind the history and basis of the civil procedure and practice of the Singapore courts which in large part owe their genesis to the English courts. The continuous inclusion over more than a decade of such a statement of practice in the practitioner's bible of civil procedure could not but help perpetuate the practice and the understanding of lawyers here that a cross-undertaking in damages would be implied in the stated circumstances.

43 I accept, with respect, the following observations of Laddie J in *A Bank v A Ltd*, Times Law Report, 18 July 2000 cited at [30] of *SmithKline Beecham Plc v Apotex Europe Ltd* [2006] 1 WLR 872:

> When an ex parte injunction or order is made other than against the Crown, it is automatically subject to a cross-undertaking in damages. So that the parties are made fully aware of their respective rights and liabilities, that cross-undertaking should be set out in terms in the order, but if it is not, it is to be implied none the less. It is difficult to imagine any circumstances in which it would be appropriate for a

> court to refuse to impose a cross-undertaking when it is making an order in the absence and without the knowledge of the target of the injunction, not least because the imposition of such a cross-undertaking does not mean that the court will inevitably enforce it against the claimant if he fails at the trial. The cross-undertaking only requires the claimant to compensate the defendant if, in its discretion, the court decides that such compensation is appropriate. In the unlikely event that a court, after argument from the claimant, decides not to impose a cross-undertaking, that should be stated expressly. The failure of the court to expressly deal with this issue in the November and January orders was not because of an unwillingness to impose a cross-undertaking but because the necessity of such an undertaking was so obvious that it did not need to be stated …
>
> Any party who seeks interlocutory relief must be taken to know and appreciate that a cross-undertaking in damages will be the price it is expected to pay and the advocate appearing on his behalf will be taken to have authority to give the undertaking. *Even in a case like this, where the November order was offered by the court rather than asked for by the party, acceptance of the offer subjects the party to exactly the same conditions and obligations as if he had asked for it in the first place. He has to pay the same price. The need to protect the interests of the absent party are the same wherever the idea for the injunction came from.* If the offer of more than was asked for places the party's advisers in difficulties they should either ask for a short adjournment to seek instructions or decline the offer. If neither of these courses are adopted and the offered injunction is accepted, the automatic obligation to submit to a cross-undertaking must be explained to the client as soon as possible. If he is not prepared to pay that price, he must return to court at the earliest opportunity-particularly before the order is served or executed-to ask for it to be modified either by expressly excluding the cross-undertaking or removing the injunction.
>
> [emphasis added]

44 The position here is analogous to the situation where the court offers an injunction in return for an undertaking. A defendant who furnishes a voluntary undertaking generally does so because of the existence of an injunction he wants discharged or to avoid such injunction being granted at all.

While termed "voluntary", the undertaking is not voluntary in the full sense of the word, being given in response to actions taken by the plaintiff to impinge on the defendant's rights to deal with property or take steps it would otherwise be fully entitled to. The court will not restrain such actions on the part of the defendant without an undertaking as to damages from the plaintiff, as the plaintiff will know or be advised. It should not alter the plaintiff's position if the defendant "voluntarily" undertakes not to do the action complained about and it is not unfair to the plaintiff to imply a cross-undertaking from him unless he expressly makes it clear from the start that he is not prepared to give one. Thus, my answer to the second question is that in Singapore the courts should imply a cross-undertaking in damages from the plaintiff when the defendant has given a voluntary undertaking.

45 In view of the above, it is not necessary to deal with the third and fourth questions.

Res judicata

46 In all cases in which an undertaking in damages has been found to have been given or has been implied by the court, the right of the claimant (*ie*, the beneficiary of the undertaking) to enforce such undertaking is not automatic. The court still has the discretion to determine whether the undertaking should be enforced. This discretion is to be exercised by reference to all the circumstances of the case and the court must be satisfied of two things: first, that the injunction was wrongly granted and, secondly, that there are no special circumstances militating against the enforcement of the undertaking (see *SH Cogent Logistics Pte Ltd v Singapore Agro Agricultural Pte Ltd* [2014] 4 SLR 1208 at [171] ("*SH Cogent*") and *Astro Nusantara*

International BV v PT Ayunda Prima Mitra and another matter [2016] SGHC 34). In *SH Cogent*, it was also held that in considering whether the injunction was wrongly granted, the success of the claimant at trial and the circumstances in which the order was obtained are important matters (at [174]).

47 China Data submitted that the court should not enforce the undertaking because there had been no determination as to whether Orders 1 and 2 had been in fact wrongly asked for and granted. In any event, Order 1 could not have been wrongly granted as Sunmax cannot claim damages in respect of the 8 million Liongold shares because it was not entitled to have taken the shares on 26 January 2012. The defendants' response to both these arguments was that they are *res judicata*.

48 The principles governing the application of the doctrine of *res judicata* are not in dispute. For a litigant to be estopped from raising an issue on the basis that that issue has already been adjudicated, it must be shown that:

(a) there has been a final and conclusive judgment on the merits;

(b) the judgment was from a court of competent jurisdiction;

(c) the parties to the two actions that are being compared are the same; and

(d) there is identity of subject matter in the two proceedings.

49 Of the above requirements, the only one that is in dispute here is the first. The plaintiffs' point, to put it shortly, is that there has been no judgment on the merits because of the way that the defendants obtained the judgment in

their favour, *viz*, by reason of the plaintiffs' failure to comply with the unless order made by the SAR. The merits which China Data said were not adjudicated by the issue of the judgment concerned China Data's assertions that:

(a) The loan agreement between China Data and Sunmax and the Escrow Agreement resulted in the creation of an equitable mortgage, such that the typical duties attendant on a mortgagee applied to Sunmax;

(b) The duties included a prohibition against self-dealing which Sunmax was plainly in breach of when it took the 8 million Liongold shares;

(c) Sunmax was never entitled to take the shares because the requisite event of default needed to trigger its power as mortgagee had not arisen; and

(d) The action of Sunmax in taking the shares unlawfully deprived China Data of its equity of redemption.

The defendants' response to the above points was that since the judgment states that Sunmax is "entitled to sell, assign, transfer or deal with … the 8,000,000 Liongold shares" it conclusively determines the issue as to the lawful ownership of the shares, and thus, ability to claim damages. This issue is, therefore, *res judicata* and cannot be raised again in these proceedings.

50 The fact that the judgment obtained by the defendants resulted from the plaintiffs' default does not by itself mean that *res judicata* cannot be

invoked. In the case of *Ozer Properties Ltd v Ghayadi* (1988) 20 HLR 232, the English Court of Appeal recognised that a judgment in default could create a situation of *res judicata* if it determined an issue which, when formulated, necessarily and with complete precision determined the rights of the parties (*per* Stocker LJ at 236). In that case itself, however, the default judgment was held not to create a *res judicata*. There, the issue that was alleged to be *res judicata* was whether the defendant was a tenant of the plaintiff. The defendant had previously obtained an injunction allowing her to enter the relevant premises and restraining the then owners of the premises from interfering with her quiet enjoyment of the same. The defendant later obtained judgment against the previous owners due to their default in filing their defence. By that judgment it was "adjudged that the [defendant] do recover against the [previous owners] damages to be assessed and costs". It was held that this judgment did not create a *res judicata* on the issue of the defendant's status as a tenant of the premises, *vis-à-vis* the new owners, because it was not necessary to support the judgment to postulate that the defendant had a tenancy of any kind. She would have been entitled to damages having regard to the events of her eviction by the previous owners even if she had not been a tenant.

51 In the present case, for Sunmax to establish its claim for damages arising out of its inability to sell the Liongold shares while the voluntary undertaking was in force, it has to show that it was the owner of those shares. To succeed in the *res judicata* argument, it must show that the issue of the ownership of the shares was an issue for determination in the action and that such issue was decided by the default judgment. In this respect, counsel for

Sunmax pointed me to the pleadings and submitted that the default judgment entered on those pleadings did indeed establish the necessary *res judicata*.

52 The relevant pleadings are the statement of claim and the defence and counterclaim. I will summarise the relevant paragraphs of these in turn. First, the statement of claim averred:

(a) By para 13(2), that by an agreement dated 29 October 2010 (the "Loan Agreement"), Sunmax agreed to advance $4m to China Data, and China Data agreed to repay the said sum by 29 January 2011 and to pay a monthly monitoring fee. Subsequently, the parties agreed to extend the maturity date to 29 July 2011.

(b) By para 14(2), that China Data received $4m from Sunmax on 29 October 2010.

(c) By para 15, that in consideration of the advance made by Sunmax, China Data arranged for Whitefield to provide the 8 million Liongold shares to Sunmax as security.

(d) By para 16, that by the Escrow Agreement, Whitefield agreed to appoint the Escrow Agent identified therein to act as an escrow agent in respect of the 8 million Liongold shares and provided the Escrow Agent with the original share certificates and signed blank undated share transfer forms (collectively, "the Escrow Documents") in respect of the Liongold shares.

(e) By para 20, that on 3 November 2011, Sunmax demanded payment of the sum of $4,160,000 from China Data, being the repayment of advance and of monitoring fees up to 29 August 2011.

(f) By para 21, that China Data's director, Mr Wong Chin Yong, was informed by Mr Li that the demand was a formality and could be ignored.

(g) By para 22, that on 16 January 2012, the Escrow Agent informed Whitefield that it had received from Sunmax a release notice dated 22 December 2011 requesting release of the Escrow Documents to Sunmax.

(h) By para 23, that on 26 January 2012, Sunmax wrongfully converted 8 million Liongold shares.

(i) By para 2 of the prayers, China Data asked for an order that Sunmax return the 8 million Liongold shares.

53 The defence and counterclaim made the following averments (in summary):

(a) By para 7, that para 32 of the statement of claim was admitted but that:

(i) the Loan Agreement was entered into on condition that the Escrow Agreement was concluded;

(ii) under the Escrow Agreement, the 8 million Liongold shares were held in escrow for Sunmax;

(iii) China Data did not repay the loan by the extended deadline of 29 July 2011 and ignored several reminders about the overdue repayment;

(iv) Sunmax therefore exercised its rights under the Escrow Agreement by instructing the Escrow Agent to release the 8 million Liongold shares to it and thereafter took possession of the shares; and

(v) up to the date of the pleadings China Data had not repaid the amount due.

(b) By para 12, para 15 of the statement of claim was not admitted.

(c) By para 42 of the counterclaim, that it was an express term of the Loan Agreement that China Data would repay the loan of $4m on, and monitoring fees until, the maturity date.

(d) By paras 43 and 44 of the counterclaim, China Data failed to repay the loan of $4m by the extended maturity date of 29 July 2011 and failed to repay the monthly monitoring fees from 28 October 2011 and these failures rendered it in breach of its obligations to Sunmax.

(e) By paras 45 and 46 of the counterclaim, that it was an express term of the Escrow Agree that the 8 million Liongold shares were held pursuant to China Data's obligations under the Loan Agreement and that by reason of China Data's breach, Sunmax was entitled to exercise its rights under the Escrow Agreement to take possession of the 8 million Liongold shares.

(f) By para 1 of the prayers, the defendants prayed for a declaration, *inter alia*, that Sunmax was entitled to sell, assign, transfer or deal with the 8 million Liongold shares.

54 It can be seen from the pleadings as paraphrased that the issue of the ownership of the 8 million Liongold shares was an integral part of each party's case. China Data's case was that Sunmax had no right to take possession of the shares and that when it did so it wrongfully converted the shares to its use. Sunmax averred that the shares were placed with the Escrow Agent on terms which gave it a right to take possession of the shares in settlement of the debt. It was entitled to exercise its rights because of China Data's various breaches and, having done so, it was entitled to a declaration that it could deal with the shares as it pleased, *ie*, in the same way that an owner would be able to. The pleadings encompassed the various issues raised by Sunmax before me.

55 Looked at in the light of the pleadings, it is clear that the language of the judgment obtained by Sunmax dealt with, and settled, the issue of the ownership of the 8 million Liongold shares. It determined that all rights to deal in the shares were vested in Sunmax, not China Data or Whitefield. The situation here is quite distinct from that which obtained in *Ozer* where the award of damages could have been made on various bases and did not imply the recognition of a tenancy. I hold, therefore, that the issues that China Data seeks to raise relating to the alleged position and duties of Sunmax as equitable mortgagee of the shares and, further, as to its ability to impugn the actions taken by Sunmax and reclaim possession of the shares, cannot be raised in these proceedings due to *res judicata*.

56 As a postscript, I add that China Data was dilatory in seeking to enforce its, or Whitefield's, equitable rights. In December 2011, Sunmax requested the Escrow Agent to release the Escrow Documents to it. China Data was informed on or about 17 January 2012 that the Escrow Documents had been released to Sunmax. It was aware then that under cl 4 of the Escrow Agreement, upon release of the Escrow Documents, it would be released from its obligation to repay Sunmax and the loan would be fully discharged. It must have known then that for it or Whitefield to seek relief from the forfeiture of the shares, the loan would have to be repaid. No action was started nor was any offer of repayment made. It was only in March 2013, when the parties' respective legal positions had been clearly formalised in the pleadings, that China Data tendered repayment of the loan. That was a time when the value of the shares exceeded the amount of the loan. It did not renew such tender at the time it sought to challenge Sunmax's entitlement to damages. Since October 2013, the value of the shares has been far short of the amount of the loan. During the last hearing, counsel for Sunmax stated that if China Data was now willing to pay it the amount tendered in March 2013, his client would re-transfer all shares covered by the Escrow Agreement. Counsel for China Data indicated that he needed to take instructions. To-date, I have heard nothing further about this. While the court has the equitable jurisdiction to revive a mortgagor's equity of redemption after it has been destroyed, this jurisdiction is exercised to give the mortgagor a further opportunity to repay the debt and recover its property (see *Cukurova Finance Ltd v Alfa Telecom Turkey Ltd (Nos 3 to 5)* [2015] 2WLR 875 at [83]). There is no point complaining about alleged wrongful destruction of one's equity of redemption if one does not show ability and willingness to repay the debt due.

57 For the reasons given above, I hold that it is not open to Sunmax (and the other plaintiffs) to now assert that Orders 1 and 2 were wrongfully granted.

Any other reason not to award damages

58 As pointed out earlier, the court has a discretion in regard to the enforcement of the undertaking as to damages and will not do so if there are circumstances that militate against such enforcement. In this respect, the only argument left to the plaintiffs, since they accept that the terms of the judgment prevent them relying on the absence of a cross-undertaking from them and since I have held their other arguments to be *res judicata*, is that in respect of the 8 million Liongold shares Sunmax should not be entitled to recover as it would have suffered no loss at all had it not refused China Data's offer to redeem the shares by repaying the debt. The plaintiffs said this refusal was a failure to mitigate but I am not convinced that that is the correct way of categorising this argument.

59 Both parties accepted that the measure of damages flowing from the interim injunction is governed by contractual principles as stated in *CHS CPO GmbH (in bankruptcy) v Vikas Goel* [2005] 3 SLR(R) 202 ("*CHS CPO*"), particularly at [89]. That case set out the principles applicable when fortification of an undertaking as to damages is applied for. Certain of those principles are equally relevant here. They are:

(a) An undertaking as to damages is one given to the court, and not to the other party.

(b) Such an undertaking is intended to provide a means of compensation for the enjoined party for loss if it occurs in relation to the grant of the injunction prayed for.

(c) The risk of loss is governed, *inter alia*, by contractual principles relating to causation, remoteness of damage and mitigation.

60 China Data argued that Sunmax failed to mitigate its loss by refusing the tender of repayment of the loan in March 2013. As Sunmax submitted, this argument is based on the assumption that at that date China Data had an equity of redemption with respect to the shares. The equity of redemption had, however, been destroyed by Sunmax's action in appropriating the shares and in this action China Data was, effectively, asking for revival of the equity and relief against forfeiture. That remedy is a discretionary one and the defendants were actively disputing China Data's right to it. In asserting that Sunmax had a duty to accept the tender of payment, China Data was saying that Sunmax had to give up its defence to China Data's claim and its position that the shares belonged to it at that time and should not be returned. In my view, in a dispute over the ownership of an asset, requiring one party to completely surrender its legal position on ownership and accept the other side's claim before adjudication of the dispute is not requiring it to mitigate at all and cannot be described as such. When there is a genuine dispute over legal rights, the refusal to accept a demand of this nature cannot be unreasonable. All the more, such refusal cannot adversely affect the refusing party's right to damages when its claim is subsequently upheld by the court. Further, in this case, the judgment, in determining the issue of ownership conclusively against China Data, also implied that any discretion available to the court had not been

exercised in favour of China Data. Since the shares belonged to Sunmax in March 2013, it had no obligation to accept the offer of redemption.

61 In my view, the plaintiffs have not put forward any valid argument as to why they should not be responsible for loss sustained by the defendants by reason of the voluntary undertakings. In May 2013, the defendants, through their counsel, made the First Sale Proposal, under which the enjoined shares would have been sold and the proceeds paid into an interest-bearing account. The plaintiffs rejected this proposal. Subsequently, in July 2013, I asked the plaintiffs' then counsel if the plaintiffs were prepared to let the defendants sell all the shares and put the money into court. Counsel for the plaintiffs said they would have to take instructions on this and would thereafter reply to the defendants' lawyers. In the event, no response was given to the defendants' lawyers. In September 2013, the defendants made the Second Sale Proposal, requesting that the plaintiffs allow Mr Li to sell his 6 million Asiasons shares in the light of the prevailing market conditions. Indeed, the Second Sale Proposal expressly stated that Mr Li was concerned about the possibility of a fall in the market and put the plaintiffs on notice that Mr Li would consider them to be responsible for any losses caused by such a fall. Again, the plaintiffs chose not to agree to the proposal.

62 As can be seen from the brief recital of events above, the plaintiffs were at all times intent on maintaining the freeze on dealing with the shares. They were aware of the possible consequences of a freeze from the time they applied for Orders 1 and 2 and were reminded of these consequences subsequently. In these circumstances, it cannot be unfair to require them to compensate the defendants for any damage caused by the freeze.

Quantification of damages

63 Having decided that damages should be awarded on the cross-undertaking, I must now decide the appropriate basis for the assessment of the defendants' loss.

64 The defendants have calculated their losses in respect of the two counters involved differently, as can be seen from the chart below:

Calculation of Damages					
Counter	**Number of shares**	**Start share price**	**End share price**	**Difference in value per share**	**Damages the defendant is entitled to**
Sunmax					
Liongold shares	8 million	$1.290 as of 30.7.2012	$0.161 as of 14.10.2013	$1.129	**$9,032,000**
Mr Li					
Asiasons shares	6 million	$1.205 as of 10.9.2013	$0.15 as of 7.10.2013	$1.055	**$6,330,000**
Liongold shares	5.2 million	$1.129 as of 30.7.2012	$0.161as of 14.10.2013	$1.129	**$5,870,800**

65 Whilst in respect of the Liongold shares the defendants use the difference in value between the date of the injunction and the date when it was discharged, in respect of the Asiasons shares, they use the difference in value between an intermediate date falling after the date of injunction and the date on which Mr Li was permitted to deal with the shares. Before examining the soundness of these proposed methods of quantification, it is helpful to first set

out the principles governing compensation under a cross-undertaking in damages.

66 It is well-established, and both parties accepted, that the general approach to be taken is akin to that in contract cases. As Lord Diplock stated in *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1974] AC 295 ("*Hoffmann-La Roche*") at 361, the assessment of damages payable under a cross-undertaking in damages:

> ... is made upon *the same basis as that upon which damages for breach of contract* would be assessed if the undertaking had been a contract between the plaintiff and the defendant that the plaintiff would not prevent the defendant from doing that which he was restrained from doing by the terms of the injunction ...
>
> [*emphasis added*]

67 This approach was also adopted by the High Court of Australia in *Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd* (1981) 146 CLR 249 and *European Bank Ltd v Robb Evans of Robb Evans & Associates* [2010] HCA 6 (unreported, 10 March 2010). The High Court expressed the view that the damages claimable should be those which flowed directly from the injunction and which could have been foreseen when the injunction was granted. This is clearly a contractual measure of damages. The High Court observed that that view was one which would be just and equitable in the circumstances of most cases. Indeed, the judge in *Moraitis Fresh Packaging (NSC) Pty Ltd v Fresh Express Australia Pty Ltd* [2010] NSWSC 704 ("*Moraitis*"), a case the defendants rely on, was guided by that holding. The passage that I have quoted from *Hoffmann-La Roche* was also cited with approval locally in *CHS CPO* at [57], in which the court also stated that

general contractual principles of causation, remoteness and mitigation should apply to the assessment of damages under a cross-undertaking.

68 Generally, the defendants have calculated their damages on the basis of the change in the market values of the shares during the period of the injunction. It cannot be contended that this method of calculation would offend the remoteness principle since it was foreseeable to the plaintiffs when the Voluntary Undertaking was given that the share prices would vary whilst the undertaking remained in effect because the affected shares were listed shares and the stock market is a volatile one. Therefore, the proper method of assessment in the present case would be to determine how much the defendants lost because they were restrained from selling the shares, subject to the defendants' duty to mitigate their losses.

69 The question that arises is as to the dates at which the shares should be valued for the purposes of the assessment because the amount lost varies with the dates chosen. The parties' submissions highlight the following dates as being potentially relevant in this regard:

(a) 30 July 2012 ("the Injunction Date") – the date of Orders 1 and 2;

(b) 2 August 2012 ("the Undertaking Date") – the date of the Voluntary Undertaking;

(c) 10 September 2013 ("the Intermediate Date") – the date on which counsel for the defendants wrote to the plaintiffs proposing that the Asiasons shares be sold and the proceeds be paid into court;

(d) 7 October 2013 ("the Dealing Date") – the date on which ORC 6974/2013 was made allowing Mr Li to deal in the Asiasons shares; and

(e) 14 October 2014 (the "Discharge Date") – the date on which Orders 1 and 2 and the Voluntary Undertaking were discharged.

70 For the purpose of this enquiry, the Undertaking Date may be disregarded in favour of the Injunction Date as no evidence has been given as to any difference in the values of the shares on the two dates. Further, in all practical ways, the defendants were restrained from dealing with the shares from the Injunction Date onwards; the undertaking merely extended the period of restraint. In the analysis that follows, I use the term "injunction" to include the Voluntary Undertaking as well.

71 Ordinarily in cases of this nature, damages are assessed with reference to the difference between the price of the property enjoined as at the date of the injunction order and its price as at the date of discharge of that order. This was, in essence, the measure used in *Mansell v British Linen Company Bank* [1891] 3 Ch 159 ("*Mansell*") at 164, which the defendants cited. I note that this ordinary measure is a rule of convenience and an approximation of what an enjoined party will have lost. By taking the price as at the date of the injunction order, the court effectively places the enjoined party in the position it would have been in had it sold the entirety of the property at the market price as at the date of the injunction order. This may not correspond precisely to the position the enjoined party would actually have been in but for the injunction, for the enjoined party might well have sold the property some time later at either a higher or lower price. Unfortunately, uncertainty of this sort is

inherent in any inquiry into how an injured party would have acted but for the wrong done to it. Unless that uncertainty can be dispelled by special evidence which proves that the property would have been sold at some other price, the court will adopt the market price as at the date of the injunction order as a default price in order to avoid engaging in excessive speculation (see *Canadian Imperial Investment Pte Ltd v Pacific Century Regional Developments Ltd* [2000] 3 SLR(R) 227 at [80] and *Mansell* at 163). All this was accepted by the defendants, who further cited *Triodos Bank NV v Dobbs* [2005] EWHC 108 (Ch) ("*Triodos*") and *Moraitis* as examples of cases where the court was satisfied by the special evidence presented. I shall return to these cases in due course.

72 As indicated at [64] above, the defendants accepted that with regard to the 13.2 million Liongold shares, there was no special evidence to show when and at what price they would have been sold, and that the ordinary measure would thus apply to those shares. The drop in the value of the Liongold shares from the Injunction Date ($1.205 per share) to the Discharge Date ($0.161 per share) is $1.129 per share and this would mean that Sunmax's loss in respect of its 8 million Liongold shares is $9,032,000 whilst Mr Li's loss in respect of his 5.2 million Liongold shares is $5,870,000. The plaintiffs on their part asserted that the defendants' loss in respect of the Liongold shares cannot be attributed to the injunction at all because the defendants would have dumped the Liongold shares in July 2012, thereby incurring a similar loss, had the injunction not prevented them from doing so.

73 I agree with the defendants that there is insufficient evidence that the Liongold shares would have been sold at a price other than the value at the

Injunction Date. Although the First Sale Proposal (described at [14] and [61] above) suggests that a sale in May 2013 was a possibility, I do not consider it sufficient to displace the ordinary measure. As for the evidence which was raised by the plaintiffs at the injunction application to suggest that the defendants had intended to "dump" the Liongold shares in July 2012, it should be stressed that a proven *risk* that an enjoined party may take a particular course of action does not equate to proof that the enjoined party *would* have taken that course. Reasonable suspicions are not, at the assessment of damages stage, sufficient. In any event, even if the plaintiffs had proven that the defendants would have dumped the Liongold shares in July 2012, they would still need to prove – and have not proven – the price that would have been obtained had this dumping been carried out. I therefore agree that the ordinary measure of damages applies to the Liongold shares and I accept the defendants' quantification.

74 In respect of the Asiasons shares, the defendants asserted that Mr Li is entitled to claim not the ordinary measure of damages, but the difference in price between the Intermediate Date and the Dealing Date. They argued that Mr Li lost a specific opportunity of realising the value of the shares during the period of the injunction and, therefore, the value of the shares on the Injunction Date should be disregarded in favour of their value on the Intermediate Date, which was when he had that opportunity to lock in a higher value. They also disregarded the Discharge Date on the basis that since Mr Li was permitted to deal with the Asiasons shares from the Dealing Date onwards, the Discharge Date was no longer significant.

75 Given that the Dealing Date was the date on which Mr Li ceased to be prevented from dealing with the Asiasons shares, I accept that the Dealing Date and not the Discharge Date is relevant for the purposes of assessing his loss with regard to those shares. The more difficult question is whether the value of the shares as at the Intermediate Date should be used in substitution for the value of the shares as at the Injunction Date. Depending on how the question is answered, there are two possible ways of assessing the loss suffered by Mr Li in respect of the Asiasons shares:

(a) The defendants' method as set out in [74] above, which would give Mr Li $6,330,000.

(b) The difference between the value of the Asiasons shares as at the Injunction Date ($0.570) and that as at the Dealing Date ($0.139), reflecting the decrease in the value of the Asiasons shares over the period of the injunction's effectiveness as against Mr Li, which would give Mr Li $2,586,000.

76 On this point, the defendants' submission is that there is special evidence that the Asiasons shares would have been sold on or around the Intermediate Date: namely, the Second Sale Proposal and the subsequent application to court when that proposal was rejected by the plaintiffs (as described at [16] above).

77 At a glance, the defendants' argument appears compelling. The Second Sale Proposal does support the contention that the defendants, specifically Mr Li, intended to sell the Asiasons shares on or about the Intermediate Date. If the shares had been sold on or about that date, they would have fetched a

much higher price than their value as at the Dealing Date. But for the plaintiffs' refusal to accept the Second Sale Proposal, the Asiasons shares would have been sold at that higher price, and so (the defendants argue) the plaintiffs should be liable for the difference.

78 In assessing the merits of this argument, it must be recalled that the notional contract breached by the enjoining party is, in the *Hoffmann-La Roche* formulation, "a contract between the plaintiff and the defendant that the plaintiff *would not prevent the defendant from doing that which he was restrained from doing by the terms of the injunction*" (emphasis added). Since it is the very existence of the injunction which prevented the defendants from disposing of the property, the court cannot simply ask whether Mr Li would have sold the Asiasons shares on or around the Intermediate Date if the plaintiff had agreed to the Second Sale Proposal. Instead, the crucial question is what Mr Li would have done with those shares *had there been no injunction to begin with*.

79 Aside from the fact that the Second Sale Proposal was made, three additional facts must be considered in answering this question.

80 First, the fact that the Second Sale Proposal evidenced an intention to sell the Asiasons shares on or around the Intermediate Date in September 2013 is counterbalanced by the existence of the First Sale Proposal which, by the same token, evidenced an earlier intention to sell those same shares (as part of the Schedule 2 shares) in May 2013. It is true that the First Sale Proposal was not pursued with the same vigour as the Second Sale Proposal, but it is no less true that if the plaintiffs had accepted the First Sale Proposal, the shares would have been sold at that point, obviating the need for the Second Sale Proposal.

Thus, the fact that the First Sale Proposal was made at all suggests that May 2013 was another possible period during which the shares might have been sold had the injunction never been granted.

81 Secondly, it is significant that the Second Sale Proposal did not state a firm intention to sell the Asiasons shares as close as possible to the Intermediate Date, but rather sought the plaintiffs' agreement to allow Mr Li to sell those shares "at a minimum price of S$1.00 per share anytime within 14 days of your acceptance of the proposal herein". This reflects the obvious reality that Mr Li, like most shareholders, did not have a single fixed target in mind, but a range of acceptable values. If the injunction had not existed, he may have been happy to sell at $1.205 per share (the price as at the Intermediate Date) or he might have decided to hold on for slightly longer in the hope of realising a larger profit. Contrariwise, the minimum price of $1.00 stated in the Second Sale Proposal might even suggest that Mr Li would have been content to sell at an earlier point, before the share price hit $1.205, had he not been constrained by the injunction.

82 Thirdly, I cannot ignore the fact that an owner of shares over which there is an injunction would necessarily have different considerations acting on his mind than would an owner of shares who is free to deal with them as he pleases. The existence of an injunction would have at least two effects pulling in different directions. First, the inconvenience and uncertainty of having to obtain either the enjoining party's consent or an order from the court may make the shareholder more reluctant to attempt a sale than he otherwise would be. Secondly, and conversely, the prospect of being locked in by the injunction for a significant period, during which the market would be bound to fluctuate,

may make the shareholder more anxious to realise the value of his shares (or, to borrow the words used in the Second Sale Proposal, more anxious "to mitigate the risk of any fall in the share prices") than he otherwise would be. It therefore cannot be taken for granted that a desire to sell on a certain date, with the injunction in place, indicates that a sale would have taken place on or around that date had the injunction never been granted.

83 Taking all the above factors into consideration, I find that it is not possible to state on a balance of probabilities whether Mr Li would, but for the injunction's existence, have chosen to realise the value of his Asiasons shares in May 2013, in September 2013 (on or around the Intermediate Date), on some other date before May 2013 or after September 2013, or at some point in between. Consequently, the ordinary measure – using the value of the Asiasons shares as at the Injunction Date as a default – should be resorted to instead.

84 My conclusion on the evidence is not undermined by any of the cases which the defendants relied on. On the contrary, those cases only fortify it further.

85 In *Triodos*, the claimant, who was the managing director and majority shareholder of Acorn Televillages Ltd, sought to restrain the receivers from disposing of shares in a subsidiary of that company. The receivers had accepted an offer for the shares on 17 July 2002 but were unable to complete the transaction due to an undertaking given by them on 30 July 2002 not to dispose of the shares. In return, the claimant had given a cross-undertaking in damages. It was subsequently held that there had been no basis for the receivers' undertaking. Lightman J assessed the damages to be what the

intended buyer had offered for the shares (given that the court found that the shares were otherwise valueless) on the basis that the undertaking caused the loss of the only prospect of sale of the shares. Additionally, the claimant had to pay interest accruing from 1 September 2002, being the date on which the intended buyer urged the receivers to apply to court to discharge the undertaking.

86 On one analysis, *Triodos* was a case where there was compelling special evidence as to the price the shares would have been sold at: the receivers had already accepted an offer, locking in the sale price. Adopting that price involved no speculation at all on the court's part and was simple common sense. In contrast, adopting the higher price in the present case would involve a great deal of speculation given the multiple possible dates on which, and values at which, the Asiasons shares could have been sold. Moreover, on an alternative analysis, *Triodos* could be seen as a case where the ordinary measure of damages was not even departed from; instead, the price which had already been set by the accepted offer formed the basis for determining the value of the shares as at the date of the undertaking. That said, given that interest was made payable from the date on which the intended buyer urged the receiver to apply to discharge the undertaking (which, one presumes, would have been near the date the intended buyer wished to complete the sale), rather than the date the undertaking was given, the former interpretation seems likelier. Whichever interpretation is correct, what is clear is that *Triodos* is a vastly different case from the present one.

87 Turning to *Moraitis*, that case involved an undertaking by the defendant not to dispose of stands at the Sydney market and a corresponding

cross-undertaking in damages by the plaintiff, both of which were given on 8 January 2007. McLaughlin AsJ found that, as at that date, the stands had a market value of A$750,000 and the defendants were in negotiations with an interested buyer who had made the defendants a higher offer of A$1.2m. Accordingly, McLaughlin AsJ awarded A$450,000 (being the difference between the value of the stands in January 2007 and the offered price) for the lost opportunity to sell the stands at A$1.2m. This was despite the fact that the market value of the stands had actually increased to A$785,000 by the time the undertaking was discharged. Putting to one side the troubling point of the apparent overcompensation of the defendants (who received both the profit they would have received had they accepted the offer in January 2007 and the profit they would have received had they rejected the offer and instead sold the stands at market value at the date of judgment), this case simply provides another example of the kind of special evidence which would be necessary for the defendants to discharge their burden of proving that a price other than the market value as at the date of injunction or undertaking should be used. All the court needed to find in *Moraitis*, albeit it did not express its conclusion in quite these words, was that the offer of A$1.2m would more likely than not have been accepted. The court did not need to speculate (as I have been asked to do in the present case) as to which dates and prices out of multiple plausible dates and prices would have been chosen for the sale.

88 Finally, in *Mansell*, two defendants, Mr Mackay and British Linen Company Bank ("the Bank"), were restrained from selling Mr Mackay's shares without the plaintiff's consent. The order was made on 21 March 1890 and on 9 October 1890, the Bank issued a summons asking for an order directing the sale of Mr Mackay's shares. Both the plaintiff and Mr Mackay

opposed it. On 31 January 1891, the plaintiff's case was dismissed and an assessment of damages took place in respect of the loss caused by the injunction. The evidence was that on the day when judgment was given against the plaintiff, the shares were worth £237 10s. On 21 March 1890, the shares were worth £400. Thereafter their value fluctuated, reaching a high point of £600 on 13 June 1890. On 9 October 1890, when the Bank applied for sale of the shares, their value was £262 10s. Initially, the damages were assessed at the difference between the value of the shares on 13 June 1890 (£600) and their value on the judgment date (£237 10s), thus taking account of the highest value of the shares during the period of the injunction.

89 On the appeal, the initial assessment of damages was overturned on the basis that it was most improbable that if the injunction had not been granted, Mr Mackay would have been so fortunate as to have sold his shares exactly at the moment between 21 March 1890 and 31 January 1891 when the price of the shares reached its highest point. Romer J noted that there was "no special evidence to render it probable that but for the injunction the highest price would have been obtained" (at 163). He instead allowed damages of £137 10s, the difference between £400, being the sum which the shares would have obtained if they had been sold on the date of the injunction, and £262 10s, the price which they would have fetched had they been disposed of on 9 October 1890 when the summons asking for sale of the shares was issued. This was the ordinary measure of damages, save that the date of the summons asking for the sale of the shares was used in place of the discharge date. Romer J did not state his reasons for that substitution, but a likely explanation is that Mr Mackay, by choosing to oppose the summons for sale, had failed to mitigate his loss and hence – assuming the application by summons would

more likely than not have succeeded had he supported it – could not claim the further fall in the share value after the date of the summons.

90 Undoubtedly, the defendants in the present case are not so ambitious as was Mr Mackay (who was seeking to use the highest price attained by his shares over the whole period of the undertaking), nor is their evidence so scant as that which was offered by Mr Mackay (who does not appear to have adduced *any* evidence as to his intentions). Nonetheless, their cases are similar to the extent that neither Mr Li nor Mr Mackay was able to adduce sufficient special evidence to prove that they would more likely than not have sold their shares on any particular date. In the face of such insufficiency of evidence, the court in *Mansell* could only fall back on the default date, *viz*, the date of the injunction order or undertaking. I can do no better.

91 I would therefore assess Mr Li's loss in respect of the Asiasons shares as being $2,586,000, which is the difference between the shares' value as at the Injunction Date and their value as at the Dealing Date.

92 Finally, contrary to the plaintiffs' submissions, I find that there was no failure on the part of either defendant to mitigate their losses. The only measure put forward as a mitigating step which the defendants should allegedly have taken was accepting the tender of repayment of the loan. I reject this argument for the reasons given in [60] above. Nothing else has been advanced in relation to mitigation.

Conclusion

93 For the reasons given above, the plaintiffs shall be jointly and severally liable to pay damages to the defendants as follows:

(a) To the first defendant, $9,032,000 in respect of the Liongold shares; and

(b) To the second defendant, $5,870,000 in respect of the Liongold shares and $2,586,000 in respect of the Asiasons shares.

94 I will hear the parties on costs. Given the rather convoluted course the assessment has taken, some consideration may have to be given as to how costs should be apportioned among the plaintiffs, particularly those who took no direct part in the assessment hearing.

Judith Prakash
Judge

Muralli Rajaram and Andrew Heng
(Straits Law Practice LLC) for the second plaintiff;
Eighth plaintiff in person;
Lee Eng Beng SC, Chua Beng Chye and Raelene Pereira
(Rajah & Tann Singapore LLP) for the defendants.