Nava Bharat (Singapore) Pte Ltd *v* Straits Law Practice LLC and another and another suit [2015] SGHC 146

Case Number	: Suit Nos 846 and 847 of 2011
Decision Date	: 28 May 2015
Tribunal/Court	: High Court
Coram	: Lee Seiu Kin J
Counsel Name(s)	: Niru Pillai and Liew Teck Huat (Global Law Alliance LLC) for the plaintiff in Suits Nos 846 and 847 of 2011; Cavinder Bull SC, Chia Voon Jiet, Simon Huang and Darryl Ho (Drew & Napier LLC) for the defendants in Suit No 846 of 2011; Ang Cheng Hock SC, Ramesh Selvaraj, Tan Kai Liang and Seow Wan Jun (Allen & Gledhill LLP) for the second defendant in Suit No 847 of 2011.
Parties	: NAVA BHARAT (SINGAPORE) PTE LIMITED — STRAITS LAW PRACTICE LLC — M RAJARAM — TAN BENG PHIAU DICKY — CHIDAMBARAM CHANDRASEGAR

Evidence

Tort—Conspiracy

Tort—Negligence

Equity—Fiduciary relationships

[LawNet Editorial Note: The plaintiff's appeal in Civil Appeal No 129 of 2015 was dismissed, and the defendants' appeal in Civil Appeal No 133 of 2015 was allowed, by the Court of Appeal on 22 February 2016. See [2016] SGCA 12.]

28 May 2015 Judgment reserved.

Lee Seiu Kin J:

Introduction

1 These suits concern the plaintiff's attempt to acquire an interest in a coal mine ("the Mine") located in Sungai Cuka in Kalimantan, Indonesia ("the Transaction"). The Transaction was beset with difficulties and it eventually failed despite the plaintiff having paid out more than US$3m. In Suit No 847 of 2011 ("S 847/2011"), the plaintiff is suing the counterparty to the Transaction and his solicitor. In Suit No 846 of 2011 ("S 846/2011"), the plaintiff is suing the solicitor and the firm that had acted for it in the Transaction. In a nutshell, the plaintiff's case is that it was defrauded by the counterparty and his lawyer, and its own lawyers had failed to safeguard its interest.

2 The trial for both suits, which were heard together, spanned a period of slightly over a year, with three tranches and a total of 41 hearing days. It was a deeply contentious matter with not only many disputes of facts but also a number of legal issues, some of which have not been addressed by the Singapore courts. At the end of the hearing, I reserved judgment. Having considered the matter, I conclude that the plaintiff's claims in both S 846/2011 and S 847/2011 should be dismissed in their entirety. I will set out the factual background and issues before I give the reasons for my decision. The table of contents that follows would hopefully aid the reader in traversing this lengthy judgment:

Factual background

The parties

3 The plaintiff in both suits is Nava Bharat (Singapore) Pte Limited ("Nava Bharat"), a company incorporated in Singapore. It is in the business of power generation, ferro alloys, mining and agri-business, among others. [note: 1] It is a wholly-owned subsidiary of Nava Bharat Ventures Limited ("NBVL"), a company incorporated in India [note: 2] and listed on the Indian stock exchanges. Ashwin Devineni ("Ashwin") is the managing director of Nava Bharat and he was the main representative for Nava Bharat in the Transaction. [note: 3]

4 The first defendant in S 846/2011 is Straits Law Practice LLC ("SLP"), a limited liability law corporation carrying on the practice as advocates and solicitors in Singapore. [note: 4] The second defendant in S 846/2011 is M Rajaram ("Rajaram"), an advocate and solicitor of the Supreme Court of Singapore and a senior director of SLP. [note: 5] Rajaram was appointed as Nava Bharat's lawyer for the Transaction. [note: 6]

5 The first defendant in S 847/2011 is Tan Beng Phiau Dicky ("Dicky Tan"), an Indonesian businessman. [note: 7] At the time of the Transaction, Dicky Tan was the president director and majority shareholder of PT Indoasia Cemerlang ("PTIC"), which was the Indonesian company with the requisite mining concessions to mine coal in the Mine. [note: 8] A mining concession is called "Kuasa Pertambangan" in Indonesia and I shall refer to Dicky Tan's mining concessions in the Mine as the "KP Concessions". Dicky Tan was served the writ of summons on 8 March 2012, [note: 9] but he did not enter into appearance. The plaintiff obtained default judgment against him on 26 August 2013. The second defendant in S 847/2011 is Chidambaram Chandrasegar ("Chandra"), an advocate and solicitor of the Supreme Court of Singapore and a senior director of Tan Peng Chin LLC ("TPC"). [note: 10] Chandra was appointed by Dicky Tan to act as his lawyer in respect of the Transaction. [note: 11]

6 Given the large number of persons and entities involved in this case, I have, for convenience, compiled a list of the names of the key persons and entities as well as the abbreviations (if any) used in this judgment. The list is annexed hereto as Annex A.

The chronology of events

Nava Bharat's search for coal

7 In 2008, Nava Bharat was actively seeking to secure a regular supply of coal for NBVL's power generation business in India. This was because the the power generation business in India of NBVL was expanding and there was a need to source for coal from other countries. [note: 12]

8 Shortly prior to the Transaction, Nava Bharat had sought to acquire an interest in another coal

mine from a different party. On or about 27 September 2008, Nava Bharat entered into a memorandum of understanding for the participatory interest in a coal mine in Central Kalimantan, Indonesia ("the Multi Guna Transaction"). [note: 13] A sum of US$2m was paid. However the Multi Guna Transaction was eventually called off as a result of a dispute between the parties. [note: 14]

9 Ashwin then found out about the Mine from Bhushan Rao ("Bhushan"). [note: 15] Bhushan was then the managing director of Agora International Trading Pte Ltd ("Agora"), a Singapore-based trading company, whose principal activity is, *inter alia*, to trade in commodities. [note: 16] On or around 16 September 2008, Bhushan and N Lakshman ("Lakshman"), the then financial director of Agora, entered into discussions with G R K Prasad ("Prasad"), the director of financial and corporate affairs of NBVL, in relation to the Mine. [note: 17] At that time, NBVL conducted a feasibility study on the Mine. [note: 18] There were also preliminary discussions on the general methodology and structure for the Transaction. [note: 19]

10 Chandra had a role in linking up Dicky Tan with Agora, a fact that was unknown to Ashwin until after the Transaction fell through. Chandra was (and still is) a non-executive director of Agora, [note: 20] and it was he who put Dicky Tan, for whom he had acted in an earlier transaction, in touch with Agora for the purpose of finding a buyer for the Mine. [note: 21] Dicky Tan instructed Chandra around August 2008 to act for him in the Transaction. [note: 22]

11 As mentioned in [5] above, Dicky Tan was the majority shareholder of PTIC holding 80% of the shares (with the other 20% held by Ridwan Halim as his nominee). PTIC received the KP Concessions from another Indonesian company, PT Batu Hitam Mulia ("PTBHM"). The KP Concessions comprised the following:

(a) A KP exploitasi licence ("KP Exploitasi Licence") for 191.014 hectares, expiring on 29 September 2010.

(b) A KP transportation and sale licence ("KP Transport and Sale Licence") relating to the KP Exploitasi Licence, expiring on 29 September 2009.

(c) A KP explorasi licence ("KP Explorasi Licence") for 936.02 hectares, which has expired on 20 October 2006.

12 The KP Exploitasi Licence allowed the holder to "mine and remove the coal", while the KP Explorasi Licence only entitled the holder to explore for coal in the specified area. [note: 23] As the KP Concessions holder, PTIC had the authority to conduct mining operations in the Mine. Therefore, Nava Bharat had to negotiate with Dicky Tan in order to acquire an interest in the Mine.

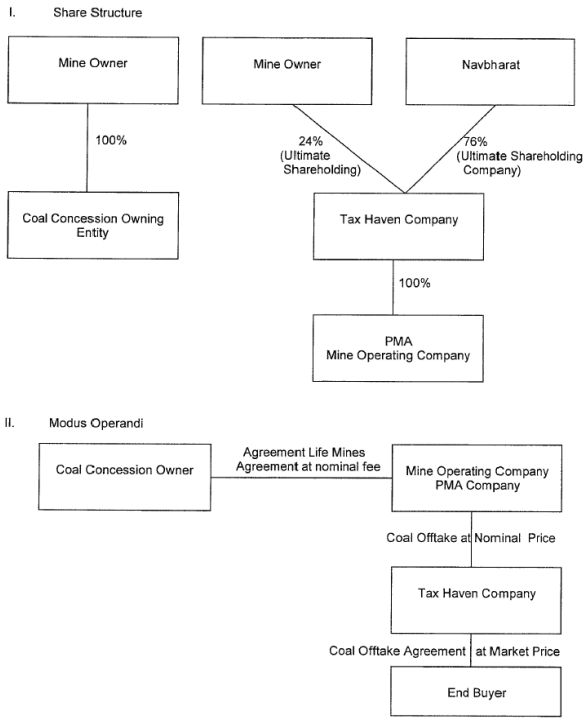
13 On 18 September 2008, Chandra wrote to Agora setting out the proposed method of the acquisition for the Mine. [note: 24] The structure envisaged by the parties and set out in Chandra's letter was as follows: [note: 25]

B. Structure of the Shareholding and Manner of Acquisition

1. Coal concession is in the form of a KP Concession. Under Indonesia law, only an Indonesian entity can own the KP Concession.

2. However a mine operating company can be owned by a foreign entity. The equity participation will be in this Company.

3. Proposed Structure which is typical in a foreign participation of a KP Concession will be as follows:



4. Coal Concession Owner will enter into a Life Mines Operating Agreement with the PMA Mine Operating PMA Company at a nominal fee.

5. MPA [*sic*] Mine Operating PMA Company will enter into a long term offtake agreement at a nominal price with the Tax Haven Company.

6. The Tax Haven Company will enter into long term back-to-back offtake agreement at a market price with the End Buyer.

14 To discuss the proposed structure set out in Chandra's letter, Chandra and Lakshman arranged for Nava Bharat, Agora and Dicky Tan to meet on 25 September 2008 at the office of TPC. [note: 26] At the meeting, Nava Bharat was represented by Ashwin and his father, Ashok Devineni ("Ashok"), the chairman of the board of directors of NBVL, and Prasad, while Agora was represented by Bhushan and Lakshman. [note: 27] It is undisputed that Nava Bharat did not have legal representation at the meeting. [note: 28] Dicky Tan was accompanied by his brother, Jason Tan, and his solicitor, Chandra. [note: 29]

15 Nava Bharat was informed at the meeting that a foreign company like Nava Bharat could not own shares in the company with the KP Concessions for the Mine. [note: 30] Instead, it was proposed that Nava Bharat hold the shares in that company through an Indonesian nominee. [note: 31] Apart from the idea of a nominee arrangement, the parties also discussed the commercial aspects of the Transaction. Specifically, Ashwin was informed that the value of the company could be fixed at US$20m based on a coal reserve of 10m metric tonnes. [note: 32] Ashwin claimed that Dicky Tan had

stated categorically that "the Mine was operational and was ready to be operated as soon as the investors moved in". [note: 33] Further, he alleged that Chandra, although appointed to represent Dicky Tan, was in fact actively advising *all* parties present at the meeting. [note: 34] This is a major point of contention between the parties, and I will address it later.

Appointment of Rajaram and ABNR

16 Having discussed the key commercial terms of the Transaction, Nava Bharat decided to proceed with the Transaction and, after the meeting on 25 September 2008, indicated that it would have to appoint its own lawyers to obtain legal advice and prepare the necessary documents to execute the Transaction. [note: 35] To this end, Nava Bharat approached Chew Chin of Baker & McKenzie. [note: 36] Chew Chin attended the meeting on 29 September 2008 with Ashwin and Bhushan. [note: 37] At this meeting, the parties discussed the possible structures that could be put in place for the Transaction. [note: 38]

17 Notwithstanding that, Nava Bharat eventually appointed Rajaram instead of Chew Chin as its lawyer for the Transaction. There is no dispute that Rajaram was recommended by Chandra. [note: 39] However, the parties do not agree on the facts which led to Chandra's recommendation of Rajaram. According to Nava Bharat, Chandra told Ashwin and Bhushan immediately after the meeting that the deal was "unlikely to progress very far" if they continued with Baker & McKenzie, and recommended that Nava Bharat appoint Rajaram instead. [note: 40] Chandra, on the other hand, said that Bhushan had asked him to recommend another Singapore law firm because Nava Bharat wanted a comparison, [note: 41] and it was in those circumstances that he recommended Rajaram to Bhushan. [note: 42]

18 Bhushan, who was acquainted with Rajaram, [note: 43] then called the latter to brief him on the Transaction. [note: 44] Among other things, it was made known to Rajaram that Nava Bharat was already considering Baker & McKenzie. [note: 45] Following the call from Bhushan, Rajaram attended the meeting on 3 October 2008 and was introduced to Ashwin. [note: 46]

19 At around the same time, Nava Bharat was also considering which Indonesian law firm to appoint for the Transaction. On 6 October 2008, Ashwin sent an email to Rajaram stating that it is "important" that Indonesian lawyers would be engaged to do the legal due diligence. [note: 47] Rajaram agreed and provided a list of five Indonesian law firms, including Ali Budiardjo, Nugroho, Reksodiputro ("ABNR"). [note: 48] While the parties agree that ABNR was appointed on or about 9 October 2008, [note: 49] they disagree on *who* appointed ABNR. Nava Bharat says it was Rajaram, while Rajaram points to Nava Bharat.

The Heads of Agreement

20 The negotiations between Nava Bharat and Dicky Tan were already in progress when Rajaram and ABNR were appointed. [note: 50] As mentioned earlier, Nava Bharat and Dicky Tan met up on 25 September 2008 to discuss the proposed structure set out in Chandra's letter dated 18 September 2008 (see [20] above). Following that, on 2 October 2008, Chandra sent an email to Ashwin and Bhushan attaching the clean and marked copies of a draft document entitled "Heads of Agreement". [note: 51] The draft Heads of Agreement was sent to Prasad, and he replied with his "corrections" on the same day. [note: 52]

21 A meeting was scheduled and held at ABNR's office in Jakarta on 13 October 2008. [note: 53] Rajaram met with Woody Pananto ("Woody") and Nafis Adwani ("Nafis") of ABNR, and Chandra joined them about an hour later, followed by Dicky Tan and Ashwin later in the day. [note: 54] The Heads of Agreement was signed by Nava Bharat, Dicky Tan and PTIC on the same day. [note: 55] As agreed under the Heads of Agreement, Nava Bharat paid US$100,000 into the stakeholding account of TPC. [note: 56]

22 The structure contemplated under the Heads of Agreement can be summarised as follows: [note: 57]

(a) PTBHM, the original holder of the KP Concessions for the Mine, will transfer the KP Concessions to PTIC.

(b) Nava Bharat, Dicky Tan and PTIC were required to procure the incorporation of a holding company ("the Holding Company"), which would wholly own a foreign-owned Indonesian company, also known as a Penanaman Modal Asing company ("the PMA Company").

(c) In the first phase of the acquisition, Nava Bharat was to acquire 15% of the equity and effective economic interest in the Holding Company by payment of US$3m (less deposit of US$100,000 held by TPC as stakeholders) to Dicky Tan. Nava Bharat had the right to acquire up to 90% of the equity and effective economic interest in the Holding Company.

(d) The PMA Company would enter into a mine operating service agreement with PTIC. This would entitle the PMA Company to operate the Mine and extract, transport and sell the coal to any customer.

(e) The PMA Company would enter into an off-take agreement with the Holding Company for the supply of coal extracted from the Mine. This would oblige the PMA Company to supply the coal extracted to the Holding Company.

(f) Nava Bharat would enter into a back-to-back off-take agreement with the Holding Company for the supply of coal. This would oblige the Holding Company to supply the coal extracted to Nava Bharat (which would be obtained by the Holding Company pursuant to the off-take agreement that it was to enter into with the PMA Company as set out above).

(g) Nava Bharat was entitled to withdraw its participation at any time within ten months of the initial completion date stipulated in the Heads of Agreement.

23 The 15% of the Holding Company was valued at US$3m in the following manner: [note: 58]

(a) The only subsisting licences within the KP Concessions were the KP Exploitasi License and the KP Transportation and Sale Licence (see [11] above).

(b) Nava Bharat, Dicky Tan and PTIC agreed that valuation of the KP Exploitasi License and the KP Transportation and Sale Licence was US$20m, based on Dicky Tan's representation that the Mine had a coal reserve of 10m metric tonnes (cll 4.1 and 4.2 of the Heads of Agreement).

(c) 15% of the valuation of US$20m amounted to US$3m.

Due diligence and change in Indonesian mining laws

24 On 14 October 2008, the day after the Heads of Agreement was signed, Ashwin received an email from Prasad with his comments on the Heads of Agreement. [note: 59] Ashwin forwarded the email to Rajaram and Lakshman for their advice. [note: 60] In Rajaram's reply on 15 October 2008, he emphasised that the Heads of Agreement was an "interim agreement", and was "not intended to encompass all the legal rights and obligations of the parties". [note: 61] He further listed a series of separate agreements would have to be prepared by SLP and ABNR, and informed Ashwin that SLP would be "obtaining the inputs of Indonesian Lawyers at all stages." [note: 62] Ashwin responded with a short email which simply stated "Ok ... sounds good". [note: 63] This was conveyed to Woody and Nafis of ABNR in Rajaram's email which was sent on the same day. [note: 64]

25 In the meantime, Rajaram worked on the draft agreements for the Transaction. On 20 October 2008, Rajaram sent an email to Ashwin and Chandra with the first draft of the agreements for their comments. [note: 65] Rajaram also sent a separate email with the draft agreements to Woody for his comments. [note: 66]

26 At about the same time, ABNR embarked on the due diligence checks. On 16 October 2008, Vincent Ariesta Lie ("Vincent") of ABNR sent a list of issues and required documents for the purpose of the due diligence exercise to Dicky Tan and Tanakorn Pitisatien ("Tanakorn"). [note: 67] Tanakorn is Dicky Tan's assistant who handled his day-to-day affairs in Indonesia, including matters related to the Mine. [note: 68] Chandra informed Vincent on the next day that the list was sent to the wrong emails, and stated that "[a]ll emails to the seller" should be sent to Tanakorn and Chandra. [note: 69] This led to Rajaram's two emails on 17 October 2008 stating that ABNR should correspond only with him and not Chandra. [note: 70] This was acknowledged by Chandra and ABNR. [note: 71]

27 On 26 October 2008, Woody sent an email attaching a copy of the draft due diligence report ("ABNR's First Draft Report") to Rajaram. [note: 72] It was stated in the ABNR's First Draft Report that Dicky Tan and Ridwan Halim were the shareholders of PTIC. [note: 73] Woody also highlighted several issues in his email, including the fact that a lend-use permit from the Ministry of Forestry ("Forestry Licence") would have to be obtained before mining operations could be carried out. [note: 74] Woody also explained the procedure to obtain the Forestry Licence in its email. [note: 75] Despite the earlier reminder from Rajaram (see [26] above), Chandra's secretary was copied in Woody's email dated 26 October 2008. Rajaram pointed this out, and Woody explained that the email was inadvertently copied to Chandra's secretary on the mistaken belief that she was one of Rajaram's colleagues. [note: 76]

28 Rajaram forwarded the ABNR's First Draft Report to Ashwin on 28 October 2008. [note: 77] Rajaram explained in his email that he plans to meet ABNR (and subsequently Dicky Tan and Chandra) to discuss the matters raised in the ABNR's First Draft Report the next day or the day after that, and then leave it to Ashwin to make a "commercial call". [note: 78] The proposed meeting did not occur as Chandra informed Rajaram that Dicky Tan would "have to make a commercial call" on whether he wishes to proceed with the deal. [note: 79]

29 On 31 October 2008, Prasad sent an email to Rajaram requesting for a legal opinion to confirm that the proposed structure for the Transaction was enforceable under Indonesian law in order to

satisfy the Indian banks financing the Transaction. [note: 80] The opinion was sent to Prasad on 7 November 2008, stating that the Transaction was valid and enforceable under Indonesian law. [note: 81]

30 On 2 December 2008, Rajaram received an email from Vincent attaching a revised due diligence report ("ABNR's Second Draft Report"). [note: 82]

31 Another meeting was held on 12 December 2008. Ashwin, Bhushan, Lakshman, Rajaram, Dicky Tan and Chandra met to discuss, *inter alia*, the transfer of the KP Concessions, which were originally held by PTBHM, to PTIC as required under the Heads of Agreement (see [22] above). [note: 83] Upon receiving a copy of the transfer on 17 December 2008, Rajaram forwarded it to Woody for verification with the relevant authorities in Indonesia. [note: 84] In the same email, Rajaram informed Woody that Nava Bharat was "in a position to complete the matter" and wanted a confirmation that "the title documents and all other required permits [a]re valid and that there are no other issues that needs to be resolved". [note: 85]

32 On or about 16 December 2008, a new mining law was passed in Indonesia. The next day, Prasad wrote to ABNR and Rajaram asking them to check on the impact of the new mining law on the proposed structure for the Transaction. [note: 86] Nafis replied on the same day pointing out that the new mining law was passed by the House of Representatives and had not been enacted yet (since the law will only be enacted within 30 days from the date on which the law was passed). [note: 87] This change in the mining law essentially introduced a new type of licence, namely, the mining business licence, also known as the Izin Usaha Pertambangan ("IUP Licence"), but it was silent on the status of the KP Concessions which were issued earlier. [note: 88]

33 A meeting was held on 19 December 2008. The meeting was attended by Ashwin, Rajaram, Chandra and others. [note: 89] At this meeting, Ashwin arranged for Mohana Sundaram Paranjothy ("Bob Sundaram") to address the meeting *via* tele-conference on the issue of the Forestry Licence. [note: 90] Bob Sundaram was, at the material time, the director of two subsidiaries of Nava Bharat (namely, PT Nava Bharat Sungai Cuka ("NBSC") and PT Nava Bharat Indonesia) and he was acting as Nava Bharat's "focal point on the ground in Indonesia". [note: 91] Bob Sundaram reported that the Mine had a KP Exploitasi Licence for 191.014 hectares but since the Mine was located in a convertible production forest, also known as Hutan Produksi Konversi ("HPK Forest"), it was necessary to have a Forestry Licence in order to operate the Mine. [note: 92] Dicky Tan and Jason Tan then joined in the meeting *via* tele-conference. [note: 93] At the meeting, Dicky Tan took the position that the Forestry Licence was not required. [note: 94] According to Rajaram, Dicky Tan threatened to "walk away from the deal" due to Ashwin's insistence for him to obtain the Forestry Licence, but Ashwin eventually agreed, after some discussion, to proceed with initial completion on the basis that Dicky Tan gave his undertaking to obtain the Forestry Licence if it was required. [note: 95] Nava Bharat denies this. This is a major factual dispute between the parties, and I will discuss this point later.

34 After the meeting on 19 December 2008, Rajaram sent an email to Nafis for ABNR's approval on the amended draft agreements (which were attached to the email), and for an update on the due diligence exercise. [note: 96] Shortly after the email was sent, Nafis and Rajaram arranged to discuss the matter over the telephone. [note: 97]

35 On the same day, Bob Sundaram sent an email to Ashwin discussing the issue of Forestry Licence. [note: 98] This was forwarded to Rajaram. [note: 99] Ashwin also forwarded to Rajaram a "Newsalert" prepared by PricewaterhouseCoopers Indonesia on the new mining law. [note: 100] Bob Sundaram sent another email to Ashwin on the next day, 20 December 2008, to reiterate that the Mine is located within the HPK Forest (such that the Forestry Licence is necessary), and in this email, he attached a due diligence report prepared by Thamotharhan Karupiah ("Karupiah") to support his position. [note: 101] Karupiah was, at the material time, the operations manager of Nava Bharat in Indonesia. [note: 102] Bob Sundaram's email dated 20 December 2008 with the report by Karupiah attached was also forwarded to Rajaram. [note: 103] A few days later, on 23 December 2008, Ashwin and Prasad communicated over email on the issue of Forestry Licence. [note: 104]

36 On 22 December 2008, ABNR sent an email to Rajaram, copied to Ashwin and Prasad, attaching the draft due diligence report ("ABNR's Third Draft Report"). [note: 105] In the same email, ABNR advised on, *inter alia*, the possible implications of the new mining law. [note: 106] Prasad, having read the ABNR's Third Draft Report, raised several points and said that it is "advisable to prepare a roadmap and indemnities before [Nava Bharat] conclude the Agreements". [note: 107]

37 Also on 22 December 2008, Chandra informed Rajaram that Jason Tan wanted the agreements to be executed before Christmas, *ie*, 25 December 2008. [note: 108] Rajaram forwarded the email to Ashwin on 24 December 2008, [note: 109] and stated that Nava Bharat's interest might be affected if the issues on the validity of the structure raised by ABNR in view of the new mining law were not resolved. [note: 110] At the same time, Rajaram wrote to Woody for his opinion on whether a new structure was required to protect Nava Bharat's interest in light of the new mining law. [note: 111] Woody replied on 29 December 2008 to say that it was difficult to give a clear opinion due to the uncertainties in the new mining law and suggested that a meeting might be useful to discuss the issues and explore any possible alternative structures. [note: 112] Rajaram wrote back on 30 December 2008 and proposed to have the meeting on 5 January 2009. [note: 113] On the same day, Rajaram and Ashwin met to discuss on the possibility of using an alternative structure for the Transaction. [note: 114]

Changes to the structure for the Transaction

38 Notwithstanding that there was mention of calling off the deal in early January 2009, Nava Bharat and Dicky Tan decided to go back to negotiations. On 12 January 2009, the parties met. [note: 115] At the meeting, Ashwin requested to "keep the communication lines open" so that they can resolve any problems "by discussion rather than by coming to unilateral decisions". [note: 116] In particular, it was noted in the minutes of the meeting that Rajaram and Chandra would work on the agreements to "meet the new revised circumstances" and the new completion date would be determined upon receiving ABNR's approval. [note: 117]

39 Dicky Tan also informed the meeting that the jetty facilities were owned by PTBHM and he was in the process of procuring the transfer of the ownership over to another one of his companies, namely, PT Adiperkasa Ekabakti Industry ("PTAEI"). [note: 118] Later that day, Prasad sent an email to Ashwin stating that Rajaram should ask Dicky Tan to include the jetty facilities as an integral element to the Mine and give a revised legal opinion in light of the new mining law. [note: 119]

40 On 15 January 2009, Chandra wrote to Lakshman and copied to Bhushan, Ashwin and Rajaram, to inform them that "the deal is on", and that Dicky Tan was "bending backwards to make the deal happen". [note: 120] Chandra also emphasised in the same email that the deal must be closed by the following week with "a definite date given to all parties". [note: 121] Rajaram responded to Chandra's email stating that it was Nava Bharat that was bending backwards to accommodate Dicky Tan, and that he would be sending out the proposed new structure later that day. [note: 122] The proposed new structure in Rajaram's email dated 15 January 2009 can be summarised as follows: [note: 123]

(a) There would be a loan agreement between Nava Bharat and PTIC/PTAEI for the sum of US$4.5m. All the shares in PTIC and PTAEI would be pledged to Nava Bharat as security for the loan.

(b) The ownership of the jetty facilities will be transferred from PTBHM to PTAEI within four weeks of the initial completion date.

(c) PTAEI would be converted to a PMA company within four weeks of the acquisition of the jetty facilities.

(d) The failure to acquire the jetty facilities or convert PTAEI into a PMA company within the stipulated time would constitute an event of default.

(e) If the new mining law permits foreign ownership of the Mine, then Nava Bharat shall have the option of converting its entire loan into an equity interest in PTIC.

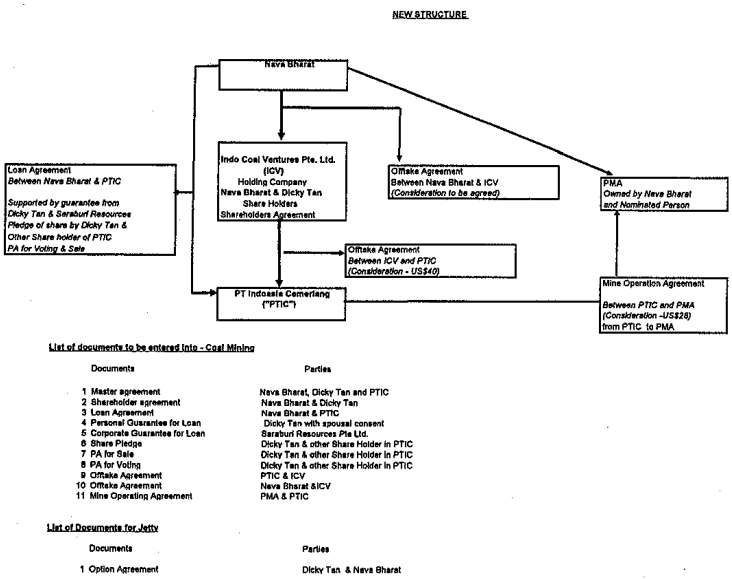
(f) In the event of default, Nava Bharat would have the option of recovering its loan by way of an off-take agreement at an agreed price to be determined.

41 The next day, Rajaram wrote to Woody to ask for advice on the legality of the proposed new structure and the due diligence in respect of the jetty facilities which were due to be submitted. [note: 124] Rajaram also asked for the final due diligence report and ABNR's advice on the final documentation to be in place for the proposed new structure. [note: 125] On the same day, Rajaram wrote to Chandra objecting to Dicky Tan's demand for the Transaction to be completed before the Chinese New Year, *ie*, 26 January 2009. [note: 126]

42 On 18 January 2009, Woody wrote to Rajaram and Chandra stating, in essence, that while the proposed new structure in Rajaram's email dated 15 January 2009 was generally feasible, it might be difficult for PTBHM to transfer the jetty facilities to PTAEI because the primary business of PTAEI was in the field of "industry" and not coal mining. [note: 127] Rajaram noticed that Woody's email was sent to Chandra despite his previous instructions not to do so (see [26] above), and he sent an email to remind ABNR that all correspondence should be addressed only to him (and not Chandra). [note: 128] Woody's email on 18 January 2009 was forwarded by Ashwin to Bob Sundaram. [note: 129] In response, Bob Sundaram said that they are also preparing a "comprehensive due diligence report" and asked Ashwin to review the reports separately so that the report by ABNR can be "scrutinized". [note: 130] On 20 January 2009, Bob Sundaram sent the due diligence report prepared by Karupiah to Ashwin and copied to Rajaram. [note: 131] As a result of the uncertainty in relation to the transfer of the jetty facilities to PTAEI, Nava Bharat and Dicky Tan decided to proceed with a loan amount of US$3m as opposed to the original sum of US$4.5m (of which US$1.5m was meant to be consideration for the transfer of the jetty facilities). [note: 132] Accordingly, the pledge for the loan would only cover the

shares of PTIC and not PTAEI. [note: 133]

43 Sometime in January 2009, Rajaram, Chandra and ABNR worked on the draft agreements for the Transaction. On 19 January 2009, Chandra sent an email to Rajaram with a series of agreements attached to it. [note: 134] On 20 January 2009, Woody sent an email to Rajaram, attaching templates for the pledge of shares agreements, the power of attorney to sell the shares in PTIC and the power of attorney to vote in PTIC ("the Pledge Documents"). [note: 135] Rajaram then sent a copy of the draft master agreement ("Master Agreement") and draft Loan Agreement for ABNR's input. [note: 136] To ensure that everyone was "on the same page", Rajaram sent a schematic diagram of the proposed new structure for the Transaction to Woody for his input on the legality of the structure in the context of Indonesian law, [note: 137] and to Prasad and Ashwin for their comments in the context of the financing scheme. [note: 138] A copy was sent to Chandra as well. [note: 139] The schematic diagram is reproduced below: [note: 140]



44 Woody, in his reply on the same day, expressed the view that, subject to certain assumptions and qualifications mainly in relation to the new mining law, the "transaction structure would work". [note: 141] He also pointed out that the schematic diagram by Rajaram showed that the debtor for the Loan Agreement should have been PTIC, instead of Dicky Tan as stated in the draft Loan Agreement which was sent. [note: 142]

45 On 21 January 2009, Rajaram met with Chandra to finalise the draft agreements for the Transaction. [note: 143] After the meeting, Rajaram sent the draft agreements to Ashwin and Prasad for their review and input. [note: 144] Both Ashwin and Prasad gave their comments on the draft agreements on the same day. [note: 145] At the same time, Rajaram sent the draft agreements to ABNR for their review and liaised with Chandra on the outstanding issues. [note: 146] In Rajaram's email to Chandra, he stated that: [note: 147]

> Gopalan, leela and shiny are scrubbing the agreements and would let you have [the] finalised versions later tonight.
>
> I will also be sending the documents to my clients and ABNR. Assuming that there are no further

amendments the signing could probably be done tom.

The other option will be for the clients to execute the agreement and hope that ABNR is prepared to sign off a decent opinion.

Whilst my clients and I have bent backwards to accommodate your clients' time frame, I cannot advise release until ABNR issues their opinion. I will be talking to them again later and tom morning.

46 On the same day, at 11.20pm, Rajaram sent the draft agreements for the Transaction to Chandra, Ashwin and ABNR. [note: 148] These include the draft agreements that were supposed to be signed the next day, namely, the Master Agreement, the Loan Agreement and the Pledge Documents. [note: 149] In the email, Rajaram had also asked ABNR to check that the "Indonesian Documents" were in accordance with Indonesian law. [note: 150]

Indonesian leg of the initial completion

47 On the morning of 22 January 2009, at 7.22am, Woody sent an email to Rajaram stating that ABNR was still "not fully clear" about the structure for the Transaction. [note: 151] In particular, ABNR's email highlighted the issue with the identity of the debtor for the Loan Agreement (which it had raised previously, see [44] above): [note: 152]

1 In the chart provided earlier and based [on] our discussion last week, we understand that the debtor of the loan from NB should be PT IC, not Dicky.

2 We note from the draft loan provided that the debtor is Dicky. We believe it is more appropriate if the debtor is PT IC, not Dicky, and Dicky will create pledge over its shares in PT IC or personal guarantee to secure the loan to PT IC. The loan of NB to PT IC can be converted into shares. This conversion right of loan into shares in PT IC may not work if the debtor is Dicky. Would you please urgently confirm the agreed structure so that we can provide our comments soon this morning?

...

48 At 8.30am, Rajaram responded to the queries raised by Woody in his earlier emails (see [44] and [47] above): [note: 153]

Apologies for not alerting you on change.

Let me explain. The original transaction was to purchase Dicky's share through a designated party. Due to the changes in the Mining Laws and advised by you, this would not be possible. We therefore structured a pledged loan in place. DT is pledging his shares to obtain the loan and he is personally liable for the loan. He is not guaranteeing this loan. He is only guaranteeing the off take performance of PTIC.

DT needs the money for the expenses incurred in getting the transfer and to pay for jetty and the road works, the jetty has to be completed within 5 months on pain of LD agreed at USD 33,000 per day f [*sic*] delay. If monies are paid to PTIC, he cannot use it for the purposes stated. This was very much discussed and deliberated wit [*sic*] DT's lawyers before we decided on the change.

In terms of conversion, this is provided for in the Master Agreement.

...

Trust that your queries have been answered and look forward to an urgent response. As explained in this morning's earlier email, the deal will be jeopardized if we do not complete by tomorrow. Whist [*sic*] the documents are been [*sic*] notarized today, I will only advise clients to realize after receipt of your opinion.

The parties are contemplating executing the agreement today at 11 in Jakarta and have made arrangements with a Notary public. Could you please let me have the amended documents urgently before that? Again, sorry for the rush but both parties have decided on commercial basis to proceed.

49 On 22 January 2009, at about 12.00pm (Jakarta time), the following agreements ("the Security Documents"), which were governed by Indonesian law, were executed by the parties, with Bob Sundaram signing on behalf of Nava Bharat: [note: 154]

(a) The loan agreement between Nava Bharat and Dicky Tan, which recorded Nava Bharat's loan of US$3m to Dicky Tan ("the Loan Agreement").

(b) The pledge of shares agreement between Nava Bharat, Ridwan Halim and PTIC, in which Ridwan Halim agreed to pledge all of his shares in PTIC to Nava Bharat as security for the due performance of Dicky Tan's obligations and liabilities under, *inter alia*, the Loan Agreement.

(c) The pledge of shares agreement between Nava Bharat, Dicky Tan and PTIC, in which Dicky Tan agreed to pledge all of his shares in PTIC to Nava Bharat as security for the due performance of Dicky Tan's obligations and liabilities under, *inter alia*, the Loan Agreement.

(d) The irrevocable power of attorney to vote shares between Nava Bharat and Ridwan Halim, which conferred upon Nava Bharat the right to vote in PTIC (with respect to Ridwan Halim's shares).

(e) The irrevocable power of attorney to vote shares between Nava Bharat and Dicky Tan, which conferred upon Nava Bharat the right to vote in PTIC (with respect to Dicky Tan's shares).

(f) The irrevocable power of attorney to sell shares between Nava Bharat and Ridwan Halim, which conferred upon Nava Bharat the right to sell Ridwan Halim's shares in PTIC in the event that Dicky Tan defaulted on his obligations under, *inter alia*, the Loan Agreement.

(g) The irrevocable power of attorney to sell shares between Nava Bharat and Dicky Tan, which conferred upon Nava Bharat the right to sell Dicky Tan's shares in PTIC in the event that Dicky Tan defaulted on his obligations under, *inter alia*, the Loan Agreement.

50 The next day, Woody sent Rajaram a copy of ABNR's draft opinion on the agreements, and stated that he will send the draft opinion on the structure later. [note: 155] Prasad wrote to ABNR on the same day stating that the opinion should cover the issue of whether Nava Bharat or its nominee has the authority to mine, sell and export coal from Indonesia. [note: 156] This was to satisfy Nava Bharat's lender for the Transaction. [note: 157] Rajaram assured Prasad that he would look into it. [note: 158] This was followed by an exchange of emails between Rajaram and ABNR on the requirement

of Nava Bharat's lender. [note: 159]

Singapore leg of the initial completion

51 On 28 January 2009, ABNR issued its opinion on the structure of the Transaction and its opinion on the Loan Agreement together with the pledge of shares agreements and powers of attorney ("ABNR's Advice on Structure" and "ABNR's Advice on Loan Agreement" respectively). [note: 160]

52 It was originally agreed that the documents for the Singapore leg of the initial completion would be signed at 4.00pm, [note: 161] but Rajaram asked for an extension of time because ABNR's opinions were not ready yet. [note: 162] After receiving the ABNR's Advice on Structure and the ABNR's Advice on Loan Agreement (see [51] above), Nava Bharat and Dicky Tan executed the following documents at SLP's office: [note: 163]

(a) The master agreement, which sets out the framework for Nava Bharat's participation in the Holding Company (*ie*, Indo Coal Ventures Pte Ltd [note: 164]) and the PMA Company (*ie*, NBSC [note: 165]) ("the Master Agreement").

(b) The mine operating service agreement, which provides for the appointment of the PMA Company as PTIC's mining operator ("the Mine Operating Service Agreement").

(c) The personal guarantee of Dicky Tan, under which Dicky Tan guaranteed to pay and satisfy Nava Bharat on demand as principal debtor all amounts due and owing under the Loan Agreement.

(d) The corporate guarantee of Saraburi Resources Pte Ltd ("Saraburi") (*ie*, one of Dicky Tan's companies), under which Saraburi guaranteed to pay and satisfy Nava Bharat on demand as principal debtor all amounts due and owing under the Loan Agreement.

(e) The option to purchase shares agreement dated 28 January 2009, which granted Nava Bharat an option to purchase the shares in PTAEI.

(f) The Holding Company off-take agreement, under which PTIC agreed to sell and the Holding Company agreed to buy all of the coal extracted from the Mine for a period of ten years ("the Holding Company Off-take Agreement").

(g) The Nava Bharat off-take agreement, under which Nava Bharat agreed to buy all coal supplied to the Holding Company under the Holding Company Off-take Agreement for a period of ten years.

53 Thereafter, pursuant to cl 14.1 of the Master Agreement, Ashwin made arrangements for US$2.9m to be released to Dicky Tan. [note: 166] Dicky Tan authorised the payment to be made by way of two cheques: a cheque of US$1.7m in the name of Jason Tan and a cheque of US$1.2m in the name of Saraburi. [note: 167] The remaining US$100,000, which was held by TPC as stakeholders (see [21] above), was also released to Dicky Tan. [note: 168]

After initial completion

54 On 29 January 2009, a day after the initial completion, Ashwin sent an email to various parties,

including Chandra and Rajaram, in which he stated that even though the process took "longer than expected", it was "much needed for us to feel safe and secure, and run our operations without fear". [note: 169] On the same day, Rajaram wrote to Ashwin and Prasad: [note: 170]

> As you know, the transaction was completed yesterday on an Initial Completion Date basis. This was after much modification to the documentations as a result of the New Mining Laws, the uncertainties caused by the laws and the way the provisions are going to be implemented and the various reservations we received from our Indonesian Lawyers – ABNR.
>
> There was also pressure to meet the deadline. Some of the documents were not ready but the sellers (Dicky Tan) was not prepared to consider the inadequacy of his own documentation and still insisted on completion on dates dictated by him. To meet the deadline, we had to complete even though the documentations were not complete. We got a Solicitor's undertaking from TPC to let us have the documents within 7 days.
>
> I will let you have the complete set of documents soon. ...
>
> I will also let you have my legal opinion, incorporating the opinion of ABNR but targeted to meet the needs of [Prasad], who is negotiating the financial package from the Bankers.

55 On the same day, Rajaram circulated a closing agenda in respect of the Transaction to the parties, including Ashwin. [note: 171] At around the same time, Rajaram also worked towards finalising a legal opinion which was meant for the lender that was financing the Transaction. [note: 172] The arrangement was that NBVL would borrow from the lender and then channel the funds for the Transaction to Nava Bharat. [note: 173] Prasad requested that the legal opinion cover, *inter alia*, the structure of the Transaction, the enforceability of the structure under Indonesian law and whether Nava Bharat could hypothecate its rights to the lender as security. [note: 174] A draft opinion was sent to Ashwin and Prasad in the evening on 29 January 2009. [note: 175] Rajaram continued to work on the opinion that he had sent to Ashwin and Prasad on 29 January 2009. [note: 176] On 6 February 2009, Rajaram issued a legal opinion on the validity of the structure of the Transaction ("SLP's Advice on Structure"). [note: 177]

Delay in obtaining the Forestry Licence

56 On 2 February 2009, Rajaram sent an email to Chandra requesting for an update on the issue regarding the Forestry Licence. [note: 178] Chandra replied a day later stating that the Forestry Licence was a condition subsequent that would be obtained if it was required. [note: 179]

57 On 3 Feburary 2009, Ashwin received news from Lakshman, who visited the Mine with Bob Sundaram, that the equipment of a contractor of an adjoining mine was confiscated because they did not have the Forestry Licence. [note: 180] Lakshman also stated that Tanakorn had maintained that the Forestry Licence was not required. [note: 181] Having received this email from Lakshman as well, Rajaram wrote to Chandra asking him to "impress upon Dicky that he has represented that all approvals for mining are in place". [note: 182] Chandra acknowledged. [note: 183]

58 A few days later, on 6 February 2009, Ashwin met with Dicky Tan. [note: 184] Following the meeting, Ashwin sent an email to Chandra and Rajaram to inform them that he had instructed Nava Bharat's Indonesian team to "do the upmost to start extracting coal ASAP" and that he hoped to

start by "mid to end of March". [note: 185]

59 In anticipation of commencing mining operations, Nava Bharat's Indonesian team took steps to engage mining contractors. [note: 186] On 11 February 2009, Bob Sundaram sent a draft coal mining agreement to Ashwin ("the draft Coal Mining Agreement"). [note: 187] For this, Bob Sundaram sought the advice of Rajaram. [note: 188] Bob Sundaram also approached Susanto, Rajasa & Associates, an Indonesian law firm, to advise on the enforceability of the draft Coal Mining Agreement. [note: 189]

60 To ensure that Nava Bharat would be extracting coal from the Mine by early April 2009 (instead of the original plan for "mid to end of March" (see [58] above)), Ashwin wrote to Nava Bharat's Indonesian team (headed by Bob Sundaram) on 2 March 2009 to request for a weekly update and tele-conference. [note: 190] Ashwin received the first weekly update on 10 March 2009, which highlighted, *inter alia*, that the Forestry Licence was required before the mining operations can commence. [note: 191] Ashwin forwarded the first weekly report to Rajaram and said that they need to clarify the issue with Dicky Tan as soon as possible. [note: 192] Ashwin proposed a meeting before the end of the week to address the issue. [note: 193] Rajaram wrote to Chandra on the next day asking for a meeting to be convened. [note: 194] Later in the day, Rajaram sent another email to Chandra stating, *inter alia*, that "an urgent meeting [was] imperative". [note: 195] Ashwin wanted to meet on the same week, while Dicky Tan was only able to meet on Friday (*ie*, 13 March 2009) in Jakarta or the following Monday (*ie*, 16 March 2009) in Singapore. [note: 196] On 12 March 2009, Rajaram wrote to Chandra (not copied to Ashwin) to reiterate the issue of the Forestry Licence and to ask Chandra to urge Dicky Tan to remedy the situation as soon as possible. [note: 197] Chandra replied that a meeting was being arranged. [note: 198] Rajaram then explained that he was aware that a meeting was being arranged but wrote the email so that Dicky Tan would know about the issue and attend to it, if possible, before the meeting with Ashwin. [note: 199] Even though Dicky Tan could not make it, a meeting (attended by Ashwin, Chandra, Rajaram, Bhushan and Lakshman) was convened on 12 March 2009. [note: 200] During the meeting, it was agreed that a Forestry Licence had to be obtained. [note: 201] It was disclosed that an application for the Forestry Licence was made in the name of PTBHM and the application was still being processed. [note: 202] It was also recorded in the minutes of the meeting that Dicky Tan had made arrangements for the Forestry Licence to be transferred to PTIC once it has been issued. [note: 203]

61 The next meeting was fixed on 16 March 2009. This was attended by Ashwin, Bhushan, Dicky Tan, Chandra, Rajaram and Tanakorn. [note: 204] At the meeting, Dicky Tan explained that the delay in obtaining the Forestry Licence was because he was "out of funds", but assured Ashwin that the Forestry Licence would be obtained soon. [note: 205] To resolve the issue, Nava Bharat expressed that it was willing to provide an advance of the monies required to procure the Forestry Licence, subject to the approval of its board of directors. [note: 206] The handwritten minutes of the meeting was typed out and sent to Ashwin and Bhushan by way of email dated 20 March 2009. [note: 207]

62 To follow up, on 23 March 2009, Chandra sent an email to Rajaram elaborating on the timing and fees involved for obtaining the Forestry Licence: [note: 208]

Option A

Forestry Licence Fee: US$500,000

Advance: US$250,000

Timing: 1 to 2 months. Possibility of 1 month is great if the 50 per cent is disbursed expeditiously

Option B

Dicky feels that the officials may be taking advantage of the situation as Tanakorn is pressing them too hard. The impression given to the officials is that Dicky is desperate and therefore the fee has been somewhat inflated.

Dicky's suggestion is to let him start work on the mine immediately for a period of 4 months. He will finance the cost of the forestry licence fee himself from the income from the mines. He has indicated that the licence would be obtained by the end of the 4 month period.

During the 4 month period, profits will be shared 85% to 15%. At the end of the 4 month period, NB can take over the mine or continue with the existing contractor and NB will enjoy 100% of the profits with Dicky's entitlement restricted to 85% of US$12, that is, the SPK Arrangements will fall in place at the end of the 4 month period.

Please let me know how we may proceed further on this.

63 Rajaram and Chandra arranged for a meeting at SLP's office on the next day to discuss the issue of the Forestry Licence. [note: 209] During the meeting on 24 March 2009, Dicky Tan explained that with sufficient funds he should be able to obtain the Forestry Licence within two to three months. [note: 210] It was eventually agreed that Dicky Tan would start mining immediately (without the Forestry Licence) for a period of four months. [note: 211] In addition, Nava Bharat and Dicky Tan would share profits during the four-month period and Dicky Tan would obtain the Forestry Licence (through the profits he would receive throughout the period) by the end of the four-month period. [note: 212] Dicky Tan would not be entitled to the profits during the four-month period if he failed to obtain the Forestry Licence within four months. [note: 213]

64 After the meeting, Chandra sent an email to Rajaram setting out the points that were discussed and, in particular, the plan to have an agreement to vary the Master Agreement ("the Variation Agreement") in order to reflect the arrangement agreed upon during the meeting. [note: 214]

65 The parties met again on 25 March 2009. Rajaram was not able to attend but arranged for Narayanan Sreenivasan ("Sreenivasan"), the managing director of SLP, to assist on the matter in his absence. [note: 215] At the meeting, it was reiterated that the parties have agreed to enter into the Variation Agreement. [note: 216] It was further agreed that the mining operations during the four-month period would be conducted in accordance with the plan drafted by Nava Bharat's staff, Vishvanathan ("the Mining Plan"). [note: 217] Chandra sent a first draft of the Variation Agreement in the evening and Sreenivasan responded with his comments which were expressly subject to the approval of Rajaram and Nava Bharat. [note: 218]

66 The Variation Agreement was executed by the parties on 26 March 2009. [note: 219] The key terms of the Variation Agreement are as follows: [note: 220]

3. PERMIT TO USE FORESTRY AREA

3.1 [PTIC] shall on or before [four calendar months after the date of this Agreement, *ie*, 26 July 2009] procure the issue of a valid and subsisting [Forestry Licence] in the name of [PTIC].

...

3.3 If [PTIC] fails to obtain the [Forestry Licence] on or before [26 July 2009], [PTIC]'s profit entitlement as set out in clause 5 shall cease with effect from [four calendar months after the date of this Agreement, *ie*, 26 July 2009] and Nava Bharat shall be entitled to 100% of the Coal Net Profits from the sale of Coal produced from the Agreed Area.

...

5. SALE OF COAL AND PROFIT SHARING

5.7 The Coal Net Profits in respect of each metric ton of Coal sold shall be shared in the manner set out below:

[PTIC] = 50%

Nava Bharat = 50%

...

67 On 26 March 2009, Bob Sundaram informed Ashwin that he had found a contact who claimed that he could assist in obtaining the Forestry Licence within two to three weeks with a total cost of US$100,000. [note: 221] On Ashwin's instructions *via* an email dated 27 March 2009, Rajaram forwarded this message to Dicky Tan (through Chandra). [note: 222] Chandra replied on 2 April 2009 informing that Dicky Tan had decided that he would "use [his] own contacts" and did not require the help of Bob Sundaram. [note: 223] Following that, Rajaram sent an email to Chandra stating that it was Dicky Tan's "sole obligation to procure the [Forestry Licence]. [note: 224] Shortly before that, Ashwin had sent an email to Bob Sundaram asking him not to get involved in the procurement of the Forestry Licence. [note: 225]

68 On 21 April 2009, Dicky Tan on behalf of PTIC took up a loan of US$200,000 from Belfield International (Hong Kong) Limited ("Belfield") for "working capital requirements" ("the Belfield Loan"). [note: 226] According to Chandra, Dicky Tan had told him that the sum was used to procure the Forestry Licence, [note: 227] and that the loan was eventually repaid in full. [note: 228]

69 On 12 May 2009, Rajaram wrote to Chandra pointing out that the Variation Agreement was concluded to enable Dicky Tan to obtain the Forestry Licence, "an issue that was not deliberated and attended to at the Initial Completion Date", and requesting that Dicky Tan provide a "detailed progress report". [note: 229] At that time, Dicky Tan had commenced mining operations at the Mine, and Rajaram emphasised in his email that Ashwin needed the progress report to facilitate his planning and mobilisation of resources for the mining operations. [note: 230] Chandra's response came on 20 May 2009. [note: 231] In his email, Chandra assured Rajaram that the Forestry Licence was "well on track" and that Dicky Tan was "very confident that he [would] be able to swing it by the first week

of July or thereabouts". [note: 232] Chandra's response was forwarded to Ashwin. [note: 233]

70 As mentioned earlier (see [65] above), Dicky Tan was supposed to extract coal from the Mine in accordance with the Mining Plan. However, Bob Sundaram visited the site on 19 and 20 May 2009 and discovered that Dicky Tan had not acted in accordance with the Mining Plan. [note: 234] Nava Bharat's Indonesian team then prepared a site visit report and an incident report which was sent to Rajaram on 26 May 2009. [note: 235] Ashwin, through Rajaram, requested for a meeting with Dicky Tan and Chandra to resolve the matter. [note: 236] Accordingly, Rajaram sent an email to Chandra to inform him of Ashwin's concerns and asked for a meeting to be arranged. [note: 237] This led to the meeting on 4 June 2009. [note: 238]

71 The meeting of 4 June 2009 was attended by Ashwin, Bob Sundaram and Dicky Tan, among others. [note: 239] Dicky Tan explained that the delay was because "the guy they used earlier could not deliver", but added that he had found a "direct contact" who could get the Forestry Licence within a month even though it will "cost more". [note: 240] Ashwin proposed that Nava Bharat could reimburse the cost of procuring the Forestry Licence and have the reimbursed amount credited towards equity contribution to the Mine. [note: 241] Dicky Tan agreed and asked for a contract to be drafted to reflect this arrangement. [note: 242] However, Dicky Tan later said that he would obtain the "in [principle] approval letter from the Forest Ministry rather than the final licence", and indicated that mining work could commence legally after the approval-in-principle ("AIP"). [note: 243] Nava Bharat's Indonesian team disagreed and said that they would have to verify the information provided by Dicky Tan. [note: 244]

72 One day after the meeting, Ashwin wrote to inform Chandra, Rajaram, Lakshman and Jason Tan of Nava Bharat's findings on the AIP. [note: 245] A check was done with the Forestry Minister's office and it was confirmed that the AIP is a letter containing a list of obligations which must be fulfilled before the Forestry Licence could be issued, and that it would not be possible to commence mining legally with just the AIP. [note: 246] As such, Ashwin insisted that they stick to the arrangement under the Variation Agreement, *ie*, for Dicky Tan to obtain the Forestry Licence by the end of the four-month period. [note: 247]

73 On 12 June 2009, Ashwin, having been briefed by Bob Sundaram, wrote to Rajaram to ask for a meeting with Dicky Tan as the situation was "going from bad to worse". [note: 248] Rajaram then wrote to Chandra expressing Ashwin's concerns and requesting for an urgent meeting to resolve the matter. [note: 249] As a result, Dicky Tan, Chandra, Ashwin and Rajaram met on 23 June 2009. [note: 250] Rajaram asked Dicky Tan to provide a firm deadline by which he would obtain the Forestry Licence, and Nava Bharat would not hesitate to exercise its right to exit from the Transaction if the deadline was not met. [note: 251] Dicky Tan assured that he would obtain the AIP by 30 July 2009. [note: 252] In response, Ashwin stated that Nava Bharat would exercise the exit option if the Forestry Licence was not obtained by 30 July 2009. [note: 253]

74 The next day, Chandra wrote to Rajaram suggesting several modifications to the proposals made during the 23 June 2009 meeting. [note: 254] According to the email, Dicky Tan would obtain the AIP by 30 July 2009, and following, that Nava Bharat will pay to PTIC a sum of US$1m which would be credited as an equity contribution. [note: 255] After that, Dicky Tan would continue to take steps to

obtain the Forestry Licence, and Nava Bharat shall have the right to exercise its exit option if the Forestry Licence was not obtained within six months from the issue date of the AIP. [note: 256]

75 On 29 June 2009, Dicky Tan met with Ashwin and others to discuss the issue of the Forestry Licence. [note: 257] Ashwin refused to take control of the Mine until the Forestry Licence has been obtained. [note: 258] Dicky Tan then assured that the Forestry Licence would be obtained by the end of July 2009. [note: 259] It was again stated that if the Forestry Licence was not obtained by the end of July 2009 as Dicky Tan had promised, then Nava Bharat would seriously consider exercising its exit option. [note: 260] The next day, Chandra sent an email to Rajaram setting out the issues that were discussed during the meeting and the proposals arising from those discussions. [note: 261] Rajaram responded with the comments from Ashwin and Bhushan. [note: 262] Following this, Ashwin met Rajaram, Chandra, Bhushan and Lakshman on 1 July 2009 to discuss the points listed in Chandra's email. [note: 263]

76 On 15 July 2009, Chandra provided Rajaram with an update on the status of the various licences and approvals that had to be obtained or renewed, such as the KP Transportation and Sale Licence (see [11] above) and the AIP. [note: 264] In his response, Rajaram asked for acknowledgement from the government bodies that they have received the letters which were attached to Chandra's email. [note: 265] As requested, Chandra sent an email to Rajaram on 28 July 2009 attaching the various letters from Dicky Tan to the government bodies and their responses. [note: 266]

77 Rajaram further requested that Chandra send him a draft supplemental agreement to vary the Master Agreement as soon as possible because Ashwin wanted to sign it before 17 July 2009. [note: 267] On 21 July 2009, Chandra sent a copy of the draft supplemental agreement to Rajaram. [note: 268] This was forwarded to Ashwin who replied with his comments on 24 July 2009. [note: 269]

78 Four months after the Variation Agreement was signed (see [66] above), there was no sign of the Forestry Licence or the AIP.

First Notice of Default

79 On 31 July 2009, Rajaram wrote to Chandra on the various defaults by Dicky Tan ("the First Notice of Default"). [note: 270]

80 On 3 August 2009, Chandra wrote to Rajaram to ask for an extension of one month to obtain the AIP. [note: 271] Rajaram responded, stating that Nava Bharat was agreeable to the extension of time on certain conditions: [note: 272]

> ...
>
> In spite of al [*sic*] these defaults and in an effort to try and save the transaction without the need to litigate, our clients are prepared to give the requested one month extension on the following terms and conditions:
>
> 1 This is the final extension and all required licenses will be obtained before 31st August 2009;
>
> 2 The obligation to produce coal set out in the 1st Variation Agreement continues;

3 All of our client's rights in the matter, including rights under the Master Agreement, the 1st Variation Agreement, the oral and written representations in the various meetings and exchange of emails are expressly reserved.

We trust that your client's [*sic*] will fulfill [*sic*] their commitment to obtain the licenses by the end of this month, 31st August 2009.

81 In an email from Bhushan to Ashwin dated 13 August 2009, which was forwarded to Rajaram, it was stated that Dicky Tan had suggested, with a view to resolving the issues, certain changes to the arrangement in return for a reduction in the overall valuation of the Mine by US$1m. [note: 273]

82 On 19 August 2009, Chandra forwarded a "copy of the AIP" to Rajaram, and explained that the original will be issued "within 3 weeks from release of moneys". [note: 274] The representatives of Nava Bharat and PTIC, including Bob Sundaram and Tanakorn, met on the next day to discuss, *inter alia*, the AIP. [note: 275] Tanakorn explained that the AIP was "in place and waiting for the Minister to sign". [note: 276] He also added that the Minister will be back on 4 September 2009 and PTIC had fulfilled all of the requirements for the issuance of the AIP. [note: 277]

Addendum Agreement and Supplemental Master Agreement

83 Between 25 and 27 August 2009, Rajaram and Chandra worked on the drafts for the agreements to reflect the arrangement discussed between Ashwin and Dicky Tan (see [80]–[81] above). [note: 278] On 25 August 2009, Ashwin sent an email to Rajaram setting out his comments on the draft agreements. [note: 279] On 28 August 2009, Nava Bharat, Dicky Tan and PTIC executed the agreements, namely the supplemental master agreement ("Supplemental Master Agreement") and the addendum agreement ("Addendum Agreement"). [note: 280]

84 The key terms of the Supplemental Master Agreement, which varied the Master Agreement, are as follows: [note: 281]

2 REDUCTION OF VALUATION OF KP CONCESSIONS

2.1 With effect from the date hereof, [PTIC] and [Dicky Tan] hereby agree that the valuation of the KP Concessions shall be reduced from US$20,000,000 to US$19,000,000.

...

4 Waiver OF CLAIMS

4.1 In consideration of [PTIC] and [Dicky Tan] agreeing to the reduction of the valuation of KP Concession from US$20,000,000 to US$19,000,000, Nava Bharat agrees not to make any claim or institute any proceedings (legal or otherwise) against [PTIC] and [Dicky Tan] for any breaches under the Master Agreement and the Variation Agreement relating to the failure of [PTIC] and [Dicky Tan] to obtain the [Forestry Licence] and failure to deliver the Coal in accordance with the Master Agreement and the Variation Agreement PROVIDED THAT the [Forestry Licence] is issued in form and substance acceptable to Nava Bharat on or before the Final Deadline [*ie*, the date falling 4 months after the date of issue of the AIP].

4.2 In consideration of [PTIC] and [Dicky Tan] agreeing to the reduction of the valuation of the

KP Concession from US$20,000,000 to US$19,000,000, Nava Bharat shall waive in full all claims (including claims for loss of profits), losses, expenses and damages whatsoever and howsoever incurred by Nava Bharat as a result of breaches committed by [PTIC] and [Dicky Tan] under the Master Agreement and Variation Agreement relating to the failure to obtain the [Forestry Licence] and the failure to deliver coal in accordance with the Master Agreement and the Variation Agreement PROVIDED THAT the [Forestry Licence] is issued in form and substance acceptable to Nava Bharat on or before the Final Deadline [*ie*, the date falling 4 months after the date of issue of the AIP]. Nava Bharat expressly secures its rights in respect to all other breaches

...

85 The key terms of the Addendum Agreement, which varied the Variation Agreement, are as follows: [note: 282]

3. ESCROW ACCOUNT

3.1 Following appointment by [PTIC] of a reputable mining contractor acceptable to Nava Bharat for a period not exceeding 6 months from the date thereof, Nava Bharat shall:

(i) pay a sum of US$250,000 to [PTIC] to part finance the costs of obtaining the AIP; and

(ii) deposit the Security Deposit [*ie*, the sum of US$500,000] in the Escrow Account.

...

4. ISSUE OF AIP

4.1 [PTIC] shall on or before the AIP Final Issue Date [*ie*, the date falling 3 weeks after the payment of the sum of US$250,000 to PTIC pursuant to Cl 3.1(i)] procure the issue of a valid and subsisting AIP in the name of [PTIC].

...

4.4 Upon tender of evidence, in form and substance acceptable to Nava Bharat, of the issue of a valid and subsisting AIP from the appropriate authority in Indonesia and upon validation by Nava Bharat of the licence particulars, [Nava Bharat] shall immediately procure the release to [PTIC] of the Security Deposit from the Escrow Account.

5 EVENTS OF DEFAULT

5.1 If [PTIC] fails to:

...

(ii) obtain the AIP on or before the AIP Final issue Date; or

(iii) obtain the [Forestry Licence] on or before the Final Deadline [*ie*, four months after the date of issue of the AIP].

Nava Bharat has the right to exercise its exit option in accordance with the Master Agreement and the Master Agreement shall be modified to allow Nava Bharat the right to

demand the return of all monies paid pursuant to the various agreements between the parties and interest on all sums so paid, from the date of payment till the repayment is made at the rate of 12% per annum.

86 On 2 September 2009, Jason Tan sent an email informing Chandra that he was in the process of converting the KP Concessions which, under the new mining law, would be merged into the IUP Licence. [note: 283] On 5 September 2009, Jason Tan sent an email to Chandra with a copy of the IUP Licence. [note: 284] This was forwarded to Rajaram on 7 September 2009. [note: 285]

Concerns over Dicky Tan's mining contractors

87 Under cl 3.1 of the Addendum Agreement (see [85] above), PTIC was obliged to appoint a mining contractor that was "acceptable to Nava Bharat", and the payment of the sum of US$250,000 by Nava Bharat was contingent on the appointment of an acceptable mining contractor. In this regard, PTIC proposed the use of mining equipment from two mining contractors. [note: 286]

88 On 5 September 2009, Ashwin received the due diligence report by Thangarajan Paranjoti ("Paranjoti"), a member of Nava Bharat's Indonesian team, which stated that there were problems with the equipment of Dicky Tan's mining contractors. [note: 287] The report was forwarded to Rajaram on 7 September 2009. [note: 288] Rajaram then sent an email to Chandra to request for Dicky Tan's urgent input on the situation as well as an update on the status of the application for the AIP. [note: 289] Chandra replied on the same day stating that the AIP should be out by next week, and that Dicky Tan would produce the requisite tonnage as required. [note: 290]

89 Notwithstanding Paranjoti's due diligence report, Ashwin sent an email to Rajaram on 7 September 2009 stating that Nava Bharat is willing to accept Dicky Tan's mining contractors. [note: 291] Accordingly, Rajaram replied to Chandra's email on the same day with Ashwin's instructions and highlighted to Chandra that Nava Bharat would look to Dicky Tan if he fell short in terms of the coal production. [note: 292]

Delays in obtaining AIP

90 Under cl 4.1 of the Addendum Agreement (see [85] above), the AIP was due on 18 September 2009. [note: 293] One day before the deadline, at a meeting between Nava Bharat and PTIC in Indonesia, Hariman of PTIC informed Nava Bharat's Indonesian team that "they [would] receive a letter confirming the in principle forestry license status". He added that the letter would be given to the management of Nava Bharat. [note: 294] On the same day, Jason Tan wrote to Chandra stating that the application for the AIP was in process but "delayed due to the bureaucracy" and the "long Ramadhan festive holiday". [note: 295] In this regard, Jason Tan attached a letter from the director of forestry area usage to PTIC as proof to Nava Bharat that the application was "really under process". [note: 296] Chandra forwarded the email to Rajaram who in turn forwarded it to Ashwin. [note: 297] Bob Sundaram, who translated the letter into English, confirmed that the letter was "only a technical consideration", and not the AIP. [note: 298] Ashwin informed Rajaram about this. [note: 299]

91 At this point in time, Rajaram advised Ashwin of Nava Bharat's rights under the Addendum Agreement and suggested that a notice of default be issued. [note: 300] After consulting with

Bhushan, Ashwin decided not to follow Rajaram's recommendation. [note: 301] Instead, he chose to negotiate an off-take agreement under which PTIC will be responsible for "supplying/exporting" coal from the Mine. [note: 302]

92 On 16 October 2009, Jason Tan informed Chandra that, notwithstanding the difficulties in procuring the AIP, he hoped that it would be signed no later than the next working day, *ie*, 19 October 2009 (which was the last working day for the Minister). [note: 303] There was no sign of the AIP on 19 October 2009.

93 One week later, on 26 October 2009, Rajaram received an email from Chandra explaining that there was further delay to the AIP because "there has been a change in the cabinet" and Dicky Tan proposed for 50% of the funds in escrow to be released "upon production of copy of a duly executed AIP by the relevant Minister" and the balance to be released upon receipt of the original. [note: 304] Bob Sundaram then wrote an email to Rajaram on 27 October 2009, copied to Ashwin, suggesting that Dicky Tan was lying when he said that the AIP would be obtained soon. [note: 305] Rajaram replied to Bob Sundaram, copied to Ashwin, stating that "Ashwin [would] have to make the call" and in the meantime Nava Bharat should extract as much coal as possible to minimise their exposure. [note: 306]

94 At around this time, Ashwin got Bill Sullivan ("Bill") of Christian Teo & Associates into the picture. On 23 October 2009, Ashwin received an email from Bill with a write up on the new mining law in Indonesia. [note: 307] Subsequently, on 29 October 2009, Bob Sundaram met Bill. [note: 308] Ashwin forwarded the write up and the minutes of the meeting to Rajaram. [note: 309]

95 On 6 November 2009, Bob Sundaram informed Ashwin that there was an ongoing "power struggle between the Indonesian Police and the Anti-Corruption agencies" which involved the Forestry Ministry and that it was likely to cause further delays to the grant of the AIP. [note: 310] This was forwarded to Rajaram on the same day. [note: 311] Rajaram then arranged for a meeting with Ashwin and Bhushan to discuss Dicky Tan's repeated defaults. The meeting took place in SLP's office on 9 November 2009. [note: 312] The next day, Ashwin instructed Rajaram to go ahead with the issuance of the second notice of default, stating that Nava Bharat could "use this to [Nava Bharat's] advantage while negotiating" with Dicky Tan. [note: 313]

Second Notice of Default

96 With Ashwin's go-ahead, Rajaram wrote to Chandra on 10 November 2009 to give notice of the various defaults by Dicky Tan and PTIC ("Second Notice of Default"). [note: 314]

97 After the Second Notice of Default was issued, there was a series of emails arranging for a meeting between the parties. [note: 315] Dicky Tan could not make it for the meeting, and Rajaram suggested that Chandra could attend and bring back the proposal for Dicky Tan to decide. [note: 316] Bhushan, who was copied in the email, then wrote to Rajaram to suggest that they should meet before the meeting with Chandra to work out their position: [note: 317]

> I suggest we meet 30 minutes before this meeting with Chandra to exchange views on 'financial concessions' that we may consider asking or tabling, and also timing of the same, ie we may decide to convey to Chandra or hold it, but in any case we should broadly work out amongst ourselves.

Rajaram agreed. [note: 318] Ashwin was copied in both emails.

The "without prejudice" proposal and draft Tripartite Agreement

98 On 16 November 2009, Rajaram wrote to Chandra with a "without prejudice" proposal as an attempt to salvage the Transaction, and asked for a meeting on the next day. [note: 319] The material terms of Nava Bharat's "without prejudice" proposal are as follows: [note: 320]

> (a) that all agreements, including supplemental agreements and addendum agreements, be terminated in consideration of the parties entering into a fresh agreement; and
>
> (b) that the fresh agreement would have the following pertinent agreements/arrangements:
>
> (i) the Mine valuation was to be revisited taking into consideration present market conditions and valuations;
>
> (ii) the royalty for coal that was agreed between parties would be renegotiated;
>
> (iii) PTIC would be converted into a PMA Company, and Nava Bharat to be issued shares in it as consideration for payments; and
>
> (iv) all penalties and price reductions agreed to in the previous agreements would remain effective in the fresh agreement.

99 The "without prejudice" proposal also specified that the agreement should be finalised and signed by 20 November 2009. [note: 321]

100 The meeting eventually took place on 16 December 2009, and it was attended by Jason Tan, Bhushan, Ashwin and Rajaram. [note: 322] The parties agreed at the meeting that, *inter alia*, a different class of shares in PTIC with exclusive rights over the KP Exploitasi Licence should be created and held by TPC as stakeholders to be released to Nava Bharat upon payment (this would later form the core of the draft Tripartite Agreement). [note: 323]

101 Ashwin received some materials on the new mining law from Bill on 5 and 12 January 2010, and he forwarded them to Rajaram. [note: 324] Sometime in December 2009 to January 2010, Rajaram had also been in communication with John Dick ("John") of Freehills (now known as Hebert Smith Freehills) over the issue of converting PTIC into a PMA Company. [note: 325] Ashwin and Rajaram met with John on 21 January 2010, [note: 326] and on the next day, John provided a preliminary advice stating, *inter alia*, that: [note: 327]

> In conclusion, we believe that the difficulties in converting a PT Biasa to a PMA Company is more of an administrative matter (which would be solved once implementing regulations are issued) rather than a fundamental legal matters [*sic*] as was experienced under the old mining regime.

102 A meeting with Dicky Tan was fixed on 27 January 2010. At this meeting, which was attended by Dicky Tan, Ashwin, Rajaram, Chandra and Bhushan, the issue of converting PTIC into a PMA Company and the status of the AIP and Forestry Licence were discussed. [note: 328]

103 On 11 February 2010, in an email to Rajaram and Bill, Ashwin informed Rajaram that Nava Bharat had decided to engage Bill as its "Indonesian legal counsel for the PTIC deal", and introduced Rajaram to Bill as Nava Bharat's "Singapore legal counsel". [note: 329] Bill sent his preliminary advice to Rajaram, copied to Ashwin, on 15 February 2010. [note: 330] On 26 February 2010, Chandra sent an email to Rajaram attaching the draft Tripartite Agreement (reflecting the arrangement discussed above at [100]). [note: 331] Rajaram forwarded the draft to Bill for his inputs on 1 March 2010, [note: 332] and Bill responded with his comments on the same day. [note: 333] In essence, Bill proposed for the KP Explorasi Licence to be transferred to another of Dicky Tan's company (since the Transaction only concerned the KP Exploitasi Licence), and to convert PTIC into a PMA Company (so that Nava Bharat can own shares in it). [note: 334] In the meantime, Bill suggested that the shares of PTIC, to the extent that it had been paid by Nava Bharat, should be transferred to Nava Bharat's Indonesian nominee, Gunawan Sukardis Subur ("Gunawan"). [note: 335]

104 As a result of Bill's input, there was another round of discussion in March 2010 and the structure contemplated under the "without prejudice" proposal (see [98] above) and draft Tripartite Agreement (see [103] above) was abandoned. [note: 336] The agreements necessary to transfer the PTIC shares from Dicky Tan to Gunawan were signed between 24 and 26 March 2010. [note: 337] However, the transfer did not occur as the shareholders' resolution and spousal consent, which were necessary for the transfer, were not signed. [note: 338]

105 The AIP was finally obtained on 23 March 2010. [note: 339] Bill confirmed on the next day that the AIP had been "issued and recorded" by the Ministry of Forestry, and added that the Forestry Licence would be issued if PTIC carried out its obligations under the AIP. [note: 340]

106 On 23 March 2010, unknown to Nava Bharat, Jason Tan obtained an order from the Central Jakarta District Court to revert Dicky Tan's shares in PTIC to the previous shareholders, *ie*, Sofwan Rahman and Suhendra on the basis that Dicky Tan did not pay for the shares (see [124] below). Sofwan Rahman and Suhendra each held 50% of the shares in PTIC before the shares were transferred to Dicky Tan and Ridwan Halim around 2008. [note: 341]

107 On 9 April 2009, Rajaram sent an email to Chandra stating, *inter alia*, that the PTIC shares had not been transferred to Gunawan and that he should confirm that it would be "done immediately". [note: 342]

The Settlement Agreement

108 On 4 June 2010, Ashwin sent an email to Rajaram setting out the points of agreement that were reached by the parties on the way forward. [note: 343] Shortly after Ashwin's email, Rajaram received an email from Chandra with essentially the same points. The arrangement, in essence, was that: [note: 344]

(a) Nava Bharat would release a sum of US$6m against compliance with the following conditions (within 14 days of receipt of written evidence):

(i) issue of the Forestry Licence;

(ii) split and transfer the 745.006 hectares of non-exploitable land (with the KP Explorasi

Licence) to another company owned by Dicky Tan and associates;

(iii) terminate the existing contractor that was appointed by PTIC;

(iv) transfer the shares in PTIC to Nava Bharat's Indonesian nominee to reflect an equity payment of US$9.25m (*ie*, US$6m to be paid out against compliance with the aforesaid items and US$3.25m as the sum paid to date);

(b) Nava Bharat would increase its equity stake in PTIC up to 90% within one month from the date of issue of the Forestry Licence and all other conditions being fulfilled, including the conversion to IUP Licence.

(c) PTIC would give up its claims over the 150,000 metric tonnes of exposed coal upon payment of a sum of US$650,000 by Nava Bharat.

(d) PTIC would not insist on the payment of US$500,000 for the AIP and the payment of US$310,000 for the split and transfer of the KP Explorasi Licence, which would be fully financed by PTIC.

109 On 11 June 2010, Rajaram sent an email to Ashwin attaching the term sheet setting out the proposal for discussion. [note: 345] On the same day, Rajaram also replied to Chandra informing him that Nava Bharat was agreeable in principle to the proposal. [note: 346] Later, on 18 June 2010, Rajaram sent a draft settlement agreement to Chandra for Dicky Tan's comments. [note: 347]

110 On 6 July 2010, Ashwin was informed by Bhushan that he was told by Jason Tan and Chandra that the Forestry Licence was "on the table of the minister" and they were "very hopeful of the signature" even though they anticipated some delay due to "political issues". [note: 348] Bhushan added that Dicky Tan had applied for the KP Exploitasi Licence and KP Explorasi Licence to be split, and was ready and willing to transfer the PTIC shares to Gunawan. [note: 349] At around the same time, Chandra wrote to inform Rajaram of the same. [note: 350] Despite that, the Forestry Licence was only obtained some time later, in October 2010 (see [121] below).

111 Rajaram sent another copy of the draft settlement agreement, together with the other documents, to Chandra on 27 July 2010 for his comments. [note: 351] Chandra responded on 10 August 2010 and stated that there was no issue with the document but requested for the transfer of the PTIC shares to be effected after the execution of the settlement agreement. [note: 352]

112 Towards the end of August 2010, Ashwin decided to ask Bob Sundaram to try and secure the Forestry Licence. On 24 August 2010, Rajaram wrote to inform Chandra of Ashwin's decision. [note: 353] Chandra replied on the same day explaining that he had not been able to contact Dicky Tan or Jason Tan. [note: 354] On 1 September 2010, Bob Sundaram informed Ashwin that he had been assured that the Forestry Licence would be issued by 18 September 2010. [note: 355] He sent another email to Ashwin on 7 September 2010 to confirm the same. [note: 356] At this point, Bhushan repeated Rajaram's suggestion for Nava Bharat to take over the Mine "as is where is", now that the Forestry Licence is assured, and ask for a discount on the price. [note: 357]

113 On 16 September 2010, Chandra sent the draft settlement agreement, together with the other

documents, to Rajaram. [note: 358] The next day, the documents, except for the draft settlement agreement, were signed and returned. [note: 359]

114 Rajaram wrote to Chandra on 23 September 2010 pointing out that Dicky Tan had failed to transfer the PTIC shares to Gunawan even though he had agreed to do so. [note: 360] To resolve this, a meeting was arranged on 1 October 2010. [note: 361] At the meeting, Jason Tan explained that Dicky Tan (who was not present) had been stripped of his powers in PTIC and was therefore unable to act on behalf of PTIC. [note: 362] He added that Dicky Tan owed money to the previous shareholders of PTIC (*ie*, Sofwan Rahman and Suhendra), and suggested that any outstanding money due to Dicky Tan could be paid to them to resolve the matter. [note: 363] Ashwin suggested that Nava Bharat is ready to pay, [note: 364] and Rajaram then proposed that an escrow account be created for the payment to the previous shareholders, subject to Dicky Tan executing the share transfer. [note: 365]

115 The settlement agreement was never concluded by the parties. [note: 366]

116 Sometime in early October 2010, Tansree Tjandra ("Tansree") announced that he would be taking over the negotiations with respect to the Mine because Dicky Tan owed money to Tansree and the rest of the family. [note: 367] A meeting was held between Tansree and Ashwin on 13 October 2010. [note: 368] After the meeting, Jason Tan sent an email to Chandra stating that Tansree wanted to have the negotiations after the Forestry Licence was issued. [note: 369] However, Tansree passed away shortly thereafter. [note: 370]

Third Notice of Default and exercise of the share pledges

117 Sometime in October 2010, Nava Bharat decided to exercise its rights under the Loan Agreement and the share pledges. As Rajaram was out of Singapore working on another matter, Sreenivasan was asked to assist in getting advice from Indonesian lawyers on exercising the share pledges. [note: 371]

118 On or about 4 October 2010, Muralli Rajaram ("Muralli"), a senior associate from SLP who was assisting Sreenivasan, wrote to Suria Nataadmadja ("Suria") of Suria Nataadmadja & Associates, a law firm in Indonesia, to enquire on the exercise of the share pledges. [note: 372] Suria replied on 7 October 2010 with the view that it was possible but "a bit complicated since the documents have no exact amount of money guaranteed by the pledge". [note: 373] Muralli then wrote to Rajaram and Sreenivasan to inform them that Suria had suggested for Nava Bharat to go back to ABNR to assist in the exercise of rights under the Loan Agreement and the share pledges. [note: 374] On the same day, Sreenivasan wrote to Ashwin stating that Nava Bharat should exercise the share pledges and "talk from a position of strength". [note: 375] Sreenivasan also pointed out that this would spark off a civil suit if there was no "commercial settlement", but Nava Bharat should go ahead as it would "tie up their shares". [note: 376]

119 Muralli also wrote to Nafis, copied to Woody, on 8 October 2010 to enquire on the exercise of the share pledges. [note: 377] Woody replied on 12 October 2010 stating that even though the "creation of pledge of shares and the related powers of attorney to sell and to vote to support the pledge of shares [is] very common", the exercise of the pledge without the cooperation of the

pledgors is "not really common" and "may always be subject to challenge by the pledgors". [note: 378] On the same day, Rajaram responded to Woody stating that another law firm had a different interpretation of the situation and would be appointed to assist on the exercise of the share pledges. [note: 379] Rajaram also added that "[their] mutual client is unhappy at the turn of events and [ABNR's] present stand". [note: 380] Woody responded on 13 October 2010 and stated that there was no basis for Nava Bharat to be unhappy with ABNR's stand given that it had "very clearly stated some qualifications on the enforceability of the pledge and powers of attorney". [note: 381]

120 On 18 October 2010, Rajaram on behalf of Nava Bharat issued another notice of default to PTIC and Dicky Tan ("Third Notice of Default"). [note: 382] One of the defaults identified in the Third Notice of Default was that Dicky Tan had failed to obtain the Forestry Licence on time. [note: 383] Dicky Tan and PTIC did not respond to the Third Notice of Default. [note: 384]

121 One day later, on 19 October 2010, the Forestry Licence was signed by the Minister. [note: 385]

122 A few days later, on 26 October 2010, Rajaram wrote to Chandra to notify Dicky Tan that Nava Bharat had exercised its rights pursuant to the Loan Agreement and share pledges. [note: 386] After exercising the share pledges, Nava Bharat transferred the PTIC shares to its Indonesian nominees Gunawan and Debora Viseka ("Debora") in the respective shareholding of 80% and 20%. [note: 387]

123 Sometime in April 2011, Nava Bharat entered into negotiations with various parties on the sale of the shares in PTIC. [note: 388] Rajaram assisted in preparing the drafts of the various agreements to facilitate Nava Bharat's sale of the PTIC shares. [note: 389] On or about June 2011, the 80% of PTIC shares held by Gunawan was sold to Indra Sulisto ("Indra") for US$8m. [note: 390] There is some dispute over whether Nava Bharat was actually paid the full sum of US$8m. Ashwin claimed that Nava Bharat had only received US$150,000 as the deal fell through eventually. [note: 391]

Loss of the PTIC shares

124 Sometime in late November 2010, Bob Sundaram received a copy of Deed No 8 which stated that Dicky Tan's 80% share in PTIC (obtained pursuant to Deed No 42) had reverted to the previous shareholders, *ie*, Sofwan Rahman and Suhendra, by an order made by the Central Jakarta District Court on 23 March 2010 because Dicky Tan did not pay for the shares. [note: 392] Deed No 8 also stated that as Dicky Tan did not have any interest in the PTIC shares, the transfer of the shares to Gunawan and Debora under Deed Nos 23, 24 and 25 (which was relied on to exercise the share pledges) was invalid. [note: 393]

125 On 30 November 2010, Bob Sundaram reported to Ashwin *via* email that his initial investigation at the "Justice and Law Ministry" (also referred to as the "Ministry of Law and Human Rights") revealed that Deed No 8 was "fabricated". [note: 394] According to Bob Sundaram, the senior manager of the Ministry explained that Deed No 8 stated that Gunawan and Debora appeared before a Notary Public on 3 November 2010 and agreed to surrender all the PTIC shares in their possession to Dicky Tan. [note: 395] Jason Tan then allegedly created Deed No 14 on 11 November 2010 under which the PTIC shares were transferred to two of Jason Tan's children and Sofwan Rahman. [note: 396]

Other transactions involving the Mine

The Lanna Transaction

126 On 7 October 2010, shortly before the share pledges were exercised, Sreenivasan came across the case of *Lanna Resources Public Co Ltd v Tan Beng Phiau Dick and another* [2011] 1 SLR 543 ("*Lanna v Tan*") and forwarded it to Ashwin. [note: 397] It was only then that Nava Bharat found out Dicky Tan had some form of arrangement with another party in relation to the Mine at around the same time as the Transaction.

127 The arrangement was for Lanna Resources Public Co Ltd, a company incorporated in Thailand ("Lanna Resources") to provide a loan of US$4m to Saraburi in return for the supply of coal ("the Lanna Transaction"). [note: 398] In or about March 2008, Dicky Tan approached Chandra to assist in respect of the Lanna Transaction. [note: 399] This was the second time Dicky Tan had approached Chandra for his services. Chandra was first appointed by Dicky Tan in 2004 to assist him with the private placement of shares in a company listed on the Singapore stock exchange. [note: 400]

128 Under memorandum of agreement dated 25 April 2008 for the Lanna Transaction, it was agreed that Lanna Resources would provide a loan of US$4m to Saraburi in two tranches of US$2m each. [note: 401] The first tranche was payable on 5 May 2008, and the second tranche was payable within 30 days of 5 May 2008, subject to satisfactory performance by Saraburi of its obligations under the coal supply agreements. [note: 402] These obligations included providing a plan, programme and budget to describe and set out how the loan would be used towards the intended purpose, that is, infrastructural upgrade for the mines. [note: 403]

129 Lanna Resources paid out the first tranche as stipulated but did not pay out the second tranche within 30 days of 5 May 2008. [note: 404] Dicky Tan and Lanna Resources could not agree on whether the obligations on the part of Saraburi were met. [note: 405] As a result, Dicky Tan purportedly accepted Lanna Resources' repudiatory breach and terminated the Lanna Transaction. [note: 406] After the Lanna Transaction fell through, Dicky Tan proceeded to look for a new investor for the Mine; he was then introduced to Nava Bharat by Bhushan (see [9] above). [note: 407]

130 Lanna Resources subsequently obtained an arbitral award against Saraburi for the sum of US$2m paid out in the first tranche of the loan. [note: 408] Lanna Resources had also sought to enforce the personal guarantees against Dicky Tan and Tanakorn through court proceedings in Singapore (see *Lanna v Tan* at [6]–[8]). [note: 409] Bhargavan Sujatha ("Sujatha") of Toh Tan & Partners, who is Chandra's sister-in-law, represented Dicky Tan in both proceedings. [note: 410]

131 According to Nava Bharat, the documents in the Lanna Transaction will show Chandra's conspiratorial involvement in the present case. [note: 411] This will be explored in greater detail below.

The Belfield Loan

132 Nava Bharat also discovered subsequently that Dicky Tan had obtained a loan from Belfield. The brief facts have been set out above at [68]. Like the Lanna Transaction, Nava Bharat claimed that the Belfield Loan and the circumstances surrounding it would reveal that Chandra was involved in a conspiracy with Jason Tan and Dicky Tan to defraud Nava Bharat. This will, likewise, be examined below.

The STX Transaction

133 Nava Bharat also found out a few months after the PTIC shares were transferred to Jason Tan's children and Sofwan Rahman (see [124]–[125] above) that Jason Tan had tried to sell the shares in PTIC to STX Corporation ("STX"), a company incorporated in Korea. As early as January 2011, Nava Bharat had tried to inform STX of its rights in PTIC (by virtue of the share pledges and prior to the reversal of the share transfer). [note: 412] Nevertheless, STX decided to proceed with the transaction. In or around May 2011, STX acquired 40% of the shares in PTIC ("STX Transaction"). [note: 413] STX then commenced mining operations at the Mine. [note: 414] Consequently, Nava Bharat commenced proceedings against STX for inducing Dicky Tan to breach his contract with Nava Bharat by entering into a contract with Dicky Tan and/or PTIC in relation to the Mine. [note: 415] Nava Bharat's claim against STX was withdrawn on 25 July 2014.

134 Sometime in 2012, STX was prevented from operating the Mine, [note: 416] and it commenced proceedings in Singapore against Dicky Tan and others for the breach of the coal and off-take agreement concluded between STX and PTIC. [note: 417] At the same time, STX also commenced proceedings against Dicky Tan and Jason Tan based on the guarantee and indemnity issued by them for the losses suffered by STX as a result of the breach by PTIC. [note: 418]

Nava Bharat's claims

Claim against Dicky Tan and Jason Tan in Indonesia

135 On 9 September 2011, Nava Bharat commenced proceedings in Indonesia against Dicky Tan, Jason Tan and others for conspiring to remove Nava Bharat's ownership rights in PTIC (Case No 623/PDT.6/2011/PN.JKT.BAR ("Case No 623")). [note: 419] In Case No 623, Nava Bharat sought, *inter alia*, a declaration that the exercise of the share pledges by Nava Bharat is valid, and that its nominees are the lawful owners of the shares in PTIC. [note: 420] The West Jakarta District Court handed down its judgment on or about 29 October 2012 (with written judgment released in December 2012). [note: 421] The Court found, *inter alia*, that the documents in relation to the Transaction, including the pledge of shares agreements, were valid and enforceable. [note: 422]

136 Notwithstanding the judgment in favour of Nava Bharat, Dicky Tan and Jason Tan continued to operate the Mine. [note: 423] In the meantime, Dicky Tan and Jason Tan have appealed against the judgment of the Western Jakarta District Court. [note: 424]

Claim against SLP and Rajaram in Singapore

137 On 26 September 2011, Nava Bharat informed Rajaram that it had appointed Global Law Alliance LLC ("GLA") to take over conduct of the matter. [note: 425] A few days later, on 5 October 2011, GLA on behalf of Nava Bharat issued a letter of demand to SLP and Rajaram, claiming, *inter alia*, that Rajaram was negligent. [note: 426] The writ of summons for S 846/2011 was filed on 22 November 2011.

138 Nava Bharat avers that the cumulative conduct of SLP and Rajaram in relation to the Transaction would constitute breach of contract, negligence and breach of fiduciary duty. [note: 427] As a result, Nava Bharat claims that it had suffered loss and damage and is seeking to recover from

SLP and Rajaram: [note: 428]

(a) damages for pre-trial loss of profits from April 2009 to April 2013 in the sum of US$44.83m, and future continuing loss of profits to be assessed, or alternatively, repayment of US$3.1m being payment made by Nava Bharat for the equity participation in PTIC;

(b) damages for wasted costs and costs of cure totalling US$2,442,220.35;

(c) damages for opportunity costs; and

(d) interest and costs.

Claim against Dicky Tan and Chandra in Singapore

139 On 5 October 2011, GLA on behalf of Nava Bharat issued a letter of demand to Dicky Tan and Chandra. [note: 429] Chandra responded on 20 October 2011. [note: 430] Nava Bharat filed its writ of summons for S 847/2011 on 22 November 2011. As mentioned earlier (see [5] above), Dicky Tan was served with the writ of summons, but had failed to enter into appearance. As a result, default judgment was entered against Dicky Tan.

140 Nava Bharat's pleaded case against Chandra is essentially two-fold. First, Chandra has conspired with Jason Tan and Dicky Tan to injure Nava Bharat by unlawful means, namely "by selling/disposing of the Mine and/or interests in the Mine to [Nava Bharat] for valuable consideration" even though Dicky Tan did not have the rights to the Mine. [note: 431] Second, Chandra held himself out as a lawyer who would look after Nava Bharat's interests, which Nava Bharat relied on, but he failed to do so. [note: 432] Nava Bharat claims that it had suffered loss and damage as a result of Chandra's acts, and seeks to recover the following: [note: 433]

(a) general damages for conspiracy to be assessed;

(b) damages for pre-trial loss of profits from April 2009 to April 2013 in the sum of US$44.83m, and future continuing loss of profits to be assessed, or alternatively, repayment of US$3.1m being payment made by Nava Bharat for the equity participation in PTIC;

(c) amages for wasted costs and costs of cure totalling US$2,442,220.35; and

(d) interest and costs.

Claim against STX in Singapore

141 Nava Bharat had also, on 17 December 2011, commenced legal proceedings against STX. In Suit No 917 of 2011 ("S 917/2011"), Nava Bharat claimed, *inter alia*, that STX had deprived Nava Bharat of its rights to the PTIC shares and to conduct mining operations to extract coal from the Mine. [note: 434] There was a dispute over whether the factual basis for Nava Bharat's claims in S 847/2011 and S 917/2011 were, as Chandra put it, completely contradictory such that it suggests Nava Bharat's claims were not genuine and *bona fide*. [note: 435] On 25 July 2014, Nava Bharat withdrew its claim against STX.

The witnesses

142 To support their respective cases, the parties called a total of five factual witnesses and three expert witnesses. I will briefly set out their evidence as well as, where necessary, my general assessment of their demeanour during the hearing.

Factual witnesses

Ashwin

143 Ashwin is one of the two factual witnesses called by Nava Bharat to testify at the trial. As the main representative of Nava Bharat in the Transaction, Ashwin's evidence covers almost all aspects of the Transaction. In this regard, he filed two affidavits evidence-in-chief ("AEIC") – one on the issue of liability and the other on the issue of quantum of the alleged losses suffered by Nava Bharat.

144 I find him to be a bright, young man but unreasonably persistent when it comes to certain points (apparently crucial for his case) which, in my view, were *clearly* not in his favour. To illustrate this, I need only to give a few examples. The first relates to Ashwin's testimony that he did not read ABNR's Third Draft Report, which was not only forwarded to him but also highlighted by Prasad's email which said that it "raises pertinent questions". [note: 436] Notwithstanding that, Ashwin insists that he did not read ABNR's Third Draft Report. [note: 437] Another example is Ashwin's repeated assertion that he believed that Nava Bharat was going to acquire equity interest in PTIC. This was clearly contradictory to NBVL's clarification issued on 31 January 2009 that it was *not* going to acquire equity stake in PTIC, but in "the Company which has exclusive off-take agreement with the Coal Concession Company". [note: 438] Even after having been shown the clarification by NBVL, which Ashwin accepts must have been confirmed by him, [note: 439] he continues to take the position that he did not know that Nava Bharat was not acquiring an equity interest in the Mine. [note: 440] Ashwin also appears to hold a very strong view that ABNR was *not* Nava Bharat's Indonesian lawyers, [note: 441] even though this was inconsistent with the position taken by Nava Bharat (this will be examined in detail at [233] below). On the whole, Ashwin gave me the impression that he might have been trying to salvage himself from a bad decision in entering into the Transaction.

145 As a matter of general observation (and I will elaborate in some detail at the appropriate points below), I also find that some of the crucial allegations that Ashwin is making against Chandra and Rajaram are *not* supported by documents. In addition, I observed that a number of the explanations offered by Ashwin are illogical and appear to be contrived to avoid contradiction. In fact, several of his explanations contradict the contemporaneous documentary evidence. One clear example is his evidence on whether he knew that the Forestry Licence was required in order to commence operations at the Mine. He said in his AEIC that he wrote to Prasad, Rajaram and Bhushan on 23 December 2008 and attached documents which "show that it was *clear* that the [Forestry Licence] was mandatory" (with the email exhibited in his AEIC). [note: 442] Pertinently, Ashwin felt that it was clear that the Forestry Licence was mandatory because he and Prasad noticed that PTBHM had earlier applied for the Forestry Licence (albeit unclear if it was eventually obtained). [note: 443] At the hearing, however, Ashwin did a *volte-face* and said that it was *not clear* to him on 23 December 2008 that a Forestry Licence was mandatory. [note: 444] I find his explanation to be contrived and contradictory to the objective documentary evidence. [note: 445]

146 I should also mention that Ashwin had also taken a very strong position on the point that Rajaram was not involved in the Multi Guna Transaction except for the drafting of the settlement agreement, [note: 446] but conceded, after being shown contradictory documentary evidence, that he

was wrong and appeared to be saying that he had forgotten about it. [note: 447] Given the number of correspondence (reflecting the extent of Rajaram's involvement in the Multi Guna Transaction), I do not think that it was something that could have been easily forgotten. [note: 448] Even if Ashwin was telling the truth (that he had forgotten about Rajaram's involvement in the Multi Guna Transaction except for the drafting of the settlement agreement), it would appear that he was prone to exaggeration. Indeed, he went so far as to say, when questioned, that he was "under oath" and would "stand by [his] word" that Rajaram was *only* involved for the settlement agreement. [note: 449] To some extent, this suggests that Ashwin has a tendency to embellish and his evidence might be unreliable. I therefore approached his evidence with caution.

Bob Sundaram

147 Bob Sundaram is the other factual witness that was called by Nava Bharat. As I have mentioned earlier, Bob Sundaram was, at the material time, the director of Nava Bharat's Indonesian subsidiaries, and acted as Nava Bharat's "focal point on the ground in Indonesia". [note: 450] He was also substantially involved in the Transaction, and his evidence reflects that. Like Ashwin, Bob Sundaram filed two AEICs, with one for the issue of liability and the other for the issue of quantum of the alleged losses suffered by Nava Bharat.

148 I find his evidence to be generally reasonable, except when it comes to the issue of the Forestry Licence. For instance, Bob Sundaram agreed during cross-examination that he would have asked about the Forestry Licence (which he knew was mandatory) when he was asked to sign the Security Documents on behalf of Nava Bharat at the Indonesian leg of the initial completion (see [49] above). [note: 451] He explained that he called Ashwin to ask about the Forestry Licence and was told that it was "Rajaram's responsibility". [note: 452] He added that he also called Rajaram and was told that the Forestry Licence had been "taken care of". [note: 453] This was a crucial piece of fact. However, it did not feature at all in Bob Sundaram's AEIC. This indicates that it was conjured up to explain why he was willing to go ahead with signing the Security Documents on behalf of Nava Bharat even though he knew that the Forestry Licence was outstanding.

149 I should also mention one other example where Bob Sundaram's evidence in relation to the Forestry Licence was inconsistent and illogical. Nava Bharat takes the position that Rajaram had, at the meeting on 19 December 2008, echoed Dicky Tan's view that there was no need for the Forestry Licence. Bob Sundaram said in his AEIC that Rajaram said that "the sellers had said that it was an operational mine and there was no need for such a licence". [note: 454] However, when asked during cross-examination, Bob Sundaram said that he did not know *who* said it. [note: 455] In an attempt to explain for the inconsistency, Bob Sundaram answered the questions in an illogical fashion: [note: 456]

> Q: ... Yesterday you did not say the statement was made repeatedly; correct?
>
> A: Yes.
>
> Q: And yesterday, when you were asked who made the statement, you were unable to name anyone, right?
>
> A: That is true.
>
> ...

Q: So you're very sure Mr Rajaram said it, right?

A: Yes, of course.

...

Q: Then why is it yesterday, when asked specifically and directly who said it, you said you didn't know? Why?

A: Well, I said -- my interpretation is there is somebody else within that group did mention, I heard about it, I don't know who it is. That is my interpretation, because Rajaram and Ashwin is somebody whom I know.

...

Q: You have now told the court that this is something you remember very, very well, that Mr Rajaram is one of the people who made this statement. ... why is it yesterday, when asked directly and pointedly, who made that statement, you did not say Mr Rajaram's name? Why?

A: Because, for me, Rajaram is already part of that discussion. I didn't go very specific about it.

150 Bob Sundaram eventually agreed to withdraw the allegation in his AEIC that Rajaram had said that "the sellers had said that it was an operational mine and there was no need for such a licence". [note: 457]

151 I also observe that Bob Sundaram appears to be making allegations against Rajaram which do not form part of the plaintiff's pleadings. [note: 458] In addition, as I will elaborate below (at [285]–[286]), Bob Sundaram appears to have changed his evidence to suit Nava Bharat's case.

Rajaram

152 Rajaram, the second defendant in S 846/2011, is one of the two factual witnesses called by the defendants in S 846/2011 to give evidence at trial. As one of the main protagonists in this case, Rajaram's evidence covers the entire Transaction.

153 I find Rajaram to be a generally honest witness. The only problem with him is that it was not his habit to make written records of his oral communication with his clients. Hence there were very few written records of his meetings and phone discussions with Ashwin. While this appears to me to be a risky manner of conducting a law practice, as the fact that he is embroiled in this suit would confirm, there is nothing in the evidence nor the circumstances that suggest that he has not disclosed any written record. This meant that we only have his word for it as to what he had advised Nava Bharat. However, I find Rajaram's evidence to be, in general, reasonable and truthful.

Sreenivasan

154 The defendants in S 846/2011 also called Sreenivasan as a witness. This is because he was tangentially involved in the Transaction. Specifically, he took over the conduct of the matter for a short period of time on two separate occasions, namely, when Rajaram was undergoing some urgent medical tests, [note: 459] and when he was away for an arbitration matter. [note: 460] Accordingly, his evidence concerns primarily with the Variation Agreement as well as the exercise of the share pledges, the two areas that he was involved in. I found Sreenivasan to be a cautious witness in that

he thinks carefully about the question before answering them. I find his evidence to be logical and consistent with the documents.

Chandra

155 Chandra, the second defendant in S 847/2011, is the only witness to give evidence in his defence. Like Ashwin and Rajaram, Chandra is the other main protagonist in this case. His evidence covers not only the entire course of the Transaction, but also the Lanna Transaction which preceded the Transaction. [note: 461]

156 In the course of the hearing, it was revealed that there were some indications in the contemporaneous documents that payments had to be made to certain officials in Indonesia in order to facilitate the procurement of the Forestry Licence. [note: 462] It was suggested to Chandra that these payments were illicit and that he was complicit in the endeavour. He claimed that it did not occur to him that such payments were illicit. He repeatedly said that he took Dicky Tan's words in good faith, [note: 463] but it appears to me that he is trying to hide behind the label of good faith. I could observe that he was uncomfortable and evasive in his answers to questions related to those payments. He is either naïve or, being put in the conundrum, had chosen to be parsimonius with the truth. I do not think that he is naïve. Nevertheless I make no finding on this because it is not necessary to do so to determine the issues before me.

157 Even ignoring the foregoing, Chandra's main problem as a witness was his inability to answer to the point. He has a tendency to meander, backpedal and give weak, often irrelevant, explanations. For instance, Chandra said in his AEIC that Dicky Tan was the owner of the Mine. [note: 464] In cross-examination, however, Chandra said that Dicky Tan was *not* the owner of the Mine. [note: 465] When he was further questioned on the following day, Chandra explained that he meant that Dicky Tan was not the *legal* owner but was the *equitable* owner. [note: 466] To give another example, Chandra said that the Transaction was the first time he dealt with something involving equity participation in an Indonesian coal mine. [note: 467] However, he had earlier dealt with the Lanna Transaction, which also envisaged (albeit only initially) equity participation of Lanna Resources in an Indonesian coal mine. [note: 468] When this was pointed out to Chandra, his response (which, in my view, was a weak one) was that the Lanna Transaction collapsed immediately. [note: 469]

158 Overall, Chandra was a poor witness. He often could not give a direct answer to the question posed but would rush into an explanation to the answer he did not give, or talk about some peripheral matter. He had to be reminded on many occasions to get to the point and not go off on a tangent. [note: 470] . I must say that his performance on the witness stand totally belies the fact that he is an experienced legal professional (albeit not a litigation practitioner) – he seemed unable to get a grip on the question and answer to the point. It was obvious to me that he was nervous, but this could be due either to his personality *or* the fact that he was trying to conceal something. However, I take into account the possibility that his dismal performance as a witness may be due to his personality and the fact that he was being personally sued for a large sum of money. As such, I do not think that it is appropriate to dismiss all of Chandra's evidence as unreliable, but have to treat it with considerable caution.

Expert witnesses

Michael Scott Carl

159 To bolster its case against SLP and Rajaram, Nava Bharat called Michael Scott Carl ("Carl") to "give expert evidence in relation to the [T]ransaction". [note: 471] Rajaram objected and argued that the evidence of Carl should be rejected in its entirety because: [note: 472]

(a) Carl lacked the proper qualifications and experience to give expert evidence in relation to the Transaction;

(b) Carl raised issues in relation to the *structure* of the Transaction that were not pleaded; and

(c) Carl had not complied with the standards expected of an independent expert witness.

160 I will address these objections below, but before that, I shall first address what I believe to be the crux of the problem with Carl's evidence, *ie*, his view on his role as an expert witness in these proceedings.

(1) Role of an expert witness

161 It appears to me that Carl is of the view that he was *not* called as an expert on Indonesian law (and in particular, Indonesian mining law), but to evaluate the work done by Rajaram in the course of the Transaction. This is reflected in his expert report, where he said that: [note: 473]

> I understand that ... I am to provide my views, *as to the appropriateness of the advice and counsel provided by Rajaram* in structuring the Transaction and reviewing due diligence and other inputs received from Ali Budiardjo, Nugroho, Reksodiputro (ABNR), which acted as Nava Bharat's Indonesian counsel in the Transaction. [emphasis added]

162 In the midst of the hearing, Mr Cavinder Bull SC ("Mr Bull"), counsel for Rajaram, sought to challenge the evidence of Carl on a number of grounds. [note: 474] They are essentially the same as the objections that I have listed above (at [159]). In response to Mr Bull's point that Carl is not qualified to be an expert witness, Carl filed an affidavit on 9 May 2013, in which he explained that: [note: 475]

> ... I was engaged to give expert opinion as a cross-border transactional lawyer dealing with a matter involving the failed acquisition of an asset in Indonesia. *I was not engaged to give expert opinion on Indonesian law*, although it is true that my practice has its particular focus on Indonesia and I rely on the knowledge and expertise that I have developed concerning Indonesia law in working with Indonesian lawyers on Indonesian transactions over these many years in expressing my views in my expert opinion, where relevant. [emphasis added]

Later in the affidavit, he went on to say that: [note: 476]

> *I have been engaged to give expert opinion on the transaction*, some aspects of which incidentally requires me to address my understanding of Indonesian law. [emphasis added]

163 As a result of Carl's view on his role in these proceedings, he went on in his expert report to draw inferences and proffered his opinion based on them. [note: 477] It is unclear how Carl arrived at some of these conclusions. One example would be Carl's view that Rajaram was representing Nava Bharat as "international or Singapore counsel" [note: 478] even though the phrase "international

counsel" does not appear in the correspondence (see [103] above, where Ashwin referred to Rajaram as Nava Bharat's "Singapore legal counsel"). Carl included in his expert report what he would have done if he was in the position of Rajaram. He said that: [note: 479]

> ... As a legal practitioner, I would have understood this information to be very important in the context of Nava Bharat's requirement that the Mine be fully operational on completion of the Transaction. Indeed, I would have assumed that the information was sufficiently important that it may potentially have affected Nava Bharat's "commercial call" whether to make a US$3,000,000 up-front payment to Dicky Tan for the Mine. I would have ensured that the information was fully and clearly conveyed to Nava Bharat for its consideration.

164 Furthermore, Carl expressed his views of what Rajaram's duty ought to be in the circumstances. For instance, he said that: [note: 480]

> I believe that ABNR accurately described the risks inherent in the Transaction structure. My only concern is that the Documents do not indicate whether these risks were conveyed to Nava Bharat, *as they should have been*, before Nava Bharat made a decision to proceed with the Transaction. [emphasis added]

165 In *Midland Bank Trust Co Ltd and another v Hett, Stubbs & Kemp (a firm)* [1979] Ch 384 ("*Midland Bank*"), which was endorsed by the English Court of Appeal in *Bown v Gould & Swayne* [1996] PNLR 130, Oliver J said at 402C that:

> The extent of the legal duty in any given situation must, I think, be a question of law for the court. Clearly, if there is some practice in a particular profession, some accepted standard of conduct which is laid down by a professional institute or sanctioned by common usage, evidence of that can and ought to be received. But evidence which really amounts to no more than an expression of opinion by a particular practitioner of what he thinks that he would have done had he been placed, hypothetically and without the benefit of hindsight, in the position of the defendants, is of little assistance to the court; whilst evidence of the witnesses' view of what, as a matter of law, the solicitor's duty was in the particular circumstances of the case is, I should have thought, inadmissible, for that is the very question which it is the court's function to decide.

166 This passage was cited with approval in *Fong Maun Yee and another v Yoong Weng Ho Robert* [1997] 1 SLR(R) 751 at [47] and *Su Ah Tee and others v Allister Lim and Thrumurgan (sued as a firm) and another (William Cheng and others, third parties)* [2014] SGHC 159 ("*Su Ah Tee*") at [83] (decision on liability upheld on appeal; see *Cheng William v Allister Lim & Thrumurgan and another and another appeal* [2015] SGCA 15 at [12]).

167 In my view, the evidence of Carl falls within the second and third categories of *Midland Bank*, namely:

> (a) the evidence of the expert's opinion of what he would have done if he was placed, hypothetically and without the benefit of hindsight, in the position of the defendant; and
>
> (b) the evidence of the expert's view on what the defendant's duty in the particular circumstances of the case is.

168 It follows that Carl's evidence is of little assistance to the court and, to the extent that it dealt with the scope of Rajaram's duty, inadmissible.

169 I note that Steven Chong J had, in *The "Chem Orchid"* [2015] 2 SLR 1020 ("*Chem Orchid*"), helpfully included a *coda* on the use of expert evidence in the proof of foreign law. While the case dealt primarily with the role of an expert on foreign law in the construction of private documents, I find his observations in relation to the role of an expert on foreign law in general (at [160]–[163]) to be a concise summary of the law. In that case, Chong J was of the view that the expert opinions filed on the issue of Korean law were "ultimately indistinguishable from submissions which offered the court no substantive assistance in terms of proof of foreign law" (at [135]). I share the same frustration with Carl's evidence. It behoves me to emphasise that this case (as well as *Chem Orchid*) should serve as a timely reminder to lawyers instructing expert witnesses (including, and perhaps more so, foreign law experts) to give clearer guidance to those witnesses on their role as an expert in legal proceedings.

170 I proceed to consider the other objections against Carl's evidence.

(2) Qualification as expert witness

171 The confusion over the role of Carl in these proceedings has resulted in other difficulties. Pertinently, Carl does *not* appear to be saying that he is an expert on Indonesian law (see [162] above), but that he is competent to give his opinion on such a transaction. In any case, I find that Nava Bharat had not proven that Carl is an expert on Indonesian mining law.

172 The admissibility of expert evidence is governed by s 47 of the Evidence Act (Cap 97, 1997 Rev Ed) ("EA"). The relevant parts of s 47 of the EA reads:

> 47.—(1) Subject to subsection (4), when the court is likely to derive assistance from an opinion upon a point of scientific, technical or other specialised knowledge, the opinions of experts upon that point are relevant facts.
>
> (2) An expert is a person with such scientific, technical or other specialised knowledge based on training, study or experience.

173 In *Leong Wing Kong v Public Prosecutor* [1994] 1 SLR(R) 681 at [16], the Court of Appeal accepted the observation in *Public Prosecutor v Muhamed bin Sulaiman* [1982] 2 MLJ 320 that "while the expert must be 'skilled', he need not be so by special study, he may be so by *experience*, and the fact that he has not acquired his knowledge professionally goes merely to the weight and not admissibility" [emphasis in original].

174 One of Rajaram's reasons for saying that Carl is not an expert on Indonesian law is because he is "not licensed as an Indonesian advocate", and that he is "required to work with licensed Indonesian lawyers in advising clients" on matters pertaining to Indonesian law. [note: 481] In response, Nava Bharat claims that Indonesian law stipulates that only Indonesian citizens can be licensed to practice Indonesian law and it is "no more than a regulatory issue" that Carl had to work with licensed Indonesian lawyers in advising clients. [note: 482] I do not agree that a person cannot be an expert witness on the laws of a country simply because he is not qualified to practice as an advocate in that country. A professor of law who may not have been called to the bar, assuming the other prerequisites are met, would certainly be considered as an expert. I therefore do not accept Rajaram's contention that Carl is not an expert because he is not licensed as an Indonesian advocate.

175 In my view, the question turns on whether Carl is a person with specialised knowledge of Indonesian law, in relation to mining, "based on training, study or experience" (s 47(2) of the EA). I do not think that Nava Bharat is suggesting that Carl is an expert on Indonesian mining law because

of training or study. In particular, I note that Carl appears to have no *formal* training or study in Indonesian law except for a one-year exchange program at the Gadjah Mada University in Yogyakarta in the 1990s and more recently when he graduated with a Bachelor of Laws from Atma Jaya University in Jakarta in October 2012. [note: 483] No documents have been produced to show the core modules or electives that were taken. If this was the sole basis for Nava Bharat's claim that Carl is an expert in Indonesian mining law, then I would have no qualms about rejecting it. However, that is not the case. Nava Bharat contends primarily that Carl has acquired substantial experience and expertise in Indonesian mining law through his practice. [note: 484] I therefore turn to consider Carl's experience.

176 Nava Bharat's case is that Carl had a "varied international corporate practice" before joining Soewito Suhardiman Eddymurthy Kardono ("SSEK") in 2004, and "[s]ince then", he has been involved as a foreign adviser acting in the role of a "transactional lawyer with a significant practice in mining transactions". [note: 485] In other words, Carl would only have, at best, nine years of practice in relation to Indonesian mining law at the time when his report was prepared. This appears consistent with the curriculum vitae of Carl. [note: 486] While I accept that nine years appear to be a fairly short period of time, I do not think that it is determinative of the issue. It would also depend on the extent of Carl's practice in this period of time.

177 I do not doubt that Carl had advised on several mining transactions in Indonesia since 2004. It is, however, not his sole or primary area of practice. Indeed, his practice at SSEK is "fairly wide ranging" and "comprehensive", [note: 487] and it includes mining, mergers and acquisitions, bank and project financing, litigation, competition law and compliance advice. [note: 488] Carl purports to be an expert in mining transactions because he had "done a larger proportion of [his] practice in mining than others". [note: 489] Yet, out of the 35 items that Carl has described as "indicative representations" of his practice at SSEK, only 11 related to mining. [note: 490] Nava Bharat contends that it is not a "numbers game", [note: 491] and that the nature and extent of the involvement would make a difference. [note: 492] Nava Bharat says that Carl was involved substantively in advising on Indonesian mining transaction which is "*prima facie* evidence that he was competent and experienced enough *to give opinion on such a transaction*" [emphasis added]. [note: 493] It is apparent that Nava Bharat is focused on whether Carl is sufficiently competent to advise on a mining transaction. This is an unfortunate consequence of the misconception as to Carl's role in these proceedings. In my view, the mere fact that a lawyer is capable of advising on mining transactions in Indonesia does not translate to mean that he is an expert on Indonesian mining law. In any case, no evidence has been adduced as to the nature and extent of Carl's involvement in those matters concerning Indonesian mining law. In this regard, Carl's evidence was that he would *always* have to advise together with his Indonesian colleagues. [note: 494] The same applies for the expert report. [note: 495] Carl says that he works with Indonesian counsel because he cannot advise alone for "only citizens of Indonesia may be admitted to practice law in Indonesia". [note: 496] However, that does not address my concern which is that there is no way to ascertain the nature and extent of Carl's involvement in those matters. Carl had not said that his Indonesian colleagues were merely placed on the files so as to allow him to skirt around the restrictions, and I do not think that it is fair to draw such an inference.

178 I note that Carl had gone through the Bachelor of Laws programme between 2004 and 2012. [note: 497] This suggests that he did not have the requisite expertise in Indonesian law, at least in the first few years when he first started at SSEK.

179 Carl, in his affidavit, also pointed out that he has been acknowledged by several "prestigious

industry publications" as "a leading foreign lawyer in Indonesia". [note: 498] More specifically, Carl said that he had been "cited for both corporate M&A transactions and projects & natural resources transaction (which also includes mining)". [note: 499] I note that Carl was described by Chambers and Partners, around early 2013, as follows: [note: 500]

> Michael Carl has been particularly active *in the past year*, with highlights including advising Intrepid Mines on its joint venture regarding an East Javan gold mine. [emphasis added]

Upon closer scrutiny, and apart from the sole mention in relation to Intrepid Mines which occurred very shortly before the present proceedings, it appears that Carl has *not* been specifically recognised for his expertise in mining law. Instead, he was acknowledged for other areas of law, such as telecommunications, securities and debt restructuring. [note: 501]

180 Accordingly, I find that, on the evidence before me, Nava Bharat had not shown that Carl is an expert on Indonesian mining law for the purpose of s 47 of the EA.

(3) Matters not pleaded

181 Apart from the above, Rajaram also argues that a substantial part of Carl's report relates to matters that were not pleaded. [note: 502] Specifically, Rajaram objects to sections 7, 10 and 11.1(g) of the expert report where Carl dealt with the adequacy of the structure for the Transaction as set out in the Master Agreement. [note: 503] Rajaram claims that these constitute new arguments that took him by surprise at trial. [note: 504]

182 By way of background, Nava Bharat had on 11 April 2013 applied to amend its statement of claim to, *inter alia*, include the alleged failure of Rajaram to properly advise it on how the Transaction should be structured to best protect its interests. This was eight days after Nava Bharat filed Carl's AEIC attaching his expert report, and 11 days before the start of the first tranche of the hearing. I disallowed the proposed amendments in relation to the alleged failure to advise on structure on 12 April 2013. In the middle of the trial, on 16 January 2014, Nava Bharat again attempted to introduce the allegation by an amendment to the statement of claim. Again, I disallowed the proposed amendments in relation to the alleged failure to advise on structure on 30 April 2014.

183 It is trite law that parties are not permitted to rely on facts which have not been pleaded: *The "Ohm Mariana" ex "Peony"* [1993] 2 SLR(R) 113 at [49]–[54]; *PT Jaya Sumpiles Indonesia and another v Kristle Trading Ltd and another appeal* [2009] 3 SLR(R) 689 at [30]. The rationale behind the rule is the need to ensure, in the interest of fairness, that parties to a dispute are informed of the case that they have to meet and are not caught by surprise. In *Sheagar s/o T M Veloo v Belfield International (Hong Kong) Ltd* [2014] 3 SLR 524, the Court of Appeal said at [94] that:

> We did not agree with Ms Foo's suggestion that she was at liberty to depart from her pleaded case. In an adversarial system such as ours, the general rule is that the parties, and for that matter the court, are bound by the pleadings: *Hadmor Productions Ltd v Hamilton* [1983] 1 AC 191 at 233. *The pleadings serve the important function of upholding the rules of natural justice. They require a party to give his opponent notice of the case he has to meet to avoid his opponent being taken by surprise at trial. They also define the matters to be decided by the court*. [emphasis added]

184 In *Singapore Civil Procedure 2015* vol I (G P Selvam gen ed) (Sweet and Maxwell, 2015) ("*Singapore Civil Procedure 2015*") at para 18/7/12, the learned editor pointed out that:

> It is essential that a pleading, if it is not to be embarrassing, should state those facts which will put those against whom it is directed on their guard, and tell them what is the case which they will have to meet ... Further, each party must plead all the material facts on which he means to rely at the trial, otherwise he is not entitled to give any evidence of them at the trial. ... Where the evidence at the trial establishes facts different from those pleaded, *e.g.* by the plaintiff as constituting negligence, which are not just a variation, modification or development of what has been alleged but which constitute a radical departure from the case as pleaded, the action will be dismissed. ...

185 Further, the learned editor said at para 18/12/30 that:

> Particulars must always be given in the pleading, showing in what respects the defendant was negligent. The statement of claim "ought to state the facts, upon which the supposed duty is founded, and the duty to the plaintiff with the breach of which the defendant is charged" (*per* Willes J. in *Gautret v Egerton* (1867) L.R. 2 C.P. 371, cited with approval by Lord Alverstone C.J. in *West Rand Central Gold Mining Co. v. R.* [1905] 2 K.B. 391 at 400; *The Kanawha* (1913) 108 L.T. 433). Then should follow an allegation of the precise breach of that duty, of which the plaintiff complains, and lastly, particulars of the injury and damage sustained.

186 The question before me now is whether the alleged failure of Rajaram to advise on the structure of the Transaction has been pleaded in the statement of claim.

187 Looking at the statement of claim, I do not think that the alleged failure to advise on structure has been specifically pleaded. It is most telling that Nava Bharat had listed down 14 alleged breaches by Rajaram, [note: 505] but failed to include the allegation that Rajaram had failed to properly advise on the structure of the Transaction. Accordingly, I find that Nava Bharat should not be allowed to adduce evidence to prove Rajaram's alleged failure to advise on the structure of the Transaction.

(4) Standards expected of expert witness

188 Rajaram contends, as an alternative basis, that no weight should be given to Carl's evidence as he has failed to comply with the standards expected of an independent expert witness. This objection comprises of three points, namely:

> (a) Carl's report did not comply with the provisions stipulated in the Rules of Court (Cap 322, R 5, 2006 Rev Ed).
>
> (b) Carl did not understand the role that he was supposed to play as an expert witness in these proceedings.
>
> (c) Carl is biased and evasive when being cross-examined, and is not an independent expert witness.

189 I have dealt with the second point above (see [161]–[168] above) and I will deal with the remaining two points below.

(a) Requirements of expert evidence

190 Order 40A r 3(2) of the Rules of Court states that an expert's report must, *inter alia*, "give details of any literature or other material which the expert witness has relied on in making the report"

and "contain a statement setting out the issues which he has been asked to consider and the basis upon which the evidence was given". Specifically, the Court of Appeal in *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 ("*Pacific Recreation*") considered at [74]–[75] that:

> 74 It is a requirement under O 40A r 3(2)(*c*) of the Rules that the expert's report contains "a statement setting out the issues which he has been asked to consider and the basis upon which the evidence was given". Form 58 [of the Subordinate Courts Practice Direction (2006 Ed)] fleshes out the details that should be provided, as follows:
>
> (a) the complete instructions which were given to the expert;
>
> (b) a statement of facts leading to the expert's opinion;
>
> (c) the facts known by the expert to be true;
>
> (d) the facts which the expert was instructed to assume; and
>
> (e) the facts which the expert had assumed.
>
> 75 If these details are not present in the expert's report, the court is entitled to reject the opinion (see, for instance, *[Ong Jane Rebecca v Lim Lie Hoa [2003] SGHC 126 at [39]–[43]]*. It should be evident from the requirements of Form 58 that the party engaging the expert itself needs to be crystal clear about its instructions; in particular, solicitors should pay special attention to the proper categorisation of "true" and "assumed" facts.

191 The requirements set out in O 40A r 3(2) of the Rules of Court are important as they inform the court of the materials consulted by the expert and enable the court to meaningfully evaluate the expert's opinion. Thus, the Court of Appeal in *Pacific Recreation* observed at [65] that the requirements under O 40A r 3(2) are mandatory except where the court directs otherwise.

192 Here, Carl did not, in his AEIC or report, set out the documents that he reviewed, [note: 506] or the oral instructions that he received from Nava Bharat. [note: 507] Carl referred repeatedly in his report to "the Documents" but did not identify what constitutes them. [note: 508] In my view, the factual basis for Carl's opinion is unclear. One clear example would be the use of the phrase "international or Singapore counsel" in the expert report. At the hearing, Carl said that the use of the phrase was something that he inferred: [note: 509]

> Q: So you were told that Rajaram was the counsel for Nava Bharat, is that right? And then you [looked] at the rest of the documents and you drew this inference; is that right?
>
> A: The use of the exact phrase "international or Singapore counsel", yes, that is what I infer. Raja roles [*sic*] as a counsel, however, was told to me, was conveyed to me as a fact.
>
> Q: That Mr Rajaram was the counsel for Nava Bharat?
>
> A: Correct, that part was conveyed to me. The exact phrasing, and my apologies, I didn't realise -- this is the first time I have been on the stand, I didn't realise the exact language would be put to this level of scrutiny -- but the phrasing "international or Singapore" is of my own device.

193 However, as I have alluded to earlier, the use of the phrase "international or Singapore counsel" is inconsistent with Ashwin's email to Bill where he introduced Rajaram simply as Nava Bharat's "Singapore legal counsel" (see [103] above). As Carl had not indicated the documents that he had reviewed for his report, it is unclear if he had taken the email into consideration.

194 With no knowledge of the documents that Carl had reviewed, the instructions that he was given, and the facts which he had assumed, it would be impossible to assess the reliability of his opinion. The failure to set out the documents that he has reviewed, among others, is significant given that Carl had made certain conclusions "[b]ased on the Documents". [note: 510] In fact, Carl admitted that the quality of his opinion is affected by the documents that he had reviewed. [note: 511] Accordingly, I would reject Carl's expert report on the basis that it had failed to comply with the requirements under O 40A r 3(2) of the Rules of Court.

(b) Lack of independence

195 Rajaram also contends that, as a result of the confusion over Carl's role in the present proceedings, he had displayed signs that would suggest his lack of independence. Specifically, Carl was said to be biased and evasive in his oral testimony.

196 In *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd and another* [2007] SGHC 50 at [207], Lai Siu Chiu J set out some guidelines that are applicable when an expert witness exhibits a lack of independence, including:

> (a) an allegation of lack of independence goes to weight and not admissibility of the evidence; and
>
> (b) where there is a lack of independence or the potential for it, the court has to evaluate the expert's evidence with care and to accept any conflicting opinion only if it is "reasonable, measured and backed by authority".

197 The courts will not hesitate, in an appropriate case, to disregard or even draw an adverse inference against expert evidence that "exceeds the judicially determined boundaries of coherence, rationality and impartiality": *JSI Shipping (S) Pte Ltd v Teofoongwonglcloong (a firm)* [2007] 4 SLR(R) 460 ("*JSI Shipping*") at [63].

198 What then constitutes partiality? The cases below offer some illustration. In *Pacific Recreation*, the Court of Appeal made observations at [71] on the examples of partiality in the case of *JSI Shipping*:

> Examples of partiality in an expert's evidence can be found in *JSI Shipping (S) Pte Ltd v Teofoongwonglcloong* [2007] 4 SLR(R) 460 at [58]-[62], where this court commented (at [58]) that the expert evidence for both sides was "rather partisan". The respondent's expert in that case made "sweeping generalisation[s] redolent of a predisposition to shore up the respondent's stance" (at [59]), leapt to baseless conclusions adverse to the other party and left out crucial portions of a quotation which cast an entirely different light on the materials which he reproduced. ...

199 To further illustrate the point, I find it useful to refer to Lai J's decision in *Wong Meng Cheong and another v Ling Ai Wah and another* [2012] 1 SLR 549 at [63], where she said:

> ... I found that both of the plaintiffs' experts did display instances of partiality to the plaintiffs'

case. They were selective in the presentation of the relevant medical evidence as they had highlighted only material which supported the plaintiffs' case and omitted to mention matters adverse to it.

200 In the present case, Rajaram identified three aspects in which Carl has displayed signs of partiality. The first is Carl's use of the label "international counsel", which implies a broader scope of duties, to describe Rajaram in his report even when there were no documents that have actually described Rajaram as such. [note: 512] While Carl started with using the phrase "Singapore or international counsel", [note: 513] he eventually decided go with "international counsel" when he was discussing on the role of Rajaram in the Transaction. [note: 514] Secondly, Carl refused to provide a straightforward answer to a simple question as to whether it would be easier for Nava Bharat to seek repayment of the funds if it was structured as a loan as opposed to an outright payment. [note: 515] This was notwithstanding that he had, in his own expert report, stated that: [note: 516]

> ... the use of a loan rather than an outright payment provided a potential advantage in that Nava Bharat would have a clearer right to seek repayment of the funds if the Transaction did not succeed on the terms eventually agreed in final documentation. ...

201 Rajaram suggests that this was because Carl did not want to give an answer which he knew would benefit Rajaram's case. [note: 517] Thirdly, Carl refused to provide a straight answer to a simple question about whether the share pledges offered a layer of protection for Nava Bharat. [note: 518] He initially refused to agree, [note: 519] and even went so far as to consider that the share pledges had no protective value, [note: 520] but eventually conceded that "the structure is better with the share pledge than without the share pledge". [note: 521] Again, Rajaram claims that this was because Carl did not want to give an answer which he knew would benefit Rajaram's case. [note: 522] Based on these points, Rajaram contends that Carl is not an independent expert witness and his evidence should therefore be discounted. [note: 523]

202 I agree that Carl had displayed signs of partiality both in his expert report and in the course of the hearing. Apart from the three points that were raised by Rajaram, I also notice that Carl had taken the liberty to raise points in his report even though they did not turn on Indonesian law. The first relates to Carl's view that Nava Bharat relied on Rajaram to represent and protect its interests in the Transaction. [note: 524] This was a conclusion that did not turn on Indonesian law. Notwithstanding that, Carl was willing to discuss it substantially in his expert report. The second concerns a point of Singapore law. Carl had expressly stated in his report that he would not deal with matters of Singapore law. [note: 525] He was not qualified to do so. Notwithstanding that, he went on to discuss the adequacy of SLP's Advice on Structure which was based on Singapore law. [note: 526] This is clearly beyond his role as an expert witness, and he was aware of it. He therefore framed it in the manner of a cursory remark. However, I do not think that it can mask the obvious point, that is, Carl went out of his way in an attempt to advance Nava Bharat's case. I also find that Carl had taken a defensive stance at the hearing, and was less than forthcoming with his answers, when it was one that might be adverse to Nava Bharat's case, even though the questions were fairly straightforward. I would therefore give little weight to the evidence of Carl.

Dipesh Kumar Dipu

203 Dipesh Kumar Dipu ("Dipu") is Nava Bharat's expert witness on the issue of the quantum of the

alleged losses suffered by Nava Bharat. He is the founding partner of Jenissi Management Consultants, an energy and resource industry-focused consulting firm that advises clients on transformation, transaction and strategic issues. [note: 527]

204 It was revealed at the hearing that Dipu had failed to disclose information with regard to his connections with Ashwin, Nava Bharat and NBVL. Dipu was the chief executive officer ("CEO") of Maamba Collieries Limited ("Maamba"), the largest coal-mining company in Zambia, from February to July 2010. [note: 528] However, he failed to disclose that Maamba was 65% owned by Nava Bharat and, as CEO of Maamba, he reported to Ashwin and Prasad. [note: 529] He explained that he had disclosed that he was the CEO of Maamba and therefore it was not necessary to specify that he used to report to Ashwin. [note: 530] I find the explanation to be unsatisfactory.

205 Furthermore, Dipu was named in NBVL's annual report of 2009/2010 as the vice president (mining projects) of NBVL. [note: 531] This was not disclosed in his curriculum vitae attached to his AEIC. However, he explains that his appointment in NBVL was simply a matter of administrative convenience. [note: 532] Since it was "not really an employment", he did not think it was right to include it in his curriculum vitae. [note: 533] However, if that were true, then it does not really cohere with the fact that he had included his position as vice president (mining projects) of NBVL in his curriculum vitae uploaded on a website called LinkedIn. [note: 534] Dipu sought to explain the difference between the curriculum vitae attached to his AEIC and the curriculum vitae uploaded on LinkedIn on the basis of the need to be "factually correct" for the "purpose of the court", [note: 535] but I have my doubts with regard to his explanation. Indeed, Dipu accepted that he could have stated in his curriculum vitae attached to his AEIC that he was the vice president (mining projects) of NBVL but only as a matter of administrative convenience. [note: 536]

206 In my view, the circumstances taken as a whole would suggest that Dipu was not being completely forthright about his connections with Ashwin, Nava Bharat and NBVL.

Ken Pendergast

207 Ken Pendergast is the expert witness for Rajaram, SLP and Chandra on the issue of quantum of alleged losses suffered by Nava Bharat. He is a partner with the transaction advisory services practice of Ernst & Young and lead the valuations and business modelling sub-service line in the Perth office. His evidence pertains to the assessment of the loss and damage allegedly suffered by Nava Bharat. [note: 537] I find him to be a generally good witness.

Issues

208 A number of issues arise for determination in this case. In S 846/2011, the issues are as follows:

(a) Whether SLP and Rajaram owed concurrent duties in contract and in tort to Nava Bharat.

(b) Whether the scope of the duty owed by SLP and Rajaram to Nava Bharat includes advising on Indonesian law and commercial matters.

(c) Whether SLP and Rajaram had breached the duty owed to Nava Bharat.

(d) Whether the alleged breach of duty by SLP and Rajaram caused the alleged losses suffered by Nava Bharat.

(e) Whether SLP and Rajaram had breached the fiduciary duty to Nava Bharat in failing to disclose Rajaram's relationship with Chandra.

209 In S 847/2011, the issues are as follows:

(a) Whether Chandra was involved with Jason Tan and Dicky Tan in a conspiracy to defraud Nava Bharat.

(b) Whether Chandra owed a duty of care to Nava Bharat.

(c) Whether the alleged breaches by Chandra caused the alleged losses suffered by Nava Bharat.

(d) Whether Chandra ought to have disclosed his relationship with Rajaram to Nava Bharat.

210 I will deal first with the issues in S 846/2011 and then with those in S 847/2011.

Claim against SLP and Rajaram for breach of contract and negligence

Duties in contract and in tort

Concurrent duties in contract and in tort

211 The starting point is that a solicitor may, and would more often than not, owe to his client concurrent duties in tort and in contract. This is the position in Singapore (see, *eg*, *Chew Kim Kee v Kertar and Co* [2004] SGHC 95 ("*Chew Kim Kee*") at [15]; *Su Ah Tee* at [72]) as well as other jurisdictions such as England, Australia and Canada (see *Jackson & Powell on Professional Liability* (John Powell QC, Roger Stewart QC, Sir Rupert Jackson gen eds) (Sweet & Maxwell, 7th Ed, 2012) ("*Jackson & Powell*") at paras 11-014 and 11-015). The rationale, as observed by Oliver J in *Midland Bank* at 411 and accepted by Lord Goff of Chieveley in *Henderson and others v Merrett Syndicates Ltd and others* [1995] 2 AC 145 at 193C, is that the assumption of responsibility, together with its concomitant reliance, would often be found in a contractual context and, subject to any exclusion by the contract, that would be sufficient to give rise to a tortious duty. Likewise, Belinda Ang Saw Ean J in *Chew Kim Kee* at [15] accepted that a relationship of proximity brought about by a retainer may be sufficient to give rise to a duty of care in negligence. It is also accepted in Singapore that a tortious duty may co-exist with a contractual duty, to the extent that the contract does not limit or exclude the tortious duty: *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559 ("*Go Dante Yap*") at [20]. This is subject to any countervailing policy considerations that might militate against the imposition of a duty of care: *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*") at [83].

212 In my view, there is no doubt that Rajaram owes concurrent duties to his client, Nava Bharat, in contract and in tort. Rajaram had entered into a solicitor-client relationship with Nava Bharat and this is evinced by, *inter alia*, the email from Rajaram to Ashwin dated 6 October 2008 which sets out Rajaram's scope of work for the Transaction. The relationship arising out of the retainer, which reflects the twin criteria of voluntary assumption of responsibility and reliance, satisfies the proximity limb of the *Spandeck* test (see *Spandeck* at [81]). There also appears to be no policy considerations which might operate to negate a duty of care between solicitor and client. Neither is there anything

in the retainer that might limit or exclude the tortious duty. The real issue lies with the scope of the duties.

Scope of the duties

213 The scope of a solicitor's duty, in contract and in tort would depend on the circumstances of the case. The duty must relate to the work undertaken by the solicitor. As such, a key step in the inquiry would be to examine the retainer with the client. In *Anwar Patrick Adrian and another v Ng Chong & Hue LLC and another* [2014] 3 SLR 761 ("*Anwar*") at [122], the Court of Appeal observed that the scope of the solicitor's *contractual* duties to his client is "informed by the terms of the retainer" and the retainer, in turn, must be "defined by reference to what the solicitor is instructed to do by the client and how he is expected to discharge his responsibilities in accordance with the notion of a reasonably competent solicitor" (citing V K Rajah JC (in *Lie Hendri Rusli v Wong Tan & Molly Lim (a firm)* [2004] 4 SLR(R) 594 ("*Lie Hendri*") at [45]). I should add that *Anwar* concerned the solicitor's tortious duty to a third party, and the observation was made in light of the Court of Appeal's view that the scope of the tortious duty owed by a solicitor to a third party must, in the absence of a retainer, necessarily be ascertained by reference to the duty of care which the solicitor owes to the client itself (at [119]–[120]). Following the footsteps of *Anwar*, Chan Seng Onn J in *AEL and others v Cheo Yeoh & Associates LLC and another* [2014] 3 SLR 1231 ("*AEL*") (no appeal against decision on negligence; see *Cheo Yeoh & Associates LLC and another v AEL and others* [2015] SGCA 26 at [12] and [14]), at [32]–[33], accepted that the scope of a solicitor's *tortious* duty would also have to be determined by reference to the scope of the retainer with his client. In addition, Chan J considered at [39] that the contents of the invoice rendered by the solicitor can be helpful in determining the scope of the retainer.

214 It is not uncommon for Singapore courts to treat a solicitor's duty in contract and in tort as not only concurrent but also co-extensive in scope: see, *eg*, *Chew Kim Kee* at [15]; *Su Ah Tee* at [72]. Nevertheless, it would ultimately depend on the facts of each case. Where a solicitor undertakes work beyond the scope set out in the retainer, then the duty of care in tort might be broader than the contractual obligation to exercise reasonable care and skill. As the learned editors of *Jackson & Powell* explain at paras 2-117 to 2-119:

> (iv) *The Scope of the Concurrent Duty*
>
> The tortious duty arises from the relationship between the parties and the function which the professional person/firm is performing. ... Although concurrent, these duties are not necessarily co-extensive. ...
>
> (v) *Can the Concurrent Duty in Tort be More Extensive than the Contractual Obligations?*
>
> As a matter of principle, if the contract of retainer governs the whole of the parties' relationship, the answer should be no. If, however, the contract governs only part of the parties' dealings, in other aspects of the parties' mutual activities there may be a tortious duty of care but no parallel contractual obligation. ... In any particular case, it will be important to establish whether the professional in effect undertook some further task or gave some advice beyond that which he had contracted to give.
>
> (vi) *Further Significance of the Contract*

> Absent some act or advice beyond the scope of his contract, it is in the contract between the professional and his client that the extent of his tortious duty will be found. His tortious duty of care will be no greater in scope than the implied contractual promise to exercise reasonable skill and care. Moreover, the contract can have greater significance: by defining what the professional is to do, it may explain the scope of his responsibility and the extent to which responsibility or risk is to rest with his client or is to be borne by others.

215 In the present case, the parties have proceeded on the basis that Nava Bharat's claims in contract and in tort overlapped completely. In particular, Nava Bharat takes the position that the concurrent duties in contract and in tort are co-extensive. [note: 538] The parties agree that the duty would be in relation to Rajaram's scope of work for the Transaction set out in his email to Ashwin dated 6 October 2008. [note: 539] The relevant part of the email states: [note: 540]

> The scope of work will be:
>
> 1 We represent your interest in the negotiation, drafting and execution of the Sale and Purchase Agreement, Joint Venture Agreements, Shareholder Agreements, Leasing Agreement in respect of the Lease and all other Agreements and documentation required to complete the matter;
>
> 2 We put into place the required corporate vehicle to facilitate the transaction;
>
> 3 We liaise with the Indonesian counsel on the legal due diligence;
>
> 4 We liaise with Stanchart's lawyers on the loan and security documentation.

216 In addition, the invoice issued by SLP on 19 February 2009 states that: [note: 541]

> To our professional charges for services rendered in connection with the above mentioned matter, including :-
>
> Our costs for preparing, drafting and engrossing the following document[s]:
>
> 1. Shareholders Agreement;
>
> 2. Nava Bharat Offtake Agreement;
>
> 3. HC Offtake Agreement;
>
> 4. Nava Bharat Loan Agreement;
>
> 5. HC Loan Agreement;
>
> 6. Power of Attorney to Mohana Sundaram Paranjothy; and
>
> 7. Legal Opinion.
>
> Reviewing and providing inputs for the following document[s]:
>
> 8. Master Agreement;

9. DT Loan Agreement;

10. Pledge of Share[s] (Dicky Tan & Ridwan Halim);

11. Power of Attorney to Vote (Dicky Tan & Ridwan Halim);

12. Power of Attorney to Sell (Dicky Tan & Ridwan Halim);

13. Guarantee by Dicky Tan;

14. Guarantee by Saraburi Resources Pte Ltd;

15. Mine Operation Services Agreement;

16. Option To Purchase Shares Agreement; and

17. Spousal Consent

All other work done in connection therewith.

217 Nava Bharat contends that Rajaram was supposed to "do everything", [note: 542] including advising on matters involving Indonesian law as well as the commercial risks and implications of entering, continuing and/or completing the Transaction. [note: 543] As such, Rajaram would owe Nava Bharat a duty to ensure that the due diligence exercise, especially for the Forestry Licence, was properly done, and to advise on the structure of the Transaction. [note: 544] Rajaram, on the other hand, takes the view that he owes no duty to advise on the structure of the Transaction (because, *inter alia*, it involves Indonesian law) or to provide commercial advice. [note: 545] At this juncture, I note that counsel have sought to frame Rajaram's duties in some detail, and in this respect, I appreciate that the Court of Appeal in *Go Dante Yap* at [19]–[20] had cautioned against the framing of a duty narrowly to reflect the specific act or omission in question such as to render the question of breach nugatory.

218 At the end of the day, the scope of the duty must be determined with reference to the work undertaken by Rajaram (see [213] above). The key question, therefore, must be: what is the work undertaken by Rajaram in relation to the Transaction, with regard to the retainer between him and Nava Bharat and the circumstances of the case.

219 The scope of a solicitor's duty cannot be viewed in isolation, and must be considered in the context of the particular characteristics of the client. The courts have routinely observed that there is a distinction between the scope of duty owed to a sophisticated businessman and the proverbial layperson. In *Satinder Singh Garcha v Uthayasurian Sidambaram and another* [2009] SGHC 240 ("*Satinder Singh*") at [92], Quentin Loh JC held that:

> [A lawyer's duty to his client] is a duty that is not helpful to describe in the abstract and it may vary depending on the characteristics of the client. A youthful client, unversed in business affairs, might need explanation and advice from his solicitor before entering into a commercial transaction that would be pointless or even impertinent if given to an experienced businessman.

Likewise, Rajah JC in *Lie Hendri* at [55] held that:

> There is obviously an appreciable difference between the level of explanation and circumspection required in dealing with a sophisticated or shrewd businessman as compared with the proverbial layman. It might be said that an impoverished explanation to a client with an impoverished knowledge about worldly matters may in itself be evidence of negligence. This is to be contrasted with the situation of the sophisticated or shrewd businessman who can usually be assumed to have a measure of knowledge pertaining to the purpose and purport of legal documentation coupled with an innate ability to quickly size up and grasp the gist of his responsibilities. Donaldson LJ (as he then was) accurately observed in *Carradine Properties Ltd v D J Freeman & Co* (1982) 126 SJ 157; [1982] CA Transcript 8260, in relation to the solicitor's duty of care to his client that:
>
> > [T]he precise scope of that duty will depend inter alia upon the extent to which the client appears to need advice. An inexperienced client will need and will be entitled to expect the solicitor to take a much broader view of the scope of his retainer and of his duties than will be the case with an experienced client.
>
> The crux of the matter is that it can usually be assumed that a businessman will not hesitate in raising queries to resolve any doubts. Language will seldom be an issue with such individuals; by dint of their business background they will employ the necessary measures or take steps to ensure they have a grasp of any responsibilities they are undertaking.

220 I agree that, for the purpose of ascertaining the proper scope of duty owed by the lawyer to his client, a distinction ought to be drawn between a sophisticated businessman and the proverbial layperson. The law should not require a lawyer to do what is plainly redundant; to do so would benefit neither the lawyer nor the client. However, it is important to bear in mind the cautionary remarks of V K Rajah JA in *Law Society of Singapore v Uthayasurian Sidambaram* [2009] 4 SLR(R) 674 at [79] that the duty to advise remains even when dealing with a sophisticated businessman:

> The second point that merited consideration was that the complainant is certainly not the proverbial layman but a sophisticated businessman with some measure of knowledge. As discussed previously … where the client is *inexperienced*, the scope of the solicitor's duty will naturally *broaden* as he will require and expect the solicitor to take a much broader perspective. The scope of the duty of the solicitor depends on the *extent* to which the client appears to need advice: *Carradine Properties Ltd v D J Freeman & Co* (1982) 126 SJ 157 ("*Carradine*") at 158. In *Carradine*, the solicitor successfully demonstrated at trial that his client did not require him to advise upon the importance of checking the scope of his insurance coverage. We agreed broadly with the proposition of the English Court of Appeal in *Carradine*, except to emphasise that ***solicitors should not rely on this to shirk their responsibilities even when dealing with a sophisticated client - the duty to advise the client still remains and the sole difference lies in deftly tailoring the advice to best suit the needs (and abilities) of the individual*** . … [emphasis in italics in original, emphasis in bold italics added]

The law is clear, as Ang J puts it in *Su Ah Tee* at [89], that even an experienced client would still require some information and advice.

221 In the present case, I find that Ashwin, as the representative of Nava Bharat, is commercially savvy and well-versed in the ways of business who would not hesitate in raising queries to resolve any doubts. One example would be his email to Rajaram on 23 December 2008 (see [35] above). Rajaram's evidence is that Ashwin is an intelligent man [note: 546] and this is borne out from the latter's performance before me on the witness stand. In addition, Ashwin had a business team in Indonesia, headed by Bob Sundaram who has experience in the coal procurement and power

generation industry, [note: 547] to advise him (see, *eg*, [33], [42], [71]–[72], [90], [95] and [125] above). Ashwin had also earlier dealt with the acquisition of the KP Concessions in the Multi Guna Transaction (see [8] above) which, although it did not require a forestry licence or encounter issues with the new mining law, would have given him some idea as to what takes place in similar transactions. He would no doubt have gained something from it. All in all, I find that Rajaram's scope of duty owed to Nava Bharat would be narrower than that owed to the proverbial layperson.

222 In addition, I find that Rajaram had not undertaken to advise on matters involving Indonesian law or commercial matters under the retainer. Neither has Rajaram held himself out, over and above the scope of work under the retainer, to do so. It follows that the duty owed by Rajaram to Nava Bharat would not extend to cover any advice on Indonesian law or commercial aspects of the Transaction. Let me elaborate.

(1) Advice on Indonesian law

223 I begin with the issue of whether Rajaram had undertaken to advise Nava Bharat on the Indonesian law aspects of the Transaction.

(a) Case law

224 Nava Bharat contends that where a Singapore lawyer is involved in a cross-border transaction with both Singapore and foreign law components, he is obliged to determine and advise on the impact of the foreign law on the transaction. [note: 548] In support of its contention, Nava Bharat cites the case of *Elinoil-Hellenic Petroleum Co SA v Wee Ramayah & Partners* [1999] 1 SLR(R) 977 ("*Elinoil-Hellenic*"), [note: 549] and refers in particular to [61], which reads:

> Fifth, in their defence WRP also relied upon the fact that they were advising a professional client, namely, SLO. I am afraid I do not think it right for WRP to try to shift the blame to SLO, the Greek lawyers of Elinoil. On the evidence before me, the Greek position and the Singapore position are different. Mr Papadopoulos (PW1) was asked about a diploma course in shipping law which he had undergone at the University of London some 26 years ago. In my view, WRP cannot shift their responsibility as a Singapore solicitor to SLO merely because PW1 had 26 years ago received some training in shipping law in England. How could he be expected to know the position prevailing in Singapore? From the questions which PW1 asked of WRP, he was clearly unfamiliar. *The matter in hand involved shipping law and practice here. It is incumbent upon a Singapore solicitor to advise his foreign clients, whether professional or otherwise, on all relevant aspects relating to the retainer which, in this case, was to secure Elinoil's claim*. [emphasis added]

225 I do not agree that *Elinoil-Hellenic* stands for the proposition that Nava Bharat seeks to advance. At [61], Chao Hick Tin J merely held that a Singapore lawyer cannot rely on the fact that his client is a foreign lawyer as a defence where the Singapore lawyer was negligent in providing advice on Singapore law. More generally, I do not think that *Elinoil-Hellenic* addressed the question of whether a Singapore lawyer is obliged to provide advice on foreign law even though he may not be qualified to do so. Nava Bharat's reliance on *Elinoil-Hellenic* is, therefore, misconceived.

226 Nava Bharat also cites the English case of *Gregory v Shepherds (a firm)* [2000] PNLR 769 ("*Gregory*") to support its proposition that Rajaram's obligations to Nava Bharat extend to cover advice on Indonesian law even though Rajaram may not be qualified to practice Indonesian law. [note: 550] In *Gregory*, the plaintiffs wanted to buy a property in Spain. They instructed the defendants, who were English solicitors, to act for them. On the defendants' recommendation, a Spanish lawyer

was instructed to carry out searches on prior encumbrances on the property. He failed to do so. As a result, the plaintiffs suffered loss. The English Court of Appeal found that the English solicitors had "held themselves out as having a Spanish conveyancing service" (at [29]) and were therefore obliged to confirm that the searches that they had instructed the Spanish lawyer to carry out had been satisfactorily completed before paying over the purchase money to the seller.

227 However, *Gregory* can be distinguished from the present case. Rajaram had never represented that he was qualified to provide advice on Indonesian law. On the contrary, the facts show that Rajaram had made it clear to Nava Bharat that he was unable to do so. As stated earlier (see [24] above), Ashwin knew and accepted that Rajaram would be "obtaining the inputs of [ABNR] at all stages". Hence, *Gregory* does not help Nava Bharat's case in any way.

228 I do not think that there can be a general rule mandating that a lawyer who is involved in a cross-border transaction, with both Singapore and foreign law components, is obliged, in all cases, to advise on the impact of the foreign law on the transaction. Neither do I consider it accurate to say that a lawyer's obligations to his client would necessarily extend to cover the aspects of the transaction governed by foreign law even if he may not be qualified to do so. At the end of the day, the question of whether a lawyer has undertaken to advise on foreign law, either in his retainer or by his conduct, must be decided based on the circumstances of the case. In this regard, it would be pertinent to consider, *inter alia*, whether it was contemplated in the retainer that a foreign lawyer would be appointed to advice on the transaction, and if so, whether the lawyer nevertheless advised on foreign law.

229 I now proceed to consider the circumstances of the present case.

(b) Circumstances of the present case

230 Nava Bharat submits that Rajaram's email dated 6 October 2008 which sets out the scope of work undertaken in relation to the Transaction and the invoice dated 19 February 2009 do not confine Rajaram's work to Singapore law. [note: 551] According to Nava Bharat, Rajaram was required to "liaise with" ABNR on the legal due diligence, and this meant that Rajaram had to ensure that the legal due diligence was in order. [note: 552] In addition, Nava Bharat relies on the invoice to support its contention that Rajaram's scope of work included advising on Indonesian law. [note: 553] I do not agree with Nava Bharat's conclusion that Rajaram had undertaken to advise on Indonesian law for the following reasons.

231 Even though Rajaram's email dated 6 October 2008 states that he was to "represent [Nava Bharat's] interest in the negotiation, drafting and execution of ... all other Agreements and documentation required to complete the matter" [note: 554], it does not mean that Rajaram was required to advise on Indonesian law. It is pertinent that the scope of work set out in Rajaram's email clearly states that Indonesian lawyers would be appointed to carry out "legal due diligence". This can only mean that the parties had envisaged that ABNR, the Indonesian counsel in the present case, would advise on the aspects of the Transaction that involve Indonesian law. It naturally follows that Rajaram could not have been expected to advise on the same. In my view, Rajaram is only required to provide ABNR with the necessary instructions and information for it to conduct the "legal due diligence", and at the end of it, to convey the results to Nava Bharat. The use of the words "liaise with" certainly does not mean that Rajaram was supposed to engage personally in rendering legal advice on Indonesian law. This is underscored by the fact that Rajaram is not qualified to give such advice, and as a result, ABNR was appointed to advise on the Indonesian law aspects of the Transaction. While Ashwin claimed that Rajaram was supposed to "read [the advice from ABNR] and

flag issues", [note: 555] he agreed that Rajaram was not supposed to add or take away anything from ABNR's advice to Nava Bharat insofar as it involved with Indonesian law. [note: 556]

232 I will first address Nava Bharat's argument that Rajaram is not merely a "post-box" such that he is only required to convey ABNR's advice to Nava Bharat. [note: 557] Nava Bharat claims that Rajaram undertook to advise Nava Bharat on the Indonesian law aspects of the Transaction with input from ABNR and this is clear from the circumstances, namely: [note: 558]

(a) Rajaram appointed ABNR and decided on its scope of work; [note: 559]

(b) Rajaram's invoice to Nava Bharat included ABNR's professional fees

(c) there was no direct correspondence between Nava Bharat and ABNR. [note: 560]

233 Based on the evidence before me, I find that ABNR was appointed by Nava Bharat to act as its Indonesian lawyers for the Transaction. It was purely out of convenience that Nava Bharat chose to communicate with ABNR through Rajaram. This did not detract in any way from the fact that ABNR was engaged by Nava Bharat as its Indonesian lawyers for the purpose of the Transaction. While I appreciate that there may be cases where the lawyers (as opposed to clients) appoint foreign counsel to advise them on a foreign law component of a transaction, and those set of facts might potentially lead to a different outcome, this was not such a case. The facts leading up to the appointment of ABNR were undisputed. On Ashwin's request, Rajaram provided a list of five Indonesian law firms (see [19] above). Rajaram also told Ashwin that he could approach other Indonesian law firms. [note: 561] ABNR was selected and one of the reasons was because it was on the panel of lawyers for Standard Chartered Bank, the intended financier for the Transaction. [note: 562] Nava Bharat had not put forward, in its pleadings or through its witnesses' evidence, the point that ABNR were not its lawyers. On the contrary, Nava Bharat explicitly refers to ABNR as its Indonesian lawyers in its opening statement, [note: 563] Ashwin's affidavit filed in support of an interlocutory application for S 847/2011, [note: 564] Bob Sundaram's AEIC, [note: 565] as well as its statement of claim in both suits. [note: 566] This coheres with ABNR's understanding that Nava Bharat was its client. In ABNR's First Draft Report, it was stated explicitly that ABNR had been "requested by [Nava Bharat] to conduct a legal due diligence on [PTIC]" and the report was "prepared for Nava Bharat". [note: 567] Likewise, in the ABNR's Advice on Structure and the ABNR's Advice on Loan Agreement, it was stated that ABNR had "acted as the legal advisor in Indonesia to Nava Bharat (Singapore) Pte Ltd". [note: 568] While Ashwin stated categorically at the start that ABNR was "acting for [SLP] who engaged them", [note: 569] he subsequently accepted that ABNR was representing "the buyer", that is, Nava Bharat. [note: 570] I find that Ashwin was evasive and inconsistent in his evidence on the role of ABNR in the Transaction. He also sought to cast doubts on the solicitor-client relationship between Nava Bharat and ABNR by insisting that Nava Bharat had not paid ABNR's fees directly and that there was no direct communication between them (see [232(b)]–[232(c)] above). However, it cannot be disputed that Nava Bharat had reimbursed SLP for the fees paid to ABNR, [note: 571] and that emails from ABNR to Rajaram had been copied to Ashwin. [note: 572] As such, I do not agree with Nava Bharat that Rajaram had undertaken to advise on the Indonesian law aspects of the Transaction with input from ABNR. I find that Rajaram was required under the retainer to provide ABNR with the necessary instructions and information for it to conduct the "legal due diligence", and at the end of it, to convey the results to Nava Bharat. This was exactly what Rajaram had done.

234 Nava Bharat refers to the case of *Yeo Yoke Mui v Ng Liang Poh* [1999] 2 SLR(R) 701 for the proposition that it is not sufficient for a lawyer to merely pass documents to a client without advice. [note: 573] However, I do not think that the proposition can be extended to require a lawyer to advise on the legal opinion of the client's foreign lawyer. This is particularly so given that (a) Rajaram was not trained in Indonesian law and ABNR was engaged precisely for that reason, and (b) Ashwin is a smart individual who is capable of understanding the advice from ABNR and would, in any case, be more than capable of voicing his concerns with ABNR (either directly or through Rajaram) if he had any.

235 I should also address Nava Bharat's contention that Rajaram's work must commensurate with his fees. According to Nava Bharat, Rajaram's fees would indicate the extent of his duty and responsibility within his scope of work. [note: 574] Nava Bharat suggests that Rajaram's fees of S$100,000 (for the conduct of the Transaction up to initial completion, excluding ABNR's fees [note: 575]) were manifestly excessive if it did not include advising on ABNR's input but merely conveying the same. [note: 576] As such, Nava Bharat submits that Rajaram's scope of work must have included liaising with ABNR on the Indonesian law aspects of the Transaction *and* advising Nava Bharat on the same. [note: 577] I pause here to note that this appears inconsistent with Ashwin's evidence that Rajaram was not supposed to add or take away anything from ABNR's advice to Nava Bharat insofar as it involved with Indonesian law. [note: 578] I further note that Nava Bharat had not objected to Rajaram's fees when it received SLP's invoice for S$100,000. It appears to be an afterthought on the part of Nava Bharat. In any case, I do not think that Nava Bharat had shown that the fees would not commensurate with Rajaram's scope of work if it did not include advising on the Indonesian law aspects of the Transaction with ABNR's input. Even if that were to be the case (and I *do not* think it is), it does not necessarily lead to the conclusion that Rajaram's scope of work must have included advice on Indonesian law.

236 Furthermore, the invoice (reproduced above at [216]) does not say anything different from the scope of work set out in Rajaram's email dated 6 October 2008. I note that the invoice did not use the words "preparing" and "drafting" for the documents governed by Indonesian law, *eg*, the Loan Agreement between Dicky Tan and Nava Bharat. On the evidence, it was clear that the templates for the agreements governed by Indonesian law were drafted by ABNR. [note: 579] There is also nothing to suggest that Rajaram had undertaken to advise on Indonesian law or that he had actually done so. Contrary to Nava Bharat's submission, it was more likely that Rajaram was reviewing the documents to ensure that they do not run contrary to Nava Bharat's instructions as well as the agreements governed by Singapore law. This is supported by the contemporaneous evidence which shows that Rajaram had sought ABNR's advice on the aspects of the Transaction which involved Indonesian law (see [242] below).

237 At this juncture, it would be apposite for me to consider Nava Bharat's contention that Rajaram had advised on the Indonesian law aspects of the Transaction and therefore Rajaram's assertion that the scope of work did not cover Indonesian advice was simply a "fabrication". [note: 580] I understand Nava Bharat to mean that Rajaram's conduct shows that the scope of work set out in the email dated 6 October 2008 includes advising on Indonesian law (as opposed to Rajaram acting beyond the scope of work in the retainer (see [214] above)). [note: 581] This must follow from Nava Bharat's position that Rajaram's duties in contract and in tort are co-extensive (see [215] above). Put simply, Nava Bharat is saying that Rajaram's subsequent conduct revealed that the scope of work in the retainer includes advice on Indonesian law. However, Nava Bharat had not explained why it would be appropriate in this case to have regard to the subsequent conduct of Rajaram in the interpretation of

the terms of the retainer which is, in essence, a contract. This is similar to the case of *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193, where the Court of Appeal at [109] refused to allow the parties to use extrinsic evidence including subsequent conduct to justify their respective contentions as to the proper interpretation of the terms in the contract because the parties did not submit on "the precise nature or limits of the extrinsic evidence which they were relying on" and "whether or why [the Court of Appeal] should have recourse to such extrinsic evidence". In the same manner, I would reject Nava Bharat's attempt to rely on subsequent conduct to advance its contentions as to the scope of work in the retainer.

238 In any event, I find that Rajaram had not advised Nava Bharat on the Indonesian law aspects of the Transaction. In this respect, Rajaram had acted in accordance with the scope of work set out in his email dated 6 October 2008 (see [231] above). In its submissions, Nava Bharat highlighted several instances where Rajaram had allegedly advised Nava Bharat on Indonesian law, namely:

(a) Rajaram spoke with Ashwin on Indonesian law when they first met on 3 October 2008 (see [18] above); [note: 582]

(b) Rajaram's email to Ashwin on 15 October 2008 (see [24] above), after the Heads of Agreement was executed, mentioned that one of the agreements to be drafted was a nominee arrangement; [note: 583]

(c) Rajaram's opinion dated 7 November 2008 (see [29] above) allegedly included advice on Indonesian law; [note: 584]

(d) Rajaram prepared the SLP's Advice on Structure (see [55] above) which allegedly included advice on Indonesian law; [note: 585]

(e) Rajaram's involvement in the restructuring of the Transaction in light of the new mining law (see [37] above);

(f) Rajaram's email to Ashwin on 15 January 2009 (see [40] above) on the intended acquisition of the jetty facilities which is governed by Indonesian law; [note: 586]

(g) Rajaram's opinion on the Mine Operating Service Agreement which was governed by Indonesian law; [note: 587]

(h) Rajaram allegedly prepared the Loan Agreement and said that the loan should be given to Dicky Tan instead of PTIC (see [43]–[46] above); [note: 588]

(i) Rajaram suggested that certain amendments be made to the draft Coal Mining Agreement (see [59] above) which is governed by Indonesian law; [note: 589] and

(j) Rajaram advised on the Variation Agreement and the Addendum Agreement. [note: 590]

However, I do not think that they support Nava Bharat's contention.

239 The brief discussion between Rajaram and Ashwin during their first meeting on 3 October 2008 (see [238(a)] above), before Rajaram was appointed as Nava Bharat's counsel, was merely a "beauty parade" to impress, [note: 591] and would not in any way constitute a representation to Ashwin that

Rajaram would be advising Nava Bharat on Indonesian law if he was appointed. Ashwin understood this because he told Rajaram shortly thereafter, on 6 October 2008, that it was important to engage Indonesian counsel for the Transaction (see [19] above). This had led to the appointment of ABNR.

240 In addition, I do not agree that Rajaram could have advised Nava Bharat on the nominee arrangement (see [238(b)] above) given that it had been decided *before* Rajaram was appointed to act for Nava Bharat. [note: 592] All that Rajaram had done was merely to inform Ashwin that an agreement would be required to reflect the nominee arrangement which was previously agreed upon between Ashwin and Dicky Tan. Indeed, Rajaram could not have advised Nava Bharat *against* the use of a nominee arrangement since he was not qualified to do so (see [231] above).

241 As for Rajaram's opinion dated 7 November 2008 as well as the SLP's Advice on Structure (see [238(c)]–[238(d)] above), Rajaram was merely conveying the advice from ABNR to Nava Bharat. Rajaram stated in the opinion dated 7 November 2008 and the SLP's Advice on Structure that they were specifically restricted to Singapore law: [note: 593]

> This opinion is limited to Singapore law of general application at the date of this opinion as currently applied by the Singapore courts, and is given on the basis that it will be governed by and construed in accordance with Singapore law. We have made no investigation of, and do not express or imply any views on, the laws of any country other than Singapore.

This is consistent with the rest of the opinion, where Rajaram addressed issues concerning Indonesian law by either referring to ABNR's advice (which was attached to the SLP's Advice on Structure [note: 594]) or reiterating it. [note: 595] Apart from Nava Bharat's bald assertion, there was nothing to show that Rajaram did anything more. [note: 596] In any case, Ashwin knew that ABNR, and not Rajaram, was advising on the legality of the structure of the Transaction. [note: 597]

242 I also do not consider Rajaram to be advising on Indonesian law when he made certain proposals and suggestions which were subject to the advice and approval of ABNR. I do not see how, logically speaking, a proposal or suggestion that is *subject* to advice on Indonesian law can itself be an advice on Indonesian law. This would address Nava Bharat's allegations in relation to Rajaram's involvement on the restructuring of the Transaction in light of the new mining law (see [238(e)] above), [note: 598] and the intended acquisition of the jetty facilities (see [238(f)] above). [note: 599] Also, I do not think that it is accurate to say that Rajaram was advising on Indonesian law when he proposed certain amendments to the draft Coal Mining Agreement (see [238(i)] above). [note: 600] In particular, I note that the draft Coal Mining Agreement was subsequently sent to the Indonesian law firm, Susanto, Rajasa & Associates, for advice on its enforceability under Indonesian law (see [59] above).

243 Nava Bharat's contention that Rajaram had advised on the Mine Operating Service Agreement (see [238(g)] above) is also unmeritorious. [note: 601] It is pertinent to note that the alleged "opinion" on Indonesian law arose in the course of discussion between Rajaram and ABNR. Nava Bharat was *not* privy to the correspondence at the material time. It follows that Rajaram could not possibly have been advising Nava Bharat on Indonesian law. Instead, I find that Rajaram was checking with ABNR if he was right to think that cl 18, the "severability" clause, would save the other parts of the agreement even if any part was rendered illegal by the new mining law. [note: 602] Woody confirmed that to be his understanding.

244 Nava Bharat also contends that Rajaram had prepared the Loan Agreement and advised that

the loan to be given to Dicky Tan rather than PTIC (see [238(h)] above). [note: 603] However, I accept that Rajaram did not draft the Loan Agreement but merely filled in the particulars for Nava Bharat based on the template provided by ABNR. [note: 604] This, alone, cannot constitute advice on Indonesian law. Moreover, it would be wrong to say that Rajaram was advising on Indonesian law when he was informing ABNR about the practical restraints faced by Nava Bharat, *ie*, Dicky Tan needed the US$3m to be paid to him, [note: 605] and there was a risk that PTIC would not be able to repay the loan if the KP Concessions (which were PTIC's only assets) were not renewed under the new mining law. [note: 606]

245 Further, Nava Bharat's allegation that Rajaram advised on the Indonesian aspects of the Transaction, including the Variation Agreement and the Addendum Agreement is misplaced given that they are not governed by Indonesian law. [note: 607]

246 As such, I do not agree with Nava Bharat that Rajaram had advised Nava Bharat on Indonesian law. Even if Rajaram had done so, I do not think that Nava Bharat had in fact relied on it or, for that matter, that it was reasonable for Nava Bharat to do so (given that it knew Rajaram was not trained in Indonesian law and had appointed ABNR). Indeed, I find that Nava Bharat was relying on ABNR as well as Bob Sundaram and Nava Bharat's Indonesian team instead.

247 Accordingly, I find that Rajaram's scope of work in the retainer does not extend to advice on Indonesian law.

(2) Commercial advice

248 I move on next to the issue of whether Rajaram's scope of work includes advising Nava Bharat on the commercial aspects of the Transaction. Nava Bharat contends that Rajaram is obliged to advise on the commercial risks and implications of entering, continuing and/or completing the Transaction. [note: 608] Rajaram takes the opposite view. In my view, Rajaram's scope of work did not extend to commercial advice.

249 The general rule is that a solicitor is not obliged to provide his client with commercial advice. In *Su Ah Tee*, Ang J commented that "it is not necessary for a solicitor to explain to his client matters of a commercial or economic nature" (at [87]), and that "a solicitor has no general duty to advise a client on matters of business since it is for the client to make his own commercial decision" (at [98]). She referred to *Jackson & Powell* at para 11-177, which states:

> **Advice on matters of business**. A solicitor is not a general adviser on matters of business, unless he specifically agrees to act in that capacity. Thus he is not generally under a duty to advise whether, legal considerations apart, the transaction which he is instructed to carry out is a prudent one, or whether the other party is solvent and whether guarantees should be sought. ...

250 The scope of a solicitor's duty to his client would not, generally speaking, include commercial advice. A solicitor cannot be expected to be responsible for the commercial viability or wisdom of entering into a transaction; that is something that the client is solely responsible for. Moreover, a solicitor is not required to go beyond the scope of the retainer to advise his client on the commercial aspects of the transaction (see *Anwar* at [129]). In a similar vein, Loh JC in *Satinder Singh* at [100] rejected the allegations of professional negligence made against a solicitor because they related to the commercial aspects of the transaction which the client was best placed to assess.

251 As shown above, the authorities are clear that a solicitor is not generally obliged to provide his client with commercial advice. The rationale is clear. A solicitor is not, and should not be, the insurer of commercial misjudgements and a legal advice is not a warranty that the transaction will be free of risks and problems: *Lie Hendri* at [43]. However, there could, in some cases, be difficulty in drawing a distinction between legal and commercial advice. The learned editors of *Jackson & Powell* explain at para 11-180 that:

> **Difficulty of drawing a distinction.** The distinction between legal and business matters is a question of degree. Thus in *County Personnel Ltd v Alan R Pulver Co* the plaintiffs took an underlease which had an unusual rent review lease whereby the rent was increased at the same percentage as the headlease. The defendant solicitors were found to be negligent in failing to advise the plaintiffs of the risks they faced unless the initial rents were known, because the mesne lessor might, as happened, have no reason to hold out for as low a rent as possible, for his lease was cheaper than the underlease which was at a considerably inflated value. They should have advised that both rents should be ascertained, and that the market level of rents should be investigated. Bingham L.J. said:
>
> > "I cannot accept the distinction drawn between legal consequences and financial implications, because in this case the significance of the legal consequences lay in the financial implications."
>
> The case should be contrasted with *Reeves v Thrings Long*. The plaintiff, who was a businessman, wished to purchase a hotel. His solicitors, the defendants, advised him that the access to the hotel car park was by licence only, with no guarantee of renewal were the licence to be brought to an end. *A majority of the Court of Appeal considered that there was no duty on the solicitor to advise his client upon the commercial implications or risks of the access provisions. Unlike the clause in County Personnel Ltd v Alan R Pulver Co, the implications of this clause were obvious*.
>
> [emphasis added]

252 In this regard, the discussion by Rajah JC in *Lie Hendri* at [62] is also pertinent:

> A solicitor's role, in the absence of specific instructions and special circumstances, is plainly to give legal as opposed to commercial or financial advice. There could, however, be unusual cases where there is some difficulty in drawing a distinct line between legal advice, financial consequences and the wisdom of the transaction. *In determining whether such a duty arises, several imponderables figure in the assessment. Particular regard ought to be given to the client's background and to the context in which the retainer is to be defined and deciphered*. [emphasis added]

253 In the present case, it is clear from the retainer (reproduced above at [215]) that Rajaram's scope of work extends only to legal and not commercial advice. There is nothing to suggest that Rajaram had held himself out to be Nava Bharat's commercial adviser. Also, I do not think that Nava Bharat had relied on Rajaram to advise on the commercial aspects of the Transaction or that it would be reasonable for Nava Bharat to do so. As mentioned earlier, Ashwin, the representative of Nava Bharat, is commercially savvy and well assisted by, *inter alia*, his business team in Indonesia headed by Bob Sundaram. Indeed, there is no evidence before me that Ashwin had relied on any commercial advice from Rajaram.

(3) Summary on the scope of the duties

254 For the reasons set out above, I find that Rajaram has a duty to exercise reasonable care and skill in relation to the work undertaken for the Transaction as set out in the retainer, which does *not* include advice on Indonesian law or commercial aspects of the Transaction.

Alleged breaches

255 I shall now consider the alleged breaches by Rajaram.

256 I start with considering the requisite standard of care to be applied when determining whether there has been a breach of duty. It is trite law that the standard of care owed by a solicitor to his client is that of a reasonably competent solicitor. The question to ask is whether it was an error that no reasonably competent solicitor would have made. In asking this question, one must take into account all of the relevant surrounding circumstances. In the words of Rajah JC in *Lie Hendri* at [42]:

> It is hornbook law that a solicitor is expected to exercise the care and skill of a reasonably competent solicitor in discharging his duties under the retainer. *In assessing the standard of care to be reasonably expected of a solicitor, the factual backdrop is of paramount importance.* Abstract notions of skill and competence often add little to resolving the situation and have to be applied with vigilance when meandering through the undergrowth of facts. It must be appreciated that there is no magic formula that can reconcile the myriad of case law principles and any attempt to distil such principles must be tinged with pragmatism. In other words, no single touchstone will suffice to illuminate or unravel the existence and extent of a duty in any given matrix. [emphasis added]

257 Judith Prakash J in *Tan & Au LLP v Goh Teh Lee* [2012] 4 SLR 1 ("*Tan & Au*") agreed with the observations of Rajah JC in *Lie Hendri* (which was affirmed in *Zhou Tong and others v Public Prosecutor* [2010] 4 SLR 534 at [15]). In this regard, Prakash J held that a solicitor should be judged in light of the circumstances at the time and without the benefit of hindsight (at [63]–[66]), as well as taking into account the "pressing time constraints" that he was facing (at [67]). In the present case there were various instances where extreme tight deadlines were unilaterally imposed by the parties (see, *eg*, [37] and [41] above). Furthermore the events spanned a relatively long period of time with a number of twists and turns along the way. As such, I do not think it is fair to say that Rajaram was or was not under time pressure over the entire period. I would, accordingly, take into account, where appropriate, the effects of those tight deadlines on the standard of care for which Rajaram's conduct ought to be measured against.

258 With that, I proceed to examine the specific allegations made by Nava Bharat against Rajaram. For convenience, the alleged breaches are as follows:

(a) failing to advise on the implications of not having the Forestry Licence;

(b) failing to advise against completion without Forestry Licence;

(c) failing to advise for the loan of US$3m to be held in escrow;

(d) restructuring the Transaction as a loan to Dicky Tan (instead of PTIC);

(e) failing to provide for an effective mechanism to convert the debt into shares in PTIC;

(f) failing to advise on the implications of the new mining law on the Mine Operating Service Agreement;

(g) failing to safeguard interest by putting in place a defective pledge; and

(h) failing to advise on the right to exercise the exit option.

259 The first three alleged breaches (see [258(a)]–[258(c)] above) relate to the Forestry Licence and the next three alleged breaches concern the new mining law (see [258(d)]–[258(f)] above). The last two alleged breaches (see [258(g)]–[258(h)] above) pertains to the share pledges and exit option. I will deal with each alleged breach in turn.

Alleged breaches relating to the Forestry Licence

(1) Failure to advise on implications of not having Forestry Licence

260 Nava Bharat contends that Rajaram failed to advise it on the implications of the absence of the Forestry Licence. [note: 609] Nava Bharat claims that Rajaram knew about the importance of the Forestry Licence but did not advise Nava Bharat on it. [note: 610] According to Nava Bharat, Rajaram should have sought input from ABNR and advised Nava Bharat on all the implications and potential pitfalls of proceeding with the Transaction without the Forestry Licence. [note: 611] In particular, it was important for Nava Bharat to understand how the absence of the Forestry Licence would have affected the Transaction, *eg*, total prohibition on operations or mere fine. [note: 612]

261 I do not agree with Nava Bharat that Rajaram had breached his duty. I accept that Rajaram did not advise on the implications of not having the Forestry Licence. But I also find the omission unsurprising (and immaterial) because he was neither obliged nor qualified to do so. It was a task that lies squarely within the purview of Nava Bharat's Indonesian lawyers, ABNR.

262 It was evident from Rajaram's email to Ashwin on 6 October 2008 that both of them knew that Indonesian counsel would have to be appointed "for due diligence and advice on Indonesian law" as well as to "assist in documentation to comply with Indonesian legal requirements". [note: 613] This is corroborated by Ashwin's evidence that "it was clear in [his] mind on 6 October that [Nava Bharat] would have an Indonesian law firm doing due diligence on the Indonesian aspects of the transaction". [note: 614] As I have earlier found, Rajaram's duty did not extend to cover advice on Indonesian law. To be clear, it is undisputed that the issue of whether a Forestry Licence was required was an issue governed by Indonesian law for which Nava Bharat had to look to the Indonesian lawyers, ABNR, for advice. [note: 615]

263 Nava Bharat appears to be alluding that Rajaram knew about the need for the Forestry Licence but had omitted to inform Nava Bharat about it. [note: 616] I do not think that such a characterisation of what happened was accurate. The issue of the Forestry Licence was first raised in ABNR's First Draft Report. [note: 617] While there were earlier indications that certain searches with the Ministry of Energy and Mineral Resources would have to be conducted, [note: 618] they did not identify the need for the Forestry Licence as a potential concern. Rajaram received the ABNR's First Draft Report on 26 October 2008 and forwarded it, together with ABNR's email, to Ashwin two days later. [note: 619]

264 Ashwin claimed that Rajaram was supposed to "read [the advice from ABNR] and flag issues". [note: 620] I find this argument contrived. The ABNR's First Draft Report was an 18-page report inclusive of a 4-page executive summary. The language was clear. It was accepted that Rajaram was not supposed to add or take away anything from ABNR's advice to Nava Bharat insofar as it involved

Indonesian law. [note: 621] I do not think that Ashwin, given his abilities, would have appreciated, much less required, any assistance in understanding the advice from ABNR. More importantly, ABNR specifically highlighted in its email, to which the ABNR's First Draft Report was attached, that a Forestry Licence might be required. [note: 622] The relevant parts read: [note: 623]

> 5. The Exploitation KP of BHM is located in the Convertible Production Forest ... Convertible Production Forest means forest which is planned to be used for transportation, transmigration, residences, agriculture, plantation, industry, etc. ... Convertible Production Forest cannot be converted into mining area. ...
>
> However, *BHM may still conduct the mining activity in the Convertible Production Forest by obtaining the lend-use permit from the Minister of Forestry* ...
>
> [emphasis added]

265 The email was forwarded to Ashwin as well. [note: 624] Rajaram's duty with respect to Indonesian law was only to convey the advice of ABNR to Nava Bharat for its consideration, and this was precisely what he did. It is also apparent that ABNR's advice covered the implications of going ahead with the Transaction without the Forestry Licence. At the hearing, Ashwin accepted that ABNR's email dated 26 October 2008 "provided advice that [Nava Bharat] would need a forestry licence before it could mine". [note: 625]

266 Ashwin insisted that he did not read ABNR's email *or* the ABNR's First Draft Report. [note: 626] However, I find this incredible. The Transaction was an important deal for Nava Bharat, [note: 627] and Ashwin knew that it was important to get Indonesian counsel to perform due diligence. [note: 628] The first line of Rajaram's email to Ashwin reads "[t]he interim due diligence report is annexed". [note: 629] This must have piqued his interest. Ashwin conceded that he was curious but nevertheless persisted that he did not look at either the ABNR's First Draft Report or ABNR's email. [note: 630] I also note that Ashwin had not mentioned this in his AEIC. [note: 631] Ashwin explained that he was waiting for Rajaram to advise him on it. [note: 632] This is most unusual given his knowledge that Rajaram could not advise on Indonesian law. [note: 633] In any case, it was not within Rajaram's duty to do so. Rajaram discharged his duty to convey ABNR's advice to Nava Bharat, and it does not matter that Ashwin failed to read ABNR's email or the ABNR's First Draft Report.

267 The parties also dispute over whether Rajaram spoke to Ashwin over the phone on the issue of the Forestry Licence after it was surfaced in the ABNR's First Draft Report. Nava Bharat vehemently denies that any such tele-conversation took place, [note: 634] while Rajaram testifies otherwise. [note: 635] Since Rajaram was not obliged to advice Ashwin on the Forestry Licence which is a matter of Indonesian law, nothing turns on this. Nevertheless, I find that there would, in all likelihood, be a call between Rajaram and Ashwin on the issue of the Forestry Licence shortly after the ABNR's First Draft Report. Nava Bharat's sole point is that there was no attendance notes to support Rajaram's evidence. [note: 636] However, the proper inference to be drawn in light of the lack of attendance notes must be one based on the circumstances of the case. In the present case, I do not think that an adverse inference is justified on the facts. Ashwin's evidence was that he did not read ABNR's email or the ABNR's First Draft Report attached thereto because he understood Rajaram to be saying that he would "get back to [him]". [note: 637] In particular, he went on to say that a lot of his dealings with Rajaram were "over the phone". [note: 638] If this was true, and bearing in mind that

Ashwin was concerned with the results of the due diligence done by ABNR over what he considered to be an important deal for Nava Bharat (see [266] above), I do not think that Ashwin would have simply ignored or forgotten about it. Ashwin would likely have taken the initiative to call Rajaram even if Rajaram had not done so. [note: 639]

268 Apart from the ABNR's First Draft Report and the email which was forwarded to Ashwin on 28 October 2008, there were three other instances on which Ashwin was informed, *before* the initial completion, that a Forestry Licence was necessary for mining, namely:

(a) minutes of the meeting on 19 December 2008 (see [33] above), which was attended by Ashwin, where it was recorded that "... before mining could start a licence from Federal Government has to be obtained". [note: 640]

(b) Bob Sundaram's email to Ashwin on 19 December 2008 (see [35] above), which stated that the Mine was located in a HPK Forest and "the approval letter from Federal Forestry Dept" was required. [note: 641]

(c) Karupiah's due diligence report (see [35] above), which stated that the Mine was in a HPK Forest and there is a "need to procure approval from Forestry Minister before mining". [note: 642]

269 Ashwin confirmed at the hearing that he was told at least three, if not four times, before initial completion that there was a requirement for the Forestry Licence to be obtained if he wanted to start mining. [note: 643] Further, Rajaram was aware that Ashwin had been "warned about these issues". [note: 644] It is clear that, in these circumstances, there was nothing else that Rajaram could have done with regard to the issue on the Forestry Licence. In this connection, Nava Bharat suggests that Rajaram should have advised against completion and I will turn to address that allegation later (see [271] below).

270 Before I proceed to the next alleged breach, I should address Nava Bharat's contention, brought up as a secondary point, that Rajaram failed to advice on the intricacies of the application procedure, the costs involved and the estimated time for the approval. [note: 645] This, again, is a task that lies within the purview of ABNR (see [261]–[262] above). It follows that the omission on the part of Rajaram would not constitute a breach. In any event, I note that Nava Bharat was in fact advised on these points. The procedure for the application was set out in detail in ABNR's email dated 26 October 2008. [note: 646] This is the same email which first identified the issue with the Forestry Licence. In addition, Nava Bharat's Indonesian team conducted the due diligence on the costs involved and time necessary to secure the approval. [note: 647]

(2) Failure to advise against completion without Forestry Licence

271 As I have alluded to earlier at [269], the next alleged breach is that Rajaram failed to advise Nava Bharat that (a) if the Forestry Licence was not available, there should be no completion and (b) if there was to be completion, it had to be on very stringent conditions. [note: 648]

272 At the outset, I should point out three observations. First, the lack of the Forestry Licence does not *per se* prevent the acquisition of the Mine, but renders the Mine inoperable legally until the Forestry Licence is obtained. Put differently, there is no reason *in law* why there cannot be completion without the Forestry Licence. Second, Nava Bharat asserts that Rajaram was supposed to

ensure that the Mine was operational upon acquisition, [note: 649] but it went ahead with the initial completion with the knowledge that the Forestry Licence must be obtained *before* mining could take place (see [264]–[269] above) and that there was no Forestry Licence. Third, the Mine was strictly speaking operational, albeit illegally, when Dicky Tan was in charge. It will become apparent later why this is an important distinction.

273 Nava Bharat's position is that Ashwin was unfamiliar with the issue of Forestry Licence and was therefore "swayed by [Dicky Tan's] statement that he had already been producing and exporting coal". [note: 650] According to Nava Bharat, ABNR and Bob Sundaram advised that the Forestry Licence was necessary, but this was disputed by Dicky Tan who insisted that he had been producing and exporting coal from the Mine. [note: 651] Nava Bharat claims that Rajaram's silence and failure to offer specific advice on the risks of completing without the Forestry Licence, when taken in light of Dicky Tan's assertion that he had been producing and exporting coal from the Mine, amounted to "(a) concealment of the risks, and therefore (b) positive advice that it was safe to complete without the [Forestry Licence]". [note: 652] Nava Bharat adds that Rajaram had aligned himself with Chandra and took the position that the Forestry Licence was not required. [note: 653] As an alternative, Nava Bharat claims that Rajaram should have advised Nava Bharat against completion because of the uncertainty surrounding the issue of Forestry Licence. [note: 654] The "uncertainty" refers to the inconsistency between ABNR's advice that the Forestry Licence was necessary for mining and Dicky Tan's assertion that he had been operating the Mine without the Forestry Licence. [note: 655]

274 Rajaram's response is that Nava Bharat decided to proceed with the Transaction on the basis of Dicky Tan's undertaking that he would procure the Forestry Licence if it was necessary. [note: 656] Nava Bharat challenges the existence as well as the adequacy of such an undertaking. [note: 657]

275 The differences in the positions taken by Nava Bharat and Rajaram necessitate an examination of the events that led to Nava Bharat's decision to proceed with initial completion despite the advice from ABNR and Bob Sundaram that the Forestry Licence must be obtained before mining can commence. At the heart of this inquiry is the question of whether Nava Bharat, having had the benefit of legal advice, made a commercial decision on the basis of Dicky Tan's undertaking to proceed without the Forestry Licence.

276 For the following reasons, I find that Nava Bharat was advised and therefore knew that the Forestry Licence was required but made a commercial decision to go ahead without the Forestry Licence on the basis of Dicky Tan's undertaking.

(a) Nava Bharat knew Forestry Licence was required under Indonesian law

277 I start from the prelude to the meeting of 19 December 2008 where Dicky Tan was said to have first agreed to obtain the Forestry Licence if it was required. As mentioned earlier, ABNR's email on 26 October 2008 raised the issue of the Forestry Licence. The email ended with a suggestion that the issue "may need to be further discussed with the counter-party", [note: 658] and this was precisely what Rajaram had planned to do. He sought to arrange for a meeting with Woody and Chandra, [note: 659] but the meeting was eventually called off as Dicky Tan wanted to make a "commercial call". [note: 660] This was because Dicky Tan was of the view that the Forestry Licence was not required. [note: 661] In other words, Dicky Tan did not dispute that there was no Forestry Licence, but was saying that it was not necessary to have one in order to mine.

278 The issue of the Forestry Licence was raised again at the meeting held on 19 December 2008 (see [33] above). At this point in time, Nava Bharat would have known that the Forestry Licence was required to mine *legally* and that Dicky Tan did *not* have the Forestry Licence. This was further reinforced when Bob Sundaram reported at the meeting that it was necessary to have a Forestry Licence in order to operate the mine. [note: 662] In fact, it was Ashwin who arranged for Bob Sundaram to call in and address the issue of Forestry Licence. [note: 663] The purpose for doing so must have been to convey to Dicky Tan what Ashwin believed to be the position, that is, the Forestry Licence was required under Indonesian law. It would also have been clear to Nava Bharat that Dicky Tan had previously wanted to call off the Transaction because of the Forestry Licence (see [277] above). In this regard, I accept Rajaram's evidence that Dicky Tan threatened to "walk away from the deal" in face of Ashwin's insistence for him to obtain the Forestry Licence. [note: 664] This led to an impasse, which was eventually resolved on the basis of Dicky Tan's undertaking to obtain the Forestry Licence if it was required.

279 On the evidence before me, I find that Ashwin could not have proceeded with the Transaction under the impression that the Forestry Licence was not necessary under Indonesian law. He knew that it was. Instead, it must have crossed Ashwin's mind that Dicky Tan was operating the Mine notwithstanding that he did not have the Forestry Licence. The implication must have been that it was possible to flout the law and operate the Mine without the Forestry Licence. Nava Bharat contends that there was a conflict between the advice from ABNR and Bob Sundaram on the one hand and the assertion of Dicky Tan on the other hand. [note: 665] However, it was apparent from both Nava Bharat's submissions and Ashwin's evidence that Dicky Tan did *not* actually say that the Forestry Licence was not required under Indonesian law, but simply that he had been "producing and exporting coal from the [Mine]" without a Forestry Licence. [note: 666] I do not think that Ashwin can genuinely claim that he was confused as to whether Indonesian law required a Forestry Licence for the operation of the Mine. He knew that it was necessary under Indonesian law from the advice that he received from ABNR and Bob Sundaram. In any event, even if Dicky Tan did claim that the Forestry Licence was not required under Indonesian law, I find it unbelievable that Ashwin would prefer the view proffered by Dicky Tan over the advice from ABNR and Bob Sundaram. This is so even if Rajaram aligned with the view of Dicky Tan (on the evidence I do not find that he did). It is highly unlikely that Ashwin would disregard the advice of ABNR, Nava Bharat's Indonesian counsel, and Bob Sundaram, its "focal point on the ground in Indonesia", and prefer the view of Dicky Tan, the counterparty to the Transaction. It is also pertinent that Ashwin knew that Rajaram was not qualified to advise on Indonesian law. In these circumstances, I am of the view that Ashwin knew that the Forestry Licence was required under Indonesian law. He could not have been misled by Dicky Tan to think that the Forestry Licence was not required under Indonesian law.

280 The fact that Ashwin knew that the Forestry Licence was necessary under Indonesian law points in favour of the existence of the undertaking by Dicky Tan. It shows that his decision to proceed with the Transaction without the Forestry Licence was made in full cognisance of the requirement under Indonesian law. It further suggests that his decision must have been premised on some reason other than that he was "swayed by [Dicky Tan's] statement that he had already been procuring and exporting coal" in light of Rajaram's alleged failure to advise against completion. In my view, it was more likely than not that he was willing to break the impasse with Dicky Tan by proceeding with the Transaction based on Dicky Tan's undertaking that he would obtain the Forestry Licence if it was required. Given that Ashwin knew, at that point in time, that the Forestry Licence was required under Indonesian law, it is clear he made the commercial call to accept Dicky Tan's undertaking.

(b) Dicky Tan agreed to obtain Forestry Licence if it was required

281 Contrary to Nava Bharat's contention, the finding that Dicky Tan had agreed to obtain the Forestry Licence if it was required is well supported by evidence, including:

(a) the notes taken at the meeting on 19 December 2008 and Chandra's email sent shortly thereafter

(b) the emails from Bob Sundaram to Ashwin shortly after the meeting on 19 December 2008;

(c) Bob Sundaram's evidence on his understanding as to why Nava Bharat proceeded with the Transaction; and

(d) the correspondence between Rajaram and Chandra shortly after the initial completion.

282 I begin with the contemporaneous evidence. At the meeting on 19 December 2008, Leela Velayuthan ("Leela"), one of SLP's staff, and Rajaram each had a printed copy of a checklist for the outstanding items for completion. On both copies, there were handwritten annotations. On Leela's copy, it was stated "Forestry application (Utaking letter from Dicky)". [note: 667] On Rajaram's copy, it was stated "Forestry application Letter of undertaking". [note: 668] In my view, these handwritten annotations suggest that Dicky Tan had agreed to apply for the Forestry Licence if it was required. In addition, Chandra's email on 23 December 2008, four days after the meeting, acknowledged the same, albeit using different words: [note: 669]

ASSETS AND LAND RIGHT

11. All documents evidencing the arrangement on the utilization of land in the mining area, e.g. *Use-Lease Agreement with the Department of Forestry* or other third party ...

TPC LLC Comments: We are instructed that our clients have been operating the mine since December 2007 and have been exporting to Thailand without such a license. *As discussed between the various parties, if the Mining Department in Banjarmarsin confirms in writing that the KP owned by PT IC requires a Forestry Licence, this will be effected as a condition subsequent prior to any further acquisitions by Nava Bharat*.

[emphasis added]

283 I will address the point about the inconsistency in the use of words to describe the undertaking from Dicky Tan later (see [293] below). Leaving that aside for the moment, Chandra's email shows that it was discussed and agreed that the parties would go ahead with the Transaction despite the differences over whether the Forestry Licence was required, and if Nava Bharat can show that the Forestry Licence was required, by way of a written confirmation from the relevant authority, then Dicky Tan would obtain it. Chandra testified at the hearing that he could not recall if Dicky Tan had said at the meeting that he would apply for the Forestry Licence if it was required, [note: 670] but I did not think it should be held against him given that the meeting occurred almost five years ago. Notably, Chandra had not, in any way, contradicted what is written in his email sent on 23 December 2008. I note the contemporaneity of Chandra's email dated 23 December 2008, as well as the fact that it was written long before these actions were brought. I should also add that the written confirmation from the "Mining Department in Banjarmarsin" was never obtained because Dicky Tan eventually accepted that the Forestry Licence was required (see [287] below). [note: 671]

284 After the meeting on 19 December 2008 (see [33] above), Nava Bharat continued to deal with the issue of Forestry Licence. Bob Sundaram sent an email to Ashwin immediately after the meeting reiterating his findings on the Forestry Licence and concluded by stating that he would "try to get as much information as possible on this forestry issue so that [there is] no conflict of information". [note: 672] On the next day, he forwarded Karupiah's due diligence report to Ashwin, and in the report, it was stated that there is a "need to procure approval from Forestry Minister before mining". [note: 673] Both confirmed that the Forestry Licence was required. Nava Bharat argues that there would have been no need for Bob Sundaram to deal with any "conflict of information" or for Karupiah's due diligence report, which dealt with the issue of Forestry Licence, if the issue had been resolved at the meeting on 19 December 2008 by way of Dicky Tan's undertaking. [note: 674] I do not agree. Contrary to Nava Bharat's argument, I find that these acts were necessitated by the fact that Nava Bharat was trying to confirm its earlier view (and hold Dicky Tan to his undertaking) that the Forestry Licence was required under Indonesian law. This view is supported by the correspondence between Ashwin and Prasad which were sent a few days later. On 23 December 2008, Ashwin sent an email to Prasad. In his email, Ashwin attached, *inter alia*, a letter of recommendation dated 13 December 2006 issued by the "bupati" for PTBHM (one of the prerequisites for the Forestry Licence application) and asked rhetorically why did PTBHM apply for the Forestry Licence in 2006 "if it [was] not required". [note: 675] Prasad replied on the same day saying that it clearly shows that the Forestry Licence was required and applied for, and asked Ashwin to check if PTBHM might have already obtained the Forestry Licence. [note: 676] The manner in which the email was written indicates that Ashwin did not actually believe Dicky Tan's assertion that the Forestry Licence was not required. As mentioned earlier, this weighs in favour of the existence of an undertaking from Dicky Tan.

285 Bob Sundaram's understanding as to why Nava Bharat proceeded with the Transaction further supports the finding that Dicky Tan had agreed to obtain the Forestry Licence if it was required. In Bob Sundaram's AEIC, he said that: [note: 677]

> On or about 22.1.09, Ashwin called to tell me that the documents for the coal mine transactions were ready and had to be notarised in Indonesia. I was nominated to sign on behalf of NBS in Indonesia. I understood that the documents were to be signed *with Dicky Tan giving his undertaking to obtain the license and complying with all other requirements to ensure that the mine was operational*. [emphasis added]

286 Nava Bharat asserts that Bob Sundaram had no personal knowledge of the discussions at the meeting on 19 December 2008 and had simply assumed that Dicky Tan had given an undertaking. [note: 678] I do not agree that Bob Sundaram's evidence in his AEIC was based on his "assumption". Bob Sundaram initially testified that he signed the documents on behalf of Nava Bharat with the "understanding" that there was an arrangement where Dicky Tan would obtain the Forestry Licence if it was necessary to mine, [note: 679] but later changed his evidence to say that it was merely his "assumption". [note: 680] Bob Sundaram's explanation was that he assumed that the issue must have been resolved since he was asked to sign the documents on behalf of Nava Bharat. [note: 681] The troubling part, however, is that he could not adequately explain why he assumed that the issue must have been resolved on the basis of an undertaking from Dicky Tan. [note: 682] Even if Bob Sundaram knew that the Forestry Licence was required and that it was supposed to be the responsibility of Dicky Tan as the seller, [note: 683] it still would not lead him to assume that the issue was resolved on the basis of an "undertaking" by Dicky Tan. It was equally possible that Dicky Tan managed to obtain the Forestry Licence in the meantime or had it all along; or that Nava Bharat decided to secure a

discount on the price instead. There is simply insufficient basis for Bob Sundaram to have assumed that there was an undertaking by Dicky Tan. The use of the word "undertaking", which corresponds with the handwritten annotation by Leela and Rajaram (see [282] above), to describe what Bob Sundaram understood to be the arrangement is also indicative. Since Bob Sundaram was not present at the meeting on 19 December 2008 (except *via* tele-conference to report on the Forestry Licence issue), it follows that his understanding that the issue was resolved by way of an undertaking from Dicky Tan must have come from Ashwin.

287 It also appears from the correspondence between Rajaram and Chandra shortly after the initial completion that Dicky Tan had agreed to obtain the Forestry Licence if it was required. On 2 February 2009, Rajaram sent an email to Chandra stating that the application and approval of the Forestry Licence was something that "your clients and you" had confirmed will be done. [note: 684] He further added that "[*m*]*y clients* are anxious to commence operations *soon* and want a confirmation on *when* the approval can be expected". [note: 685] Chandra responded the next day and confirmed that "it was agreed" that the procurement of the Forestry Licence "will be treated as a condition subsequent" and reiterated that Dicky Tan would obtain the Forestry Licence if it was required. [note: 686] Ashwin was copied in this exchange of emails, [note: 687] but there was no evidence to suggest that he had objected to the accuracy of the emails apart from Ashwin's bald assertions in court. [note: 688]

288 Nava Bharat contends that there was no undertaking given by Dicky Tan before the initial completion. Ashwin's evidence at the hearing was that the undertaking was only given a few days after initial completion. [note: 689] This was neither pleaded in the statement of claim nor raised in his AEIC. [note: 690] Nevertheless, Nava Bharat raises a host of apparent inconsistencies to support its contention, including:

(a) Rajaram's email to Chandra on 2 February 2009 which stated that the Forestry Licence was something that Dicky Tan had "confirmed" will be done; [note: 691]

(b) Chandra's email to Rajaram on 3 February 2009 which stated that the Forestry Licence was a "condition subsequent" and that Dicky Tan would obtain the Forestry Licence if it was required; [note: 692]

(c) Rajaram's email to Chandra on 3 February 2009 which stated that Dicky Tan had "represented that all approvals for mining are in place"; [note: 693]

(d) Rajaram's email to Chandra on 11 March 2009 which stated that the initial completion was based on the undertaking from Dicky Tan *and* a letter authorising the extraction of 50,000 metric tonnes of coal by end of March 2009; [note: 694]

(e) Rajaram's email to Chandra on 12 March 2009 which stated that Dicky Tan acknowledged, before the "Initial Completion Date", that the Forestry Licence was a "mandatory requirement"; [note: 695]

(f) The typewritten minutes of the meeting on 16 March 2009 stated that the condition subsequent regarding the Forestry Licence was agreed between Rajaram and Chandra by an exchange of emails, and Nava Bharat claims that it refers to the emails between Rajaram and Chandra on 2 and 3 February 2009 which occurred *after* initial completion; [note: 696]

(g) The handwritten minutes of the meeting on 24 March 2009 stated that the Forestry Licence was a "condition precedent" and Tanakorn would provide it within two weeks after completion, while the typewritten minutes made no reference to any undertaking by Dicky Tan. [note: 697]

(h) Rajaram's email to Chandra on 12 May 2009 which stated that the Variation Agreement was concluded to facilitate Dicky Tan to obtain the Forestry Licence, "an issue that was not deliberated and attended to at the Initial Completion Date". [note: 698]

(i) The First Notice of Default which stated that there were "express and oral representations" that all approvals and licences required for the production of coal from the Mine had been obtained but made no reference to the undertaking by Dicky Tan. [note: 699]

(j) Rajaram's email to Chandra dated 3 August 2009 which stated that there were "express and oral representations" that all approvals and licences required for the production of coal from the Mine had been obtained but made no reference to the undertaking by Dicky Tan. [note: 700]

(k) The Second Notice of Default which stated that Dicky Tan had misrepresented that the Mine was an "operating mine" and that all necessary approvals to operate the Mine were "in hand" but made no reference to the undertaking by Dicky Tan. [note: 701]

(l) Rajaram's email to Bill on 11 February 2010 which, according to Nava Bharat, should be understood to mean that the absence of the Forestry Licence was discovered *after* initial completion and at that point Dicky Tan promised to secure the Forestry Licence. [note: 702]

(m) Rajaram's email to Chandra on 9 April 2010 which stated that Dicky Tan misrepresented that the Mine was operational but made no reference to the undertaking by Dicky Tan. [note: 703]

(n) The Third Notice of Default which stated that Dicky Tan fraudulently misrepresented that the Forestry Licence was not required but made no reference to the undertaking by Dicky Tan. [note: 704]

(o) The executive summary dated 4 November 2010, prepared by Rajaram, which stated that Dicky Tan misrepresented that it was an operational mine but made no reference to the undertaking by Dicky Tan. [note: 705]

289 The main thrust of Nava Bharat's contention appears to be that there was a conspicuous lack of reference to the undertaking by Dicky Tan in the correspondence after initial completion. [note: 706] As a secondary point, Nava Bharat highlights that Rajaram had repeatedly insisted in the correspondence that Dicky Tan represented that the Mine was operational and/or all requisite approvals had been obtained and this is inconsistent with his case that that there was an undertaking from Dicky Tan. [note: 707] I do not think that they support Nava Bharat's contention that there was no undertaking by Dicky Tan.

290 As a preliminary point, I should say that, as shown earlier, the evidence supports the finding that Dicky Tan had agreed at the meeting on 19 December 2008 to obtain the Forestry Licence if it was required. This was evidenced in writing by Chandra's email on 23 December 2008 (see [282] above), and repeated again by Dicky Tan shortly before the Singapore leg of the initial completion on

28 January 2009 (see [52] above). [note: 708] They are not, contrary to Nava Bharat's suggestion, three different undertakings. [note: 709]

291 I go back to addressing Nava Bharat's contention. The undertaking from Dicky Tan, as demonstrated earlier, was conditional in the sense that Dicky Tan would apply for the Forestry Licence only *if* it was required. The undertaking was framed in such a manner because Dicky Tan insisted that he had been mining and exporting coal despite not having the Forestry Licence. Put simply, Dicky Tan represented that the Forestry Licence was not required for the mining and exporting of coal (*ie*, the representation), and if it was required, then he would obtain it (*ie*, the conditional undertaking). The representation and the conditional undertaking are not mutually exclusive. It follows that the reference to Dicky Tan's representation (or misrepresentation) that the Mine was operational and/or all requisite approvals had been obtained is not inconsistent with the fact that he had agreed to obtain the Forestry Licence if it was required.

292 Nava Bharat argues that a reasonable solicitor would have pointed out that there was a breach of the undertaking when issuing a formal notice (*eg*, the notice of default) such that the failure to do so indicate that there is no such undertaking. [note: 710] I do not agree that a breach of the undertaking must invariably have been, in the words of Nava Bharat, the "first salvo" to be fired. [note: 711] In fact, I do not think that it would have been appropriate to allege that there was a breach of the undertaking at all. After the initial completion, Dicky Tan acknowledged that he was obliged to secure the Forestry Licence and did not in any way attempt to resile from his undertaking to obtain the Forestry Licence. The problem was that Dicky Tan had not been able to secure the Forestry Licence with sufficient expediency. In these circumstances, I find that the fact that Rajaram had not alleged that there was a breach of undertaking by Dicky Tan is not, in any way, indicative that there was no such undertaking.

293 While I appreciate that there have been several ways in which the undertaking by Dicky Tan had been characterised (see [288(a)], [288(b)] and [288(g)] above) and variations in the facts surrounding the undertaking (see [288(d)] above), I do not think that these differences are material for the present purpose. Pertinently, and Nava Bharat completely misses this point, I note that, notwithstanding the differences, those correspondence and documents suggest, in essence, that Dicky Tan had represented that the Forestry Licence is not required in order to mine and/or that if it was required, he would obtain it. In other words, they support or are at least consistent with the finding that Dicky Tan had agreed that he would obtain the Forestry Licence if it was required. The *ex post facto* characterisation by Rajaram and Chandra, whether as a condition subsequent or otherwise, would not change what has actually transpired. In this regard, Nava Bharat's contentions are entirely misplaced.

294 Similarly, Rajaram's email to Chandra on 12 March 2009 (see [288(e)] above) does not support Nava Bharat's claim that there was no undertaking by Dicky Tan. [note: 712] Indeed, if Dicky Tan had *accepted* that the Forestry Licence was a mandatory requirement before the initial completion (and Nava Bharat *knew* that it was required under Indonesian law), then it is unlikely that Nava Bharat would complete without an undertaking from Dicky Tan to obtain the Forestry Licence.

295 I do not agree with Nava Bharat's suggestion that there was no undertaking from Dicky Tan before the initial completion because the typewritten minutes of the meeting on 16 March 2009 (see [288(f)] above) showed that the "condition subsequent" was only agreed between Rajaram and Chandra *after* the initial completion, by way of the exchange of emails on 2 and 3 February 2009. While I accept that the "exchange of emails" probably referred to the emails dated 2 and 3 February 2009, I do not think that it necessarily follows that there is no undertaking by Dicky Tan

at the meeting on 19 December 2008. Indeed, the emails dated 2 and 3 February 2009 themselves referred to a prior arrangement in which Dicky Tan would obtain the Forestry Licence if it was required. These emails, when read together with Chandra's email on 23 December 2008 as well as Leela and Rajaram's handwritten annotations (see [282] above), would show that Dicky Tan had agreed to obtain the Forestry Licence if it was required prior to the initial completion. It is in this context that the typewritten minutes of the meeting on 16 March 2009 must be read and understood.

296 Likewise, I find that Nava Bharat's reliance on Rajaram's email to Bill on 11 February 2010 (see [288(l)] above) does not assist its case. Rajaram informed Bill in his email that Nava Bharat was "surprised, when contrary to all representations that all approvals/permits are in place, they were informed by Dicky Tan that they did not have a Forestry Approval and hence Mining Operations could not be commenced". [note: 713] Nava Bharat suggests that this email shows the completion occurred before it was discovered that there was no Forestry Licence and it was then that Dicky Tan promised to secure the Forestry Licence. [note: 714] For the reasons stated earlier, this cannot be right. Nava Bharat and Rajaram knew before the initial completion that there was no Forestry Licence and that was the cause of the impasse which the meeting on 19 December 2008 was supposed to resolve. In my view, Rajaram was simply trying to convey that Dicky Tan had represented that the Forestry Licence was not required for mining to commence but it turned out to be untrue.

297 I come finally to Rajaram's email to Chandra on 12 May 2009 which appears on its face to be a "smoking gun" that the issue of Forestry Licence was not addressed at the meeting on 19 December 2008. For accuracy, I should reproduce the relevant part of the email:

> You will recall that the [Variation Agreement] was entered to facilitate your client to obtain the forestry licence, an issue that was *not deliberated and attended to at the Initial Completion Date*. [emphasis added]

298 Nava Bharat claims that this shows that the issue of Forestry Licence was not deliberated and attended to at initial completion. [note: 715] However, I cannot agree with Nava Bharat's interpretation. The email cannot be read in isolation and must be understood in the proper context. In this regard, the circumstances surrounding the Variation Agreement would be relevant. It is clear from the facts that I have set out earlier (see [61]–[66] above) that the Variation Agreement was meant to encapsulate the arrangement reached between Nava Bharat and Dicky Tan to resolve the delay in obtaining the Forestry Licence. I also note that the issue of Forestry Licence was clearly deliberated upon by Nava Bharat and Dicky Tan *before* the initial completion – the meeting on 19 December 2008 being an obvious example. Nava Bharat may disagree as to how the issue was finally resolved, but it cannot deny that the issue of Forestry Licence was deliberated upon and addressed before the initial completion. What was *not* deliberated and addressed was in fact the *deadline* for Dicky Tan to obtain the Forestry Licence if it was required. This was also the issue that the Variation Agreement sought to resolve. In light of these circumstances, I find Nava Bharat's interpretation to be completely untenable. I accept Rajaram's evidence that what he meant in the email was that there was no deadline prescribed for Dicky Tan to obtain the Forestry Licence before initial completion. [note: 716] Nava Bharat claims that Rajaram's evidence is contradicted by Chandra's email dated 23 December 2008 as well as the minutes for the meetings held on 16 and 24 March 2009, but I do not agree. Chandra's email does not provide a date on which Dicky Tan was obliged to obtain the Forestry Licence; it merely states that the Forestry Licence should be obtained "prior to any further acquisitions". [note: 717] Even though the minutes appear to provide that Dicky Tan must obtain the Forestry Licence within a specific time frame, [note: 718] they do not state whether it was decided before or after the initial completion date. It follows that, contrary to Nava Bharat's contention,

Rajaram's email does not show that there was no undertaking given by Dicky Tan on 19 December 2008.

299 Accordingly, I find that Dicky Tan represented to Nava Bharat at the meeting on 19 December 2008 that the Forestry Licence was not required for the mining and exporting of coal, and if it was required, then he would obtain it.

(c) Commercial decision by Nava Bharat to complete without Forestry Licence

300 My findings on this point can be summarised as follows: Nava Bharat knew that the Forestry Licence was required to mine *legally* and that Dicky Tan did *not* have the Forestry Licence. At that point in time, Dicky Tan threatened to call off the Transaction. However, Nava Bharat decided that it was willing to take the risk and go ahead with the Transaction in light of Dicky Tan's claim that it was possible to mine without the Forestry Licence and that he would undertake to obtain the Forestry Licence if it was necessary.

301 A client is fully entitled to ignore the advice of his lawyer and enter into risky deals. The client may well have a bigger appetite for risks and considers that the deal is worth entering into, but that has nothing to do with the lawyer. It is ultimately a commercial decision that has to be made by the client. To impose a duty on the lawyer in these circumstances would be akin to making him the underwriter for the commercial call of the client. As I have mentioned earlier (see [249]–[251] above), there is generally no obligation on the part of a solicitor to advise his client on the commercial wisdom of a transaction. This, of course, would not apply to a lawyer who goes beyond the usual scope of work of a lawyer to offer commercial advice, but that is not the case here (see [253] above).

302 On these facts, I do not think that Rajaram is obliged to advise Nava Bharat against completion in light of the absence of the Forestry Licence or the uncertainty surrounding the issue of Forestry Licence. Nava Bharat was advised by ABNR and Bob Sundaram that the Forestry Licence must be obtained before mining can commence legally. It nevertheless made a commercial decision to proceed without the Forestry Licence on the basis of Dicky Tan's undertaking. It was an informed decision by Nava Bharat to go ahead with the Transaction and Nava Bharat must therefore bear the consequences.

(d) Inadequacy of an oral undertaking

303 I move on to consider if Rajaram is in breach of his duty in failing to advise Nava Bharat that the completion must be on "stringent conditions" in light of the absence of the Forestry Licence. I have earlier found that Dicky Tan represented that the Forestry Licence was not required but if it was, then he would obtain it. I also said that the *ex post facto* characterisation does not affect the inquiry as to what has actually transpired. However, I find that this interchangeable use of terms by Rajaram and Chandra to be a manifestation of a deeper problem, namely the inadequacy of the oral undertaking by Dicky Tan.

304 Rajaram contends, in essence, that there is no need to include it in the contractual documents as (a) the undertaking was evidenced in writing and (b) Dicky Tan had never denied it. [note: 719] The fact that Dicky Tan had never denied that he was obliged to obtain the Forestry Licence if it was required is completely irrelevant to the question of breach. This leaves us with the question of whether Rajaram ought to have advised Nava Bharat that the completion can only proceed if the undertaking by Dicky Tan is incorporated into the contractual documents or otherwise put into writing.

305 In my view, and I have dealt with this earlier (see [300]–[302] above), Rajaram is not obliged to dictate the commercial terms on which Nava Bharat should proceed with the Transaction. Nava Bharat is perfectly entitled to proceed with the Transaction on the basis of the oral undertaking by Dicky Tan if it, having been duly advised, deems fit. However, Rajaram ought to have advised Nava Bharat on the legal implications that might follow if it were to complete on the basis of an *oral* undertaking by Dicky Tan to obtain the Forestry Licence if it was required. He failed to do so. Rajaram appeared to have appreciated that there is a need to get a letter of undertaking from Dicky Tan. The handwritten annotations of Leela and Rajaram (see [282] above) would suggest so. However, it was not done. Rajaram referred to Chandra's email on 23 December 2008, but as I have found earlier, it was a written confirmation of Dicky Tan's oral undertaking on 19 December 2008 and not a separate written undertaking (see [290] above).

306 Hence, I find that Rajaram was in breach of his duty by failing to advise Nava Bharat on the legal implications of proceeding with the Transaction based on Dicky Tan's *oral* undertaking to obtain the Forestry Licence if one was required.

(3) Failure to advise for the loan of US$3m to be held in escrow

307 Nava Bharat's next contention is that Rajaram failed to advise that the loan should be paid into an escrow account and to be released only after the Forestry Licence was obtained. [note: 720]

308 Nava Bharat claims that a reasonably competent solicitor would have "considered other options to achieve [Nava Bharat's] objectives with minimum exposure to risks of loss or damage", and one of the options would be for the money to be held in an escrow account pending the Forestry Licence. [note: 721] Rajaram's primary response is that there was no basis for him to advise for the money to be held in escrow as it was not discussed or contemplated by the parties and to propose such an arrangement would result in Dicky Tan walking away from the deal and the deal being aborted. [note: 722] Rajaram contends, in the alternative, that the money, which was a loan to Dicky Tan, could not have been put in escrow as that would defeat the intent of the loan. [note: 723]

309 In my view, a reasonably competent solicitor in the position of Rajaram would not necessarily have advised Nava Bharat that the money should be placed into an escrow account pending the Forestry Licence. The standard of care must be analysed in light of the nature of the specific risk that has eventuated, and this requires consideration of the magnitude of the risk, the seriousness of the harm if the risk eventuates, the cost and practicability of steps to eliminate or mitigate that risk: *BNJ (suing by her lawful father and litigation representative, B) v SMRT Trains Ltd and another* [2014] 2 SLR 7 at [55]. Here, the risk in question would be the delay in obtaining the Forestry Licence. The harm that would follow if the risk in question materialises was not a particularly serious one. It would simply have been the losses flowing from the delay in obtaining the Forestry Licence for which Nava Bharat had the means to put an end to (*ie*, by applying for the Forestry Licence personally). Nava Bharat contends that if the money was placed in escrow pending the Forestry Licence, then it might have been saved. [note: 724] I do not think that this is a fair characterisation of the harm that would follow if the risk in question materialises.

310 It appears that Nava Bharat had taken into account the occurrence of subsequent events, such as the loss of the PTIC shares, when determining if Rajaram ought to have advised for the money to be placed into an escrow account pending the Forestry Licence. This must be rejected. The issue of standard of care must be judged in light of the circumstances at the time and not with the benefit of hindsight: *Tan & Au* at [64]–[65], citing *Jackson & Powell* at para 11-092 and *PlanAssure*

PAC (formerly known as Patrick Lee PAC) v Gaelic Inns Pte Ltd [2007] 4 SLR(R) 513 at [54]. Nava Bharat claims that the argument was not made with the benefit of hindsight as Rajaram had advised for money to be put into escrow in the course of the Transaction after the initial completion. [note: 725] However, the fact that Rajaram subsequently took additional precautions in those instances does not in itself show that he was negligent in failing to advise for the money to be placed into an escrow account (see *Charlesworth & Percy on Negligence* (Christopher Walton, gen ed) (Sweet & Maxwell, 12th Ed, 2010) at para 7-49, citing *Philpott v British Railways Board* [1968] 2 Lloyd's Rep 495 at 502). The instances in which Rajaram recommended payment into the escrow account occurred *after* completion, and as such, the circumstances were different because Dicky Tan had, by then, failed to obtain the Forestry Licence in an expeditious fashion.

311 It would also have been impractical, in light of the circumstances, for Rajaram to advise Nava Bharat to place the money into an escrow account as a means of reducing the risk of delay in obtaining of the Forestry Licence. The Transaction was structured as a loan to Dicky Tan. It would have been unreasonable to expect Rajaram to advise that the money should be held in escrow despite the fact that it was a loan for which security (in the form of the share pledges and guarantees) was obtained. More importantly, the contemporaneous evidence shows that Dicky Tan's position was that he required the money to be paid to him upfront upon initial completion. This was recorded in Rajaram's email to Woody on 22 January 2009: [note: 726]

> [Dicky Tan] needs the money for the expenses incurred in getting the transfer and to pay for jetty and the road works, the jetty has to be completed within 5 months on pain of LD agreed at USD 33,000 per day f [*sic*] delay. ...

At the hearing, Ashwin accepted that a stakeholding arrangement would not have been acceptable to Dicky Tan because he needed the money to pay for the expenses incurred in getting the transfer and to pay for the jetty and road works. [note: 727] It certainly could not have been reasonable to expect Rajaram to advise on the use of an escrow account when it runs contrary to the intentions of the parties to make upfront payment at the initial completion.

312 Accordingly, I find that Rajaram was not in breach in not advising Nava Bharat that the money should be placed into an escrow account pending the Forestry Licence.

Alleged breaches relating to the new mining law

(1) Restructuring the Transaction as a loan to Dicky Tan

313 In light of the new mining law, the Transaction had to be restructured. Nava Bharat claims that it wanted to acquire an equity interest in the Mine and the new mining law, which would allow it to own shares in PTIC, presented an excellent opportunity for it to do so. [note: 728] According to Nava Bharat, Rajaram breached his duty when he acted contrary to ABNR's advice and structured the Transaction as a loan to Dicky Tan instead of PTIC. [note: 729] In addition, Nava Bharat argues that Rajaram had failed to advise Nava Bharat on the implications of not heeding ABNR's advice to give the loan to PTIC and not Dicky Tan. [note: 730]

314 I find that Nava Bharat's contentions are without merit.

315 The Loan Agreement is governed by Indonesian law, [note: 731] and it follows that the implications of naming Dicky Tan as the debtor (such as the possibility of converting the loan into

shares in PTIC) is a matter of Indonesian law. As I have found earlier, Rajaram is not under a duty to advise on Indonesian law. Hence, Nava Bharat's contention that Rajaram ought to have advised it on the implications of not heeding ABNR's advice on Indonesian law is untenable. Rajaram was not in the position to doubt the advice of ABNR or veto the commercial decision of Nava Bharat. The proper questions to ask should, therefore, be whether ABNR's advice was conveyed to Nava Bharat and if so, whether Nava Bharat made the commercial decision to proceed with Dicky Tan as the debtor in the Loan Agreement in spite of ABNR's advice.

316 In my view, Nava Bharat was advised by ABNR on the implications of having Dicky Tan instead of PTIC as the debtor named in the Loan Agreement. In particular, ABNR commented on 22 January 2009 that "the conversion of loan into shares under [Article 6 of the Loan Agreement] may only work if the debtor is PTIC, not [Dicky Tan]". [note: 732] The email was sent to Ashwin and copied to Prasad. [note: 733] Nava Bharat was therefore aware of ABNR's advice on this issue.

317 With the advice from ABNR, Nava Bharat then made the commercial decision to proceed with Dicky Tan as the debtor of the loan. Nava Bharat claims that it was Rajaram who disregarded the advice of ABNR. [note: 734] I do not agree. In Rajaram's reply to ABNR before the Indonesian leg of the initial completion on 22 January 2009, he explained that Dicky Tan was made the debtor because he needed the money "for the expenses incurred in getting the transfer and to pay for jetty and the road works", and concluded by pointing out to ABNR that "both parties have decided on commercial basis to proceed". [note: 735] Pertinently, Ashwin was copied to the email, and there is no evidence to suggest that he took issue with the contents of Rajaram's email to ABNR. [note: 736] In view of my assessment of Ashwin, I do not accept that he was one who would have been led by the nose and simply agree with Rajaram. I find that Ashwin would most certainly have objected if he thought, at that point in time, that Rajaram was misrepresenting the position to ABNR. He did not. It is also pertinent to note that Nava Bharat had averred in its statement of claim that it was "prepared to take a commercial risk on the implications [of] the new mining laws". [note: 737] To my mind, the logical conclusion from the totality of the circumstances must be that Rajaram was acting in accordance with the instructions of Ashwin.

318 Nava Bharat further argues that Rajaram's negligent conduct in this respect was "manifest on the face of it", and that he was rushing through the documentation. [note: 738] I agree that there was a rush to complete. This is apparent from the record. However, I find that it was Ashwin who wanted to meet Dicky Tan's demand to complete on an expedited basis. Dicky Tan had threatened to walk away if the money was not paid directly to him, [note: 739] and Nava Bharat was eager to close the deal. On the latter point, I accept Chandra's evidence that "both parties were in a haste to sign the documents". [note: 740] I also accept Rajaram's evidence that "Ashwin was also anxious to complete the deal". [note: 741] They are not only supported by contemporaneous documents, [note: 742] but more importantly, consistent with the evidence of Ashwin. The reason for Nava Bharat's strong desire for the Transaction to proceed at a brisk pace stems from the pressure which Ashwin faced from NBVL. Ashwin testified at the hearing that NBVL was "yelling at [him] to get coal" because there was a power plant that was coming up which was "[dependent] on Indonesian coal". [note: 743] According to Ashwin, NBVL was "determined to get coal from [the Mine]", and "eager to get coal for the power plant". [note: 744]

319 I pause to note that it was not the first time that Dicky Tan had threatened to walk away. Dicky Tan had previously threatened to walk away when the issue of Forestry Licence surfaced (see [33] and [278] above). Nava Bharat decided to take the risk and proceeded on the basis of Dicky

Tan's undertaking despite having being advised by ABNR and Bob Sundaram on the requirement under Indonesian law.

320 Furthermore, contrary to Nava Bharat's assertion, Rajaram was warning Nava Bharat against proceeding with such haste. This is most clearly demonstrated in Rajaram's email on 16 January 2009, where he informed Chandra that he would "not be able to meet [Dicky Tan's] unilateral imposition of timelines" unless ABNR approves of the proposed structure, and that "setting datelines [*sic*] when the documentation is far from complete is neither fair nor practical". [note: 745] Ashwin conceded under cross-examination that he received this email and he knew that Rajaram was advising against meeting Chandra's timelines. [note: 746] It appears that Ashwin was not really concerned at that time that the rush to complete would not be in the interest of Nava Bharat. He observed that there was a "flurry of activities" immediately before the Indonesian leg of the initial completion, [note: 747] and Rajaram had cautioned against haste. [note: 748] In fact, the circumstances would suggest that Ashwin wanted to complete before Dicky Tan could change his mind and walk away from the deal. It is only with the benefit of hindsight that Nava Bharat is now blaming Rajaram.

321 Hence, I find that Rajaram was acting on Nava Bharat's instructions to complete the deal on the terms (*ie*, Dicky Tan as debtor) and within the deadline imposed by Dicky Tan. Rajaram tried to warn against haste, and ABNR advised on the implications of having Dicky Tan as the debtor. However, it would appear that Nava Bharat wanted to meet its commercial objectives set out by NBVL and decided to proceed with the Transaction due to Dicky Tan's threats to walk away. It cannot now turn around and blame Rajaram for not having vetoed what turned out to be an unwise commercial decision.

(2) Failure to provide for an effective mechanism to convert the loan into shares in PTIC

322 Nava Bharat further alleges that Rajaram had breached his duty in failing to provide an effective mechanism to allow Nava Bharat to convert the loan into shares in PTIC. [note: 749] This is closely connected with the issue of whether the loan should have been given to PTIC or Dicky Tan. As mentioned earlier, ABNR's advice was that the conversion of loan into shares in PTIC may not work if the loan was given to Dicky Tan.

323 I am unable to agree with Nava Bharat. For a start, I note that this allegation does not appear anywhere in the pleadings. Since it is an allegation that has not been pleaded, I do not think that it ought to have been made in submission: *Chow Kwok Ching v Chow Kwok Chi and others and other suits* [2008] 4 SLR(R) 577 at [29]. As I have mentioned earlier (see [182] above), Nava Bharat had previously filed two applications to amend its statement of claim to include allegations relating to this issue, and it was rejected on both occasions. Rajaram proceeded on the basis that this allegation was not in issue, and did not adduce evidence on Indonesian law to rebut the allegation. Hence, Rajaram would be prejudiced if Nava Bharat was allowed to submit on the issue despite not having raised it in the pleadings.

324 Moreover, Nava Bharat had not proven that a loan to PTIC could have been converted into shares in PTIC under Indonesian law. Nava Bharat's claim in relation to the alleged failure is premised on the fact that the loan to PTIC *could* have been converted into shares in PTIC. However, I have earlier rejected the evidence of Carl. Even if I had not, I do not think that Carl had, in his expert report, identified the relevant sources of Indonesian law which would allow for such a conversion. [note: 750] Accordingly, there is no evidence to show whether Indonesian law would have allowed for such a conversion.

325 In any case, I am of the view that Nava Bharat's contention is misplaced. The crux of the matter lies with the change in the debtor named in the Loan Agreement from PTIC to Dicky Tan. Nava Bharat's contention is premised on ABNR's advice that the loan should be given to PTIC because the conversion of loan into shares "may not work if the debtor is [Dicky Tan]". [note: 751] I found earlier that Nava Bharat had made the commercial decision to go ahead with naming Dicky Tan as the debtor in the Loan Agreement despite the advice of ABNR. By proceeding with Dicky Tan instead of PTIC named as the debtor in the Loan Agreement despite ABNR's advice, Nava Bharat must be taken to have abandoned the possibility of having a convertible loan issued to PTIC. As such, I do not see how Nava Bharat can possibly contend that Rajaram had failed to put in place an effective mechanism to ensure that the loan can be converted into shares in PTIC.

326 Notwithstanding Nava Bharat's decision to give the loan to Dicky Tan and the uncertainty surrounding the new mining law, Rajaram took steps to ensure that there are contractual terms in, *inter alia*, the Loan Agreement which would allow Nava Bharat and Dicky Tan to re-negotiate in the event that the new mining law permits foreigners to own a direct interest in a company which holds the KP Concessions for the Mine. [note: 752] This, in my view, would suffice to meet the standard of care required of him.

327 Nava Bharat claims that the optional conversion clause in the Loan Agreement is illusory because it can only work with Dicky Tan's assistance. [note: 753] No evidence was adduced to support this. Even if this was true, I find that it was an inevitable result of Nava Bharat's decision to give the loan to Dicky Tan instead of PTIC. Moreover, the Loan Agreement was drafted based on a template provided by ABNR, [note: 754] and the effectiveness of the optional conversion clause is a matter of Indonesian law on which Rajaram would have neither duty nor capacity to advise.

328 Nava Bharat further claims that the optional conversion clause in the Loan Agreement would not prevent Dicky Tan from transferring the shares to other parties before Nava Bharat could take steps to convert. [note: 755] In my view, this is a red herring. The risk that Dicky Tan might transfer the shares to other parties exists even if, as Nava Bharat submits, a clause was included in the Master Agreement to allow the conversion of the loan into shares in PTIC. [note: 756] More importantly, the Transaction was structured such that Nava Bharat would still be entitled to the coal in the Mine for a period of ten years at a stipulated base quantity and price under the Holding Company Off-take Agreement even if Dicky Tan chose to transfer the shares in PTIC to other parties. [note: 757] This would, in essence, achieve Nava Bharat's objective of securing the coal in the Mine.

329 Nava Bharat also highlighted the list of alleged problems that was identified by Carl to have afflicted the optional conversion clause in the Loan Agreement. [note: 758] However, this is immaterial for the present inquiry. The Loan Agreement, which is governed by Indonesian law, [note: 759] was drafted by ABNR. Rajaram has no duty to advise on the validity and effectiveness of the optional conversion clause which are matters of Indonesian law. Therefore, even if I accept Carl's evidence (and I do not), it would have no impact on the issue of whether Rajaram was in breach.

330 In light of the foregoing, I find that Nava Bharat's allegation that Rajaram had failed to provide for an effective mechanism to convert the loan into shares in PTIC to be without merit. Nava Bharat's decision to give the loan to Dicky Tan instead of PTIC essentially destroyed the basis for an effective mechanism to convert the loan to shares in PTIC (according to ABNR's view (see [316] above)). There can be no convertible loan given to PTIC since Nava Bharat decided to give the loan to Dicky Tan instead. Notwithstanding that, Rajaram had put in place provisions to give Nava Bharat the opportunity to re-negotiate for equity participation if the new mining law turned out to be favourable.

Even if the optional conversion clause was, as Nava Bharat seems to suggest, invalid or ineffective, it would have been a matter of Indonesian law which was not within the purview of Rajaram. It follows that there can be no breach on the part of Rajaram.

(3) Failure to advise on the implications of the new mining law on the Mine Operating Service Agreement

331 Nava Bharat claims that Rajaram failed to advise Nava Bharat on the possible implications that the new mining law might have on the validity of the Mine Operating Service Agreement. [note: 760]

332 By way of background, the Mine Operating Service Agreement is an agreement that was concluded between PTIC (as the holder of the KP Concessions of the Mine) and NBSC (as the PMA Company chosen by Nava Bharat). [note: 761] It was first contemplated as part of the initial structure under the Heads of Agreement (see [22(d)] above). Under the Mine Operating Service Agreement, NBSC was appointed as the mining operator entitled to extract, transport and sell the coal from the Mine to any customer. [note: 762]

333 Under the new mining law, there was a possibility that a mining operator (such as NBSC) could no longer be owned by foreigners. [note: 763] This issue was identified and raised by ABNR at least three times. ABNR first highlighted the issue in its email on 22 December 2008 to Rajaram, and copied to Ashwin. [note: 764] In the email, ABNR stated that:

> New Mining Law
>
> ...
>
> We would also like to raise an issue on the appointment of a mining services company. In the new mining law, Article 124 (1) stipulates that the holder of an IUP shall use local/national mining services company. Further Articles [*sic*] 124(2) regulates that in the event there is no mining services company as mentioned in paragraph (1), the holder of the IUP may use other mining services company which is Indonesian legal entity (*berbadan hukum Indonesia*) . *There is no definition or explanation of 'local/national mining services company' under the new mining law.*
>
> Based on the above, we are afraid that the authority will interpret 'local/national mining services company' as a mining services company 100% owned by Indonesian; therefore, a PMA company does not fall into this definition. The holder of IUP may only use a PMA mining services company (as an Indonesian legal entity) in the event there is no 'local/national mining services company'. *We are of the view that this provision and un-clarities* [*sic*] *in provisions of the new mining law may cause a problem to the proposed cooperation agreement.*
>
> ...
>
> Before we move forward with the completion of this transaction under the existing structure, we believe that it is important for us to analyze further the impact of the new mining law, conduct research with the relevant Government offices and discuss with the local Government of Tanah Laut Regency.
>
> [emphasis added]

334 I pause here to note that ABNR merely highlighted that the uncertainty with the new mining

law *may* cause problems. Rajaram then conveyed the message to Ashwin, and stated that he was "particularly concerned with the observation made on the new Mining laws that appear to question the validity of even the [Mine Operating Service Agreement]". [note: 765] In other words, Nava Bharat knew that the Mine Operating Service Agreement might be adversely affected by the new mining law.

335 ABNR raised the issue again on 18 January 2009, and pointed out that "the new mining law creates *uncertainty* on the validity and enforceability of [the] Mine Operating [Service] Agreement". [note: 766] As such, it specifically stated that its opinion on the validity of the Mine Operating Service Agreement will be "highly qualified". [note: 767] Again, Ashwin was privy to the advice. [note: 768]

336 On 23 January 2009, shortly *after* the Indonesian leg of the initial completion, Prasad wrote to ABNR asking for an opinion stating that Nava Bharat had the "authority to conduct the mine operations, sale and export of the coal from Indonesia freely". [note: 769] ABNR then sent an email to Rajaram stating that "the rights of a mining services company to conduct the mine operation *may be limited* by the enactment of the new mining law" [emphasis added], and referred to its earlier email on 18 January 2009. [note: 770] In response, Rajaram said that the Mine Operating Service Agreement was left intact because cl 18, the "severability" clause, would save the other parts of the agreement even if any part is rendered illegal. [note: 771] ABNR replied with "[t]hat is my understanding". [note: 772]

337 Nava Bharat contends that any reasonably competent solicitor in these circumstances would have assessed the implications of the new mining law before proceeding further in the Transaction. [note: 773] I understand this to mean that Rajaram ought to have advised Nava Bharat to "wait and see" in light of the uncertainty in the new mining law. In this regard, I do not think that Nava Bharat's contention has any merit. Nava Bharat's contention rightly presumes that the implications of the new mining law on the Mine Operating Service Agreement can only be made clear with the passing of time. At that point in time, even ABNR could not say for sure what the impact of the new mining law might have on the Mine Operating Service Agreement. However, Nava Bharat could not wait. As I have explained earlier (see [318]–[320] above), Nava Bharat was eager to proceed with the Transaction. I accept Rajaram's evidence (which, I note, is consistent with the circumstances) that the issue was brought to Ashwin's attention but he nevertheless decided to "go ahead" with the initial completion. [note: 774] Nava Bharat was repeatedly advised by ABNR and was therefore fully aware that there is uncertainty as to the validity of the Mine Operating Service Agreement by virtue of the new mining law. In my view, there is no need for Rajaram to state the obvious. Nava Bharat knew of the risks but chose nevertheless to proceed with the Transaction.

338 Nava Bharat also took objection to the fact that Rajaram pointed out to ABNR (and *not* Nava Bharat) and sought its confirmation on the effects of cl 18 of the Mine Operating Service Agreement (*ie*, the "severability" clause) in light of the uncertainty caused by the new mining law. According to Nava Bharat, Rajaram "acted expressly against the advice of ABNR" and "did not advice Ashwin when he took the position contrary to ABNR's advice". [note: 775] I do not agree. For a start, I note that Rajaram's email was sent to ABNR, and it was clearly *not* an advice to Nava Bharat. Moreover, it did not contradict ABNR's advice which was that the implications of the new mining law were unclear. Rajaram's point was to clarify that the implications of the new mining law would not *necessarily* nullify the entire Mine Operating Service Agreement but only the parts that were rendered illegal. This does not detract from but merely clarifies ABNR's advice. Rajaram was not saying that the new mining law would have no effect on the Mine Operating Service Agreement or that it was safe to proceed. It certainly could not have been what Ashwin would have understood if he had read the emails in their

proper context. At the end of the day, Nava Bharat made a commercial decision to proceed. Rajaram was not under a duty to advise Nava Bharat on the commercial wisdom of the Transaction.

Alleged breach relating to share pledges

339 Nava Bharat contends that Rajaram had failed to safeguard its interest when he put in place the share pledges which were "afflicted by a litany of defects upon defects". [note: 776] According to Nava Bharat, these alleged defects rendered the share pledges "defective" and "doomed to fail". [note: 777]

340 I note at the outset that the share pledges and the powers of attorney are governed by Indonesian law. [note: 778] As such, they fall within the responsibilities of ABNR and not Rajaram. The share pledges and the powers of attorney were based on templates prepared by ABNR. ABNR also reviewed and approved the final drafts before execution. Specifically, it was opined in ABNR's Advice on the Loan Agreement that the share pledges constitute "legal, valid and binding obligations" on the part of Dicky Tan and Ridwan Halim. [note: 779] Rajaram had no reason to doubt or question ABNR's advice on the validity of the share pledges and powers of attorney.

341 One of Nava Bharat's allegations is that Rajaram failed to have regard to ABNR's qualifications in respect of the share pledges and did not advise Nava Bharat on the qualifications. [note: 780] The specific points identified by Nava Bharat were: (a) that the powers of attorney to sell the shares in PTIC, albeit "customary" in Indonesian legal practice, may not be upheld by the Indonesian courts, [note: 781] and (b) that the share pledges could only be exercised if there was no objection from other creditors. [note: 782] In my view, this allegation is unfounded. This is a matter of Indonesian law, and ABNR's qualifications on the share pledges and powers of attorney were made known to Ashwin. This is evident from the contemporaneous documents. ABNR's qualifications were raised in its draft and final opinions which were sent *via* three emails on 23 and 28 January 2009. [note: 783] Ashwin and Prasad were copied in all three emails. [note: 784] As I have earlier found at [221], Ashwin is not the proverbial layperson and would certainly have been able to read and understand the contents of ABNR's emails. Even if he could not, I am convinced that he would have raised his concerns with ABNR through Rajaram. [note: 785] He did not do so. Indeed, Mr Niru Pillai, counsel for Nava Bharat, acknowledged, rightly in my view, that Rajaram was not expected to "take a highlighter and highlight" the ABNR's opinion for Ashwin. [note: 786] In my view, Nava Bharat was duly advised and would have known about the qualifications on the share pledges and powers of attorney.

342 Nava Bharat also raised a series of alleged defects in relation to the share pledges, including:

(a) The share pledges covered the 20% shares in PTIC held by Ridwan Halim even though he did not receive any part of the loan. [note: 787]

(b) The share pledges covered both the KP Exploitasi Licence and the KP Explorasi Licence when Nava Bharat was only entitled to the former and not the latter. [note: 788]

(c) The share pledges did not specify the exact amount of money that was guaranteed by them. [note: 789]

343 As the share pledges were governed by Indonesian law, the validity and enforceability of the share pledges would therefore not be something that Rajaram was obliged to advise on. This would

suffice to deal with all of the alleged defects with the share pledges. In any case, ABNR gave its stamp of approval for the share pledges, subject to the qualifications which Nava Bharat was aware of, and there was no reason for Rajaram to doubt the accuracy of the advice given by ABNR.

344 One of the difficulties with Nava Bharat's case is that the allegations of defects with the share pledges are not supported by evidence on Indonesian law. This is because I have earlier rejected Carl's evidence. Moreover, ABNR appeared to have accepted the share pledges as good under Indonesian law.

345 Nava Bharat also appears to be suggesting that there were issues with the enforceability of the share pledges because Rajaram (and SLP) started seeking advice from Indonesian lawyers (*ie*, Suria and ABNR) when it was time to exercise the share pledges. [note: 790] Nava Bharat claims that the response of Suria and ABNR showed that the share pledges were "dead in the water from the outset" and that they were "illusory" as they did not constitute security for the loan given to Dicky Tan. [note: 791] I find this statement to be factually inaccurate and misleading as Nava Bharat did successfully exercise the share pledges (see [122] above). Moreover, I do not agree with Nava Bharat's characterisation of the events that transpired. I have set out the brief facts preceding the exercise of the share pledges at [118]–[119]. In my view, Rajaram (and SLP) was not seeking advice on the enforceability of the share pledges, but on whether the share pledges could be exercised in light of the circumstances and if so, how to do it. This is clear from Muralli's email to Suria, which reads: [note: 792]

> As set out in the attached Chronology, a notice of default was sent to PTIC and DT for not obtaining a forestry licence within the stipulated time (this being an Event of Default which would result in the termination of the Loan Agreement). Following from this, we would be grateful if we can have your views on the following:
>
> 1) Can client now exercise its right under the Pledge of Shares Agreement?
>
> 2) If so, how would client go about exercising its rights under the same (is there a need to give any notice etc.)?
>
> 3) If client cannot now exercise its rights under the Pledge of Shares Agreement, what else has to be done to enable client to exercise those rights?
>
> ...

These are questions that have to be answered by an Indonesian lawyer, and I do not see any basis for Nava Bharat to object.

346 Suria informed Muralli that there may be some complications in exercising the share pledges because of the way in which they were drafted, and asked Nava Bharat to go back to ABNR for assistance (see [118] above). Muralli did so, and ABNR said that the exercise of the share pledges unilaterally was subject to challenge by the pledgors (see [119] above). When Rajaram pointed out that Nava Bharat was unhappy with ABNR's present stand, ABNR explained that Nava Bharat had no reason to be dissatisfied given that it had "very clearly stated some qualifications on the enforceability of the pledge and powers of attorney" (see [119] above). Ashwin was privy to the advice from ABNR (see [341] above) and must be taken to have agreed to proceed notwithstanding the qualifications.

347 To be complete, I should address Nava Bharat's contention that Rajaram was negligent by sending to Chandra the "wrong drafts for the pledge" on 21 January 2009. [note: 793] I find that there is no merit to this contention. Not all mistakes or oversight would invariably constitute a breach of duty. On the circumstances of the present case, I do not think that it was an error that no reasonably competent solicitor in the same circumstances would have made.

348 Accordingly, I find that Rajaram had no duty to ensure that the share pledges and powers of attorney were valid and effective under Indonesian law. ABNR gave its advice on the share pledges and powers of attorney, including the qualifications thereto, and Ashwin was copied in the emails. Ashwin would have read and understood ABNR's advice, and there was nothing more for Rajaram to do. With the benefit of ABNR's advice, Nava Bharat had decided to proceed with the Transaction.

Alleged breach relating to exit option

349 Nava Bharat also alleges that Rajaram had failed to advise it to exercise the exit option throughout the Transaction. [note: 794] Nava Bharat's case is that the contemporaneous evidence shows that Rajaram did not advise Ashwin to exercise the exit option, [note: 795] but instead went ahead to put in place alternative arrangements which benefited Dicky Tan at the expense of Nava Bharat. [note: 796] I disagree.

350 Rajaram's evidence was that he had advised Ashwin that Nava Bharat had the option to exit, if it wanted to, as early as March 2009 and continuously thereafter. [note: 797] At the hearing, Ashwin conceded that Rajaram had reminded him of Nava Bharat's right to exit the Transaction "numerous times". [note: 798]

351 More importantly, contrary to Nava Bharat's contention, there is clear documentary evidence to show that Rajaram had advised Nava Bharat of its right to exit. This advice was documented in at least two emails from Rajaram to Nava Bharat. The first email was sent on 18 September 2009, around the time when Dicky Tan failed to meet the deadlines under the Addendum Agreement. In the email, Rajaram stated: [note: 799]

> Dear Ashwin
>
> We had signed the Addendum Agreement (AA) on the 28th of August 2009.
>
> It is an express term of the AA that the AIP will be issued within 3 weeks form [*sic*] the date of the AA; the AIP will therefore have to be obtained by the 18th of September 2009.
>
> The mail quite clearly indicates that this cannot be done. *The AA also provides for the right to demand the return of all monies paid, pursuant to the various agreements, with an interest rate of 12% per annum till the monies are repaid. There is a clear default and we are not obliged to continue with the Agreement.*
>
> [emphasis added]

Even though Rajaram went on to explore with Nava Bharat the possibility of issuing a notice of default to trigger negotiations with Dicky Tan, [note: 800] it does not detract from the fact that Rajaram had advised Nava Bharat on its right to exit.

352 The second email was sent on 27 October 2009. Bob Sundaram informed Rajaram that it would take a few months before the issue of the Forestry Licence can be resolved. In response, Rajaram wrote that Ashwin "will have to make the call". [note: 801] Even though Rajaram also suggested that Nava Bharat can continue allowing Dicky Tan to "lift" as much coal as possible while waiting for the Forestry Licence to materialise, I think that the email, read as a whole in its proper context, would be understood to mean that Ashwin must decide if he wants to continue with the deal. As such, I accept Rajaram's evidence that this was an advice for Nava Bharat to consider if it wishes to exercise the exit option. [note: 802]

353 Apart from the two emails to ABNR, there are further contemporaneous evidence which supports the finding that Nava Bharat was fully aware of the right to exit the deal. A meeting was held on 23 June 2009 between Ashwin, Rajaram, Chandra and Dicky Tan to discuss the issue of the Forestry Licence. [note: 803] The minutes of the meeting recorded that Rajaram informed Chandra and Dicky Tan that if the Forestry Licence was not obtained within a specific time frame, then Nava Bharat "can exercise the exit options [*sic*]". [note: 804] Another meeting was held on 29 June 2009. [note: 805] This meeting was attended by, *inter alia*, Ashwin, Rajaram, Chandra and Dicky Tan. [note: 806] One day after the meeting, Chandra wrote to Rajaram setting out the issues that were discussed and one of the items was that Nava Bharat "shall have the right to exercise its exit option" if the Forestry Licence cannot be obtained within six months. [note: 807] This was forwarded to Ashwin on the same day. [note: 808]

354 The documentary evidence reveals that Rajaram had, in fact, advised Nava Bharat of its exit option. Having done so, it was entirely up to Nava Bharat to decide if it wanted to continue or not. This brings me to the next point, that is, Nava Bharat's contention that Rajaram went ahead to put in place alternative arrangements that favoured Dicky Tan at the expense of Nava Bharat. [note: 809] Again, I find Nava Bharat's contention to be unsupported by evidence. Rather, the evidence shows that Ashwin was the one who wanted to press ahead and use Dicky Tan's breaches as bargaining chips to extract more favourable commercial terms. In fact, there is evidence to suggest that it was Bhushan and *not* Rajaram who proposed to use Dicky Tan's defaults to ask for "financial concessions" (see [97] above).

355 Ashwin accepted that he found out that mining could not commence without the Forestry Licence around five days after initial completion but he "ma[d]e the conscious decision not to exit the deal". [note: 810] This was around February 2009.

356 This decision led to the discussions between the relevant parties to try and resolve the issue of Forestry Licence (see [60]–[65] above). The discussions culminated in the execution of the Variation Agreement on 26 March 2009 which imposed an obligation on PTIC to secure the Forestry Licence for the Mine within four months. [note: 811] Ashwin admitted that by entering into the Variation Agreement, he made a commercial decision to proceed with the deal rather than to terminate it. [note: 812]

357 At around June 2009, when the four-month deadline was up, Dicky Tan informed that he needed more money to obtain the Forestry Licence. Nava Bharat nevertheless decided to proceed. This is evident from the minutes of the meeting on 4 June 2009, which was not attended by lawyers. The minutes of the meeting recorded that Ashwin offered to "expedite the process" by suggesting that Nava Bharat "reimburse the cost of procuring [the] forestry licence [provided that] Dicky Tan can confirm the licence within 1 month". [note: 813] At the hearing, Ashwin explained that it was not

advantageous to exit the deal and so he "took a decision to proceed". [note: 814] It was, in his words, a "commercial decision". [note: 815]

358 By the end of July 2009, Dicky Tan still had not obtained the Forestry Licence and was in continuing default. Nava Bharat continued to be willing to provide Dicky Tan with a further extension of time. Rajaram, in his email to Chandra dated 3 August 2009, granted Dicky Tan an extension of one month to obtain the Forestry Licence. The email, which was copied to Ashwin, reads: [note: 816]

> In spite of al [*sic*] these defaults and in an effort to try and save the transaction without the need to litigate, our clients are prepared to give the requested one month extension ...

359 Despite the one-month extension, Dicky Tan was still unable to obtain the Forestry Licence. Nava Bharat then made the commercial decision to enter into the Addendum Agreement dated 28 August 2009, under which Dicky Tan was provided with a further three-week extension to obtain the Forestry Licence. [note: 817]

360 Notably, it was Ashwin's evidence that Nava Bharat was willing to proceed with the Transaction despite Dicky Tan's defaults even in February 2010. [note: 818] In fact, Ashwin testified that Nava Bharat was "willing to abide by the agreements [Nava Bharat] got into" and make payment for the shares even in October 2010 when the share pledges were exercised. [note: 819]

361 The evidence shows that it was a commercial decision made by Ashwin not to exit the Transaction despite having been duly advised by Rajaram as to its right to exit. Nava Bharat claims that the alternative arrangements (such as the Variation Agreement and Addendum Agreement) were put in place by Rajaram to benefit Dicky Tan at the expense of Nava Bharat. I cannot agree. Nava Bharat had repeatedly made the commercial decision to proceed with the Transaction despite having been advised of its exit option (as well as other contractual safeguards) because it was satisfied with using Dicky Tan's breaches as leverage to extract more favourable commercial terms. This is apparent from the face of the various agreements (see, for instance, cl 3.3 of the Variation Agreement (see [66] above) and cll 2.1 and 4 of the Supplemental Master Agreement (see [84] above)). Moreover, I accept Bob Sundaram's evidence that Ashwin had told him that the lack of the Forestry Licence resulted in "variations to the contracts which he believed to be in [Nava Bharat's] favour". [note: 820] Significantly, even Ashwin accepted under cross-examination that that Nava Bharat reached a "commercial deal" with Dicky Tan to lower the price of the Mine due to the delay in obtaining the Forestry Licence. [note: 821] All these evidence contradict Nava Bharat's belated assertion that the alternative arrangements only benefited Dicky Tan.

362 At the end of the day, Dicky Tan repeatedly breached his obligations and Rajaram pointed out to Nava Bharat that it was entitled to exit the Transaction. However Nava Bharat chose to continue and used Dicky Tan's continuing breaches as leverage to obtain favourable commercial terms. In these circumstances, I find that Rajaram had met the standard of care that is required of him. There is no duty on his part to persuade Nava Bharat to exit the Transaction. Nava Bharat chose to continue with the Transaction despite knowing that it was entitled to exit, in the process obtaining more favourable commercial terms from Dicky Tan. It cannot now attempt to pin the blame on Rajaram.

363 I should briefly address one ancillary point raised by Nava Bharat, which is that Rajaram had advised Nava Bharat to continue negotiating and "lift" as much coal as possible even though there was no Forestry Licence. Nava Bharat claims that this constitutes illegal mining, and Rajaram did not

advice on the implications of such illegality on the enforceability of the agreement in Singapore. [note: 822] This point has not been pleaded by Nava Bharat and thus, I need say no further on it except to note that the mining was supposed to be conducted by Dicky Tan, and not Nava Bharat, on an *ad hoc* basis while the parties negotiate on the way to move the matter forward. [note: 823]

Summary on the alleged breaches by Rajaram

364 My findings on the alleged breaches are that Rajaram had not breached his duty as alleged by Nava Bharat except for one, namely, the failure to advise Nava Bharat on the legal implications of proceeding with the Transaction based on Dicky Tan's *oral* undertaking to obtain the Forestry Licence if it was required. Hence, Nava Bharat's claim must fail insofar as they relate to the other alleged breaches of Rajaram.

365 I move on to consider the issue of causation.

Causation in contract and in tort

366 I begin by pointing out that Nava Bharat had addressed the issue of causation in a haphazard manner. In its submissions, Nava Bharat appeared to have been satisfied dealing only with the issue of causation with respect to Rajaram's alleged negligence and breach of fiduciary duty, [note: 824] and have conspicuously failed to address on the issue of causation in relation to the alleged breach of contract.

Burden of proof

367 Nava Bharat accepts that it bears the *legal* burden to prove causation, but contends that the *evidential* burden lies with Rajaram since he asserts that "the loss and damage to [Nava Bharat] would have occurred anyway". [note: 825] I do not agree with Nava Bharat insofar as it is contending that, as a starting point, the burden lies with the defendant to prove that the losses allegedly suffered by the plaintiff would have occurred notwithstanding the alleged breaches by Rajaram. I find the contention to be unsupported in law.

368 The plaintiff bears the burden of proving causation, and it would not be entitled to recover damages if, on the balance of probabilities, the loss would have been suffered even if the defendant had not acted negligently: *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR(R) 782 ("*Sunny Metal*") at [71]. The Court of Appeal in *Sunny Metal* at [71] accepted the view of Christopher Lau JC in *Guan Ming Hardware & Engineering Pte Ltd v Chong Yeo & Partners* [1996] 2 SLR(R) 382 at [99] that:

> ... [The lack of causation] is a direct attack on the plaintiff's case, for it indicates that the plaintiff's case is defective in one of its elements. From this it must follow that it must be part of the plaintiff's assertions that there is sufficient causation, and therefore the burden must lie on him.

369 As for the distinction between legal and evidential burden of proof, the discussion by the Court of Appeal in *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank International), Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63 ("*Rabobank*") at [30] is instructive. The evidential burden is a "tactical onus to contradict, weaken or explain away the evidence that has been led": *Rabobank* at [30], citing *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 ("*Britestone*") at [58]. In other words, the evidential burden only shifts to the defendant

where the plaintiff has adduced sufficient evidence to support its case. The illustration in *Britestone* at [60] makes this very clear:

> To contextualise the above principles, at the start of the plaintiff's case, the legal burden of proving the existence of any relevant fact that the plaintiff must prove and the evidential burden of adducing some (not inherently incredible) evidence of the existence of such fact coincide. Upon adduction of that evidence, the evidential burden shifts to the defendant, as the case may be, to adduce some evidence in rebuttal. If no evidence in rebuttal is adduced, the court may conclude from the evidence of the plaintiff that the legal burden is also discharged and making a finding on the fact against the defendant. If, on the other hand, evidence in rebuttal is adduced, the evidential burden shifts back to the plaintiff. If, ultimately, the evidential burden comes to rest on the defendant, the legal burden of proof of that relevant fact would have been discharged by the plaintiff. The legal burden of proof - a permanent and enduring burden - does not shift. A party who has the legal burden of proof on any issue must discharge it throughout. ...

370 Nava Bharat cites two Singapore cases to support its contention, namely, *Wai Wing Properties Pte Ltd v Lim, Ganesh & Liu (a firm)* [1994] 1 SLR(R) 1004 ("*Wai Wing*") and *Tan Hock Tee v C S Tan and Co* [1996] 2 SLR(R) 578 ("*Tan Hock Tee*"). It is important to bear in mind that these cases were High Court decisions that preceded the Court of Appeal decisions in *Rabobank* and *Britestone*. In any event, I do not think that they stand for the proposition that, as a starting point, the burden lies with the defendant to prove that the losses allegedly suffered by the plaintiff would have occurred in any event. In *Wai Wing*, Chao J said at [65]–[66] that:

> 65 The failure to reply to the statutory notice would convey to Lee and his solicitor the impression that the plaintiffs had no defence to the notice and that the plaintiffs were just being difficult or unreasonable in refusing to pay the sum claimed. In those circumstances, I cannot see what other conclusion any reasonable person or solicitor could have drawn. It was really inevitable that Lee, on the advice of his solicitor, decided to file the petition. There was simply no reason for him not to proceed.
>
> 66 Liu has suggested in his evidence that even if a reply had been given there was no guarantee that Lee would not file his petition. In answer to that I would make these observations. ... Secondly, having been negligent in discharging his duties as a solicitor, *which negligence I have found caused Lee to file the petition*, I think the burden shifts to the defendants to show that even if there was no failure, Lee would still have proceeded to file the petition. ...
>
> [emphasis added]

371 In my view, Chao J was not saying anything different from what the Court of Appeal has said in *Rabobank* and *Britestone*. He found that the negligence "caused Lee to file the petition" and the *evidential* burden shifts to the defendants to show otherwise. Lai J in *Tan Hock Tee* does not purport to take a different stance, but "fully endorse[d]" (at [37]) the comments of Chao J in *Wai Wing*.

372 Based on the foregoing, I am unable to agree with Nava Bharat that the evidential burden lies with Rajaram because he asserts that "the loss and damage to [Nava Bharat] would have occurred anyway". Nava Bharat must adduce some evidence to show that the losses suffered were caused by Rajaram's breach before the *evidential* burden shifts over to Rajaram.

373 With this in mind, I proceed to consider whether causation can be established on the evidence.

Alleged breaches by Rajaram

374 Nava Bharat had not clearly addressed how each of the alleged breaches by Rajaram caused the losses allegedly suffered by Nava Bharat. Instead, Nava Bharat dealt with the issue in its submissions under three categories, namely, Forestry Licence, new mining law and the escrow arrangement. Nava Bharat also proceeded on the basis that all of the alleged losses were caused by the alleged breaches of Rajaram. To my mind, the lack of clarity in the manner which Nava Bharat addressed the issue of causation exposes the weakness of its case. In addition, Nava Bharat had not addressed the issue of causation in relation to the alleged failure to advise on the implications of the new mining law on the Mine Operating Service Agreement as well as the alleged failure to advise on the right to exercise the exit option.

375 Notwithstanding that, I will address the points that were raised by Nava Bharat. Even so, I do not think that Nava Bharat can prove that the losses suffered were caused by the alleged breaches of Rajaram (even if they were established).

376 Millett LJ in *Bristol and West Building Society v Mothew* [1998] Ch 1 ("*Mothew*") at 11C–11E said that:

> *Where a client sues his solicitor for having negligently failed to give him proper advice, he must show what advice should have been given and (on a balance of probabilities) that if such advice had been given he would not have entered into the relevant transaction or would not have entered into it on the terms he did*.
>
> ...
>
> Where, however, a client sues his solicitor for having negligently given him incorrect advice or for having negligently given him incorrect information, the position appears to be different. *In such a case it is sufficient for the plaintiff to prove that he relied on the advice or information*, that is to say, that he would not have acted as he did if he had not been given such advice or information. It is not necessary for him to prove that he would not have acted as he did if he had been given the proper advice or the correct information.
>
> [emphasis added]

377 The passage was cited with approval by Rajah JC in *Lie Hendri* at [65] and Ang J in *Su Ah Tee* at [118]. I agree. In my view, this is no more than the "but for" test for causation in fact which is applicable in *both* tort and contract (see *Sunny Metal* at [63]).

(1) Forestry Licence

378 Nava Bharat appears to be contending that it would not have suffered the losses but for Rajaram's failure to advise on the implications of not having the Forestry Licence as well as advise against completion without the Forestry Licence. [note: 826] In essence, Nava Bharat is suggesting that it would not have proceeded with the Transaction (or on such terms), and hence, would not have incurred the alleged losses, if it was duly advised by Rajaram. However, Nava Bharat has not adduced any evidence to show that it would not have proceeded with the Transaction if it was duly advised. In fact, the evidence indicates otherwise. I have earlier found that Nava Bharat was eager to proceed with the Transaction (see [318]–[320] above). The desire to complete the Transaction led Nava Bharat to accept Dicky Tan's oral undertaking despite knowing that the Forestry Licence was required under Indonesian law (see [260]–[306] above). The logical inference, in light of the entirety

of the evidence, is that Nava Bharat would have proceeded with the Transaction even if it had been duly advised by Rajaram. I find, accordingly, that Nava Bharat had not proven that it would not have proceeded with the Transaction (or on such terms) but for Rajaram's alleged failure to advice.

(2) New mining law

379 Nava Bharat also argues that it would not have suffered the losses but for Rajaram's failure to give the loan to PTIC and provide for an effective mechanism to allow for conversion of the loan into shares in PTIC. [note: 827] However, this argument is premised on the basis that Nava Bharat would have been able to convert the loan into shares in PTIC. Again, this is not supported by the evidence. Nava Bharat had not shown that the convertible loan would have worked under Indonesian law. In addition, even if I accept that Rajaram had advised Nava Bharat to give the loan to Dicky Tan and not PTIC, I do not accept that Nava Bharat had acted upon that advice. The circumstances were such that Nava Bharat could not have been able to conclude the Transaction if the loan was not given to Dicky Tan. Further, the evidence shows that Nava Bharat was eager to complete the Transaction. In my view, Nava Bharat had not shown that it would not have given the loan to Dicky Tan but for Rajaram's alleged advice. Accordingly, I find that Nava Bharat had not proven that the losses that it had allegedly suffered were caused by Rajaram's alleged advice for the loan to be given to Dicky Tan instead of PTIC.

380 Notably, Nava Bharat concedes that the "defective pledge did not directly result in any specific item of loss suffered by [Nava Bharat]". [note: 828] Instead, Nava Bharat claims that it was "part of the cumulative breach" which ultimately caused loss to Nava Bharat. [note: 829] To that end, Nava Bharat alleges that the sharepledges were "doomed to fail from the beginning" and was "useless". [note: 830] Nevertheless, Nava Bharat managed to exercise the share pledges (see [122] above), and the West Jakarta District Court found that the pledge of shares agreement were valid and enforceable (see [135] above). In my view, Nava Bharat's contention is not only oddly framed but also plainly misconceived.

(3) Escrow arrangement

381 Nava Bharat further contends that "the loss caused by the failed [T]ransaction could have been substantially saved" but for Rajaram's failure to "[employ] the escrow procedure". [note: 831] I do not see how this contention assists Nava Bharat's case. It is undisputed that the Forestry Licence was eventually obtained on 19 October 2010. In other words, even if Nava Bharat was right that Rajaram was in breach of his duty by failing to advise for the US$3m to be put into an escrow account pending the Forestry Licence, it would only have delayed but not stopped Nava Bharat from paying US$3m to Dicky Tan. Moreover, Nava Bharat had not adduced any evidence to show that if such advice had been given it would not have entered into the Transaction (or on such terms) as it did. In fact, the evidence before me suggests that Dicky Tan would not have agreed to any escrow arrangement as the whole purpose of the Transaction was to put him in funds to pay expenses related to the transfer and to pay for the jetty and road works (see [311] above). I therefore find that Nava Bharat had not proven that the losses that it had allegedly suffered were caused by Rajaram's alleged failure to advise for the US$3m to be placed into an escrow account.

Commercial decisions and alleged fraud

382 Having regard to all of the evidence before me, I find that the losses allegedly suffered by Nava Bharat were caused by the alleged fraud perpetrated by Dicky Tan and others to deny Nava Bharat of the PTIC shares.

383 As I have earlier mentioned, the evidence supports the view that the losses allegedly suffered by Nava Bharat were not caused by the alleged breaches of Rajaram because Nava Bharat would in any event have proceeded with the Transaction on such terms. In light of the delay in obtaining the Forestry Licence, Nava Bharat chose to harness the opportunity to press Dicky Tan for concessions in return for extensions of time. Having done so, and eventually obtaining the Forestry Licence, Nava Bharat decided to exercise the share pledges. This allowed Nava Bharat to secure the shares in PTIC and transfer them to its nominees (see [122] above).

384 Nava Bharat would not have suffered the alleged losses *but for* the subsequent acts of Jason Tan and others. These acts can be categorised into two groups.

385 The first was the series of Deeds in relation to the PTIC shares which were said to have been fabricated by Jason Tan. The facts are set out above at [124]–[125], but to summarise, the shares in PTIC secured by Nava Bharat through the exercise of the share pledges were invalidated by Deed No 8, which was allegedly fabricated. Pursuant to Deed No 14, the PTIC shares were then transferred to two of Jason Tan's children and Sofwan Rahman, and Jason Tan was made the president director of PTIC. [note: 832] At the hearing, Ashwin accepted that Deed No 14 was the reason why Nava Bharat could not take control of PTIC, and believed that it was a "scam" by Jason Tan and Dicky Tan. [note: 833]

386 The second was the series of court actions in Indonesia which essentially resulted in the reversal of the PTIC shares from Dicky Tan to Sofwan Rahman and Suhendra. It began with Case No 01/PDT.G/2010/PN.JKT.PST ("Case No 1"), where Sofwan Rahman and Suhendra, as the previous shareholders of PTIC, sued Dicky Tan to invalidate his rights in the PTIC shares on the basis that he did not pay for them. [note: 834] On 23 March 2010, the Central Jakarta District Court ruled in favour of Sofwan Rahman and Suhendra. Pertinently, ABNR's due diligence revealed Dicky Tan as the shareholder of PTIC and did not raise any issues on the validity of his shareholding. [note: 835] Dicky Tan and Ridwan Halim then commenced Case No 98/PDT.G/2011 ("Case No 98") against Nava Bharat in an attempt to void the Transaction on the basis that he did not understand the contractual documents which were in English and that he had not paid Sofwan Rahman and Suhendra as he was awaiting payment from Nava Bharat. [note: 836] They claimed that Nava Bharat had not paid the sum of US$3m and asked for the Transaction to be declared null and void. [note: 837] It is not in dispute that Nava Bharat did pay Dicky Tan the sum of US$3m. On 22 March 2012, the Central Jakarta District Court allowed the claim and declared the Transaction null and void. [note: 838] Nava Bharat lost on appeal to the High Court, and has appealed to the Supreme Court. [note: 839] At the time of the hearing, the Supreme Court had not delivered its judgment. [note: 840] It is important to note that Bob Sundaram accepted at the hearing that Nava Bharat would still "be holding the [PTIC] shares" if not for the order of court which he felt was a "scam" by Jason Tan and Dicky Tan. [note: 841] After that, Jason Tan sued Dicky Tan in Case No 72/PDT/G/2012 ("Case No 72") and sought to invalidate *all* of the transactions carried out by Dicky Tan under the name Tan Beng Phiau Dick from 29 November 2000 onwards because his lawful name was Tansri Bengawan. [note: 842] Dicky Tan did not appear in court, and default judgment was entered against him on 15 August 2012. [note: 843]

387 None of these acts can be attributed to Rajaram. They did not result from Rajaram's alleged breaches. Nava Bharat claims that the Indonesian suits (see [386] above) might not have been commenced or would not have been resolved the way that they were *if* Nava Bharat had the Forestry

Licence and was able to carry out the mining operations. [note: 844] This is nothing but an unjustified assertion. No evidence was adduced. Nava Bharat says that the "but for" test must be applied "flexibly and with common sense". [note: 845] Even so, they are not magic words that one can utter when evidence to prove causation is lacking. I find Nava Bharat's allegations to be clearly without foundation. To be clear, I do *not* consider that Rajaram was obliged to identify whether Dicky Tan and Jason Tan were perpetrating a fraud against Nava Bharat. It was not Nava Bharat's pleaded case that Rajaram was required to safeguard against fraud but failed to do so. Bob Sundaram accepts this. [note: 846] It is understandable why Nava Bharat chose not to take that position. The law generally frowns upon imposing liability on a solicitor who has acted with reasonable care for the losses caused by the fraud of a third party (see *Su Ah Tee* at [117] citing *Platform Funding Ltd v Bank of Scotland plc (formerly Halifax plc)* [2009] QB 426 at [52]). To overcome the difficulty, Nava Bharat re-characterised its case against Rajaram essentially as one of failure to advise it against completing the Transaction or hand over the money to Dicky Tan for reasons other than fraud, *eg*, the absence of the Forestry Licence and the new mining law. However, the action, as it was eventually characterised, was plagued with other difficulties (which I have discussed earlier), including the fact that Nava Bharat would have proceeded with the Transaction on the same terms even if Rajaram had not allegedly breached his duty.

Summary on causation in contract and in tort

388 On the evidence before me, I find that Nava Bharat had failed to prove that it would not have proceeded with the Transaction on the same terms if Rajaram had not allegedly breached his duty. Nava Bharat chose to proceed because of commercial reasons, and the losses allegedly suffered by Nava Bharat were caused by the alleged fraud perpetrated by Jason Tan and Dicky Tan. It follows that Nava Bharat's claim against Rajaram and SLP in contract and in tort must fail.

389 I turn to consider Nava Bharat's claim for breach of fiduciary duty.

Claim against SLP and Rajaram for breach of fiduciary duty

Duty of loyalty

390 Nava Bharat contends that Rajaram, as the lawyer representing Nava Bharat in the Transaction, owed a duty of "unflinching loyalty" to Nava Bharat. [note: 847] According to Nava Bharat, Rajaram breached his duty by failing to disclose his relationship with Chandra and the circumstances surrounding his appointment, and this allowed Rajaram to "show preference to Chandra and his client [Dicky Tan]". [note: 848] I understand Nava Bharat to be arguing that there is some form of conflict for which Rajaram ought to have sought its consent by disclosing the material facts. To be precise, the alleged conflict arose out of Rajaram's relationship with Chandra – they are brothers-in-law and were former partners in the law firm Raja, Loo and Chandra. [note: 849] However, I am of the view that Nava Bharat's claim against Rajaram for breach of fiduciary duty must fail for the following reasons.

391 To support its claim against Rajaram for breach of fiduciary duty, Nava Bharat relies mainly on *Law Society of Singapore v Tan Phuay Khiang* [2007] 3 SLR(R) 477 ("*Tan Phuay Khiang*"), as well as *Hurlingham Estates Ltd v Wilde & Partners* [1997] 1 Lloyd's Rep 525 ("*Hurlingham Estates*"). However, the cases offer little assistance. *Tan Phuay Khiang* was a case that discussed the duty of "unflinching loyalty" of a lawyer in the context of professional misconduct and the Legal Profession (Professional Conduct) Rules (Cap 161, R1, 2000 Rev Ed). *Hurlingham Estates* was a case where the plaintiff was claiming against its former solicitors for breach of contract and negligence. The plaintiff applied for

leave to amend to add a claim based on conflict of interest, but this was refused by Lightman J.

Two categories of conflict rules

392 Lawyers generally owe fiduciary duties to their clients: *Law Society of Singapore v Wan Hui Hong James* [2013] 3 SLR 221 ("*Wan Hui Hong James*") at [7]–[8]; *Snell's Equity* (John McGhee QC, gen ed) (Thomson Reuters (Legal) Limited, 32nd Ed, 2010) ("*Snell's Equity*") at para 7-004. That, however, does not take us very far. The questions that remain unanswered include the obligations that he owes as a fiduciary, the manner in which he has allegedly failed to discharge those obligations, and the consequences of those alleged breaches.

393 The starting point would have to be the authoritative statement on the duty of loyalty of a fiduciary laid down by Millett LJ in *Mothew* at 18 (and cited with approval by the Court of Appeal (albeit not in the context of a solicitor-client relationship) in *Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal* [2009] 3 SLR(R) 109 ("*Ng Eng Ghee*") at [135]) that:

> The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work [P D Finn, *Fiduciary Obligations* (The Law Book Company Limited, 1977) at p 2], he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary.
>
> ...
>
> The nature of the obligation determines the nature of the breach. The various obligations of a fiduciary merely reflect different aspects of his core duties of loyalty and fidelity. Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity. Mere incompetence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty.

394 The cases on conflict can be divided into two broad categories, namely, conflict of duty and interest and conflict of duty and duty (also referred to as the "double employment rule" (see *Mothew* at 19)): P D Finn, *Fiduciary Obligations* (The Law Book Company Limited, 1977) ("*Fiduciary Obligations*") at pp 199–200 and 252–254; *Snell's Equity* at paras 7-018 and 7-036.

395 The rule against conflict of duty and interest is best described by the oft-cited statement of Lord Herschell in *George Bray v John Rawlinson Ford* [1896] AC 44 at 51 (which has been cited with approval in *Ng Eng Ghee* at [137]) where he said:

> … It is an inflexible rule of a Court of Equity that a person in a fiduciary position ... is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. …

396 This begs the question: what constitutes a fiduciary's "interest"? I do not think that it is capable of a comprehensive definition (see *Fiduciary Obligations* at pp 203–204). Neither do I consider

it necessary to do so. However, the case law as it stands can be broadly categorised into the following:

(a) cases where a fiduciary, in performance of his duties, obtains financial benefits for himself beyond his authorised remunerations (also commonly referred to as "unauthorised remunerations");

(b) cases where a fiduciary, in the same transaction, acts both in that capacity on one side and as an undisclosed principal on the other (also commonly referred to as "self-dealing"); and

(c) cases where a fiduciary, within the scope of his undertaking, takes on his own account a benefit to the exclusion of his beneficiary (also commonly referred to as "fair-dealing").

397 These are not exhaustive categories, but they do provide an indication as to what would constitute a fiduciary's "interest" for the purpose of the rule against conflict of duty and interest (see *Fiduciary Obligations* at pp 204–205). Prof Finn observed in *Fiduciary Obligations* at p 203 that:

> The sheer variety of transactions to which the conflict rule applies makes it impossible to give anything like a comprehensive definition of an "interest" for its purposes. In rudimentary terms it signifies *the presence of some personal concern of possible significant pecuniary value in a decision taken, or transaction effected, by a fiduciary*. ... [emphasis added]

398 This not only explains the existing case law, but also coheres with the *raison d'être* of the rule (see *Fiduciary Obligations* at p 200; John Glover, *Commercial Equity: Fiduciary Relationships* (Butterworths, 1995) ("*Commercial Equity*") at para 5.45). Prof Finn's observation was cited with approval by the Court of Appeal in *Ng Eng Ghee* at [147]. More recently, the Court of Appeal in *N K Rajarh and others v Tan Eng Chuan and others* [2014] 1 SLR 694 ("*N K Rajarh*") at [43] also accepted Prof Finn's views on what constitutes a fiduciary's "interest".

399 The double employment rule covers different ground from the rule against conflict of duty and interest. It deals with situations where the fiduciary acts for two principals with potentially conflicting interests or, in other words, "he puts himself in a position where his duty to one principal *may* conflict with his duty to the other": *Mothew* at 18. Like the rule against conflict of duty and interest, there is no absolute bar against a fiduciary acting for more than one client in a transaction. It depends on whether there is "a real risk of potential conflict of interests or actual conflict between different clients in a transaction", and this is because a balance must be struck between principle and expediency: *Lie Hendri* at [47].

400 In both cases, the conflicting duty or interest must be properly identified. In this regard, I find *Pilmer and others v Duke Group Limited (in liquidation) and others* (2001) 207 CLR 165 to be instructive. In that case, the majority of the High Court of Australia held at [83] that:

> The conflicting duty or interests must be identified. Conflict is not shown by simply pointing to the fact that there had been past dealings between the appellants and interests associated with the Kia Ora directors. The fact that dealings are completed will ordinarily demonstrate that any interest or duty associated with those dealings is at an end and no continuing duty or interest was identified here. Nor is it sufficient to say generally that there was a hope or expectation of future dealings. That will often be so. Most professional advisers would hope that the proper performance of the task at hand will lead the client to retain them again. No real or substantial possibility of conflict was demonstrated.

401 In my view, the onus of identifying the conflicting duty or interest lies with the plaintiff. A mere allegation that there is a conflict, without more, is not sufficient.

No personal interest in the Transaction

402 As I have alluded to earlier, Nava Bharat alleges that there is a conflict of interest because Chandra, who represented Dicky Tan in the Transaction, is Rajaram's brother-in-law as well as former partner in a law firm. At the hearing, however, Ashwin was unable to identify the conflicting duty or interest. [note: 850] Ashwin's objection appears to be one that relates primarily to the fact that they are brothers-in-law. [note: 851] I find it difficult to see how the present circumstances would fit into either the rule against conflict of duty and interest *or* the double employment rule. This is not a case where Rajaram is acting for both Nava Bharat *and* Dicky Tan. I also do not see how any of the recognised categories of the rule against conflict of duty and interest (which I have set out at [396] above) can possibly apply. This leaves us with the question of whether the rule against conflict of duty and interest should be extended to apply to familial relationships.

403 In my view, the fact that a family member is involved as a solicitor in a transaction should not, without more, constitute a fiduciary's "interest" for the purpose of the rule against conflict of duty and interest. I find it hard to accept as a general proposition that a solicitor acting for a client would necessarily align himself with the interest of his family member who is acting as the solicitor for the counterparty. Such a view is supported by the Canadian case of *R v Clarke* [2012] NSSC 406. In that case, the Nova Scotia Supreme Court was asked to remove a lawyer, Tyler Hodgson and/or the law firm from acting as counsel for Colpitts in a criminal matter. Colpitts was previously involved in the civil matter (arising from the same facts) in which the lawyer's father, James Hodgson represented NBFL, the party suing Colpitts. One of the allegations was that there may be a breach of Tyler Hodgson's duty of loyalty to Colpitts because of his father's representation in the civil matter (at [71]). The Court rejected the allegation and held at [97]–[98] that:

> 97 ... Tyler Hodgson has no interest, personal or financial, in his father's client, NBFL, and, specifically, has no interest, personal or financial, in the outcome of NBFL's civil litigation in the KHI matter. His interests [*sic*] in representing Colpitts is a professional interest.
>
> 98 The fact that NBFL is the client of Tyler Hodgson's father does not result in Tyler Hodgson having a personal interest which is in conflict with the interests of his client, Colpitts, or which could have a material adverse effect upon Tyler Hodgson's representation of Colpitts. Tyler Hodgson is able to give Colpitts his undivided loyalty. There is no reason to think that his duty of loyalty to Colpitts would be impaired.

404 Nava Bharat asserts that there is a "parasitic symbiotic relationship" between Rajaram and Chandra because of Rajaram's alleged incompetence. [note: 852] It further claims that Rajaram was beholden to and influenced by Chandra throughout the Transaction, and thus acted in such a way that subordinated Nava Bharat's interests. [note: 853] Notwithstanding that, Ashwin accepted at the hearing that brothers-in-law do *not* always agree with each other. [note: 854] I understand Nava Bharat to be saying that Rajaram is influenced by Chandra because of the familial relationship *and* Rajaram's incompetence. I disagree.

405 As mentioned earlier, I do not think that there can be a conflict of duty and interest arising out of the fact that Chandra is the brother-in-law of Rajaram. Rajaram's relationship with Chandra, in itself, does not give rise to a personal "interest" in the Transaction which would conflict with his duty to Nava Bharat. It does not follow from the fact that Chandra was Rajaram's brother-in-law that

Rajaram was influenced by Chandra. Neither does the evidence supports such an allegation. On the contrary, I noticed that there were various instances where Rajaram spoke up against Chandra on behalf of Nava Bharat (see, *eg*, [40]–[41] and [45] above). To illustrate the point, I only need to raise two examples. On 16 January 2009, Rajaram made it clear in his email to Chandra that even though Dicky Tan was pushing for completion, he was unable to comply with Dicky Tan's "unilateral imposition of timelines" unless ABNR ensured that Nava Bharat's interests in the Transaction was protected by approving the proposed structure. [note: 855] At the hearing, Ashwin conceded under cross-examination that the email showed that Rajaram did not blindly comply with Chandra's requests. [note: 856] Similarly, on 21 January 2009, Rajaram informed Chandra that, regardless of Dicky Tan's timelines for initial completion, he would not advise Nava Bharat to proceed with the Transaction until ABNR's legal opinion was issued.

406 In addition, the question of competence (or lack thereof) is separate from whether a fiduciary has acted in accordance with its duty of loyalty (see *Snell's Equity* at para 7-009), and in any case, Nava Bharat has not proven that Rajaram was influenced by Chandra due to his alleged incompetence. In any event, Nava Bharat's allegations cannot stand in light of my findings above (in relation to the claims in contract and tort).

407 Moreover, and this has not been addressed earlier, I find Nava Bharat's allegation that Chandra had exercised influence over the appointment of Rajaram to be baseless. The background facts are set out above at [16]–[18], and I will not repeat them here. Chandra's evidence was that he had recommended Rajaram after having been asked by Bhushan (who was acting on behalf of Nava Bharat) to recommend another Singapore law firm for the purpose of obtaining a competing bid against Baker & McKenzie. [note: 857] The fact that SLP's fees turned out to be higher than the quoted fees of Baker & McKenzie does not mean that Bhushan could not have asked for a competing bid. Even though Chandra had recommended Rajaram, Nava Bharat was free to choose its own lawyers. This is clear from Ashwin's email to Chandra dated 7 October 2008, which reads: [note: 858]

> *We are still in the process of deciding our law firm*. We will have a confirmation by tomorrow afternoon, and will be accompanied by the respective law firm during our meeting. ... [emphasis added]

408 Nava Bharat also alleges that Chandra had "substantive discussions" with Rajaram before the first meeting on 3 October 2008, and that it is reasonable to infer that the discussions related to the substantive issues surrounding the Transaction and his role as Nava Bharat's counsel. [note: 859] Nava Bharat goes further to allege that Chandra and Rajaram must have been working on a strategy to undermine the appointment of Baker & McKenzie. [note: 860] However, all these are mere speculations as Nava Bharat has not produced *any* evidence to support them.

409 Accordingly, Nava Bharat had not shown, on the evidence, that Rajaram was influenced by Chandra because of the familial relationship or Rajaram's alleged incompetence such as to give rise to a situation of conflict.

Duty to disclose

410 Since there is no actual or potential conflict, there is no need for Rajaram to disclose his relationship with Chandra to Nava Bharat. The informed consent of the principal(s), which necessitates full disclosure by the fiduciary, is a "mechanism by which the fiduciary can avoid liability" if he wishes to act in a conflict situation: *Snell's Equity* at paras 7-019 and 7-038. It follows that the obligation to obtain the informed consent of the principal(s) only arises when there is actual or

potential conflict. While the Court of Appeal in *N K Rajarh* at [43] said that there is a "duty of disclosure and openness", this must be read in the proper context. In particular, the Court of Appeal reiterated its views in *Ng Eng Ghee* at [147] that "[a] fiduciary must disclose a personal interest as soon as a *possible conflict arises*, or as soon after as practicable" [emphasis added]. Furthermore, the learned author in *Commercial Equity* argues persuasively against a "duty to disclose" at para 5.50–5.51 that:

> Disclosure serves as an exception to the conflicts rule ... Sufficient disclosure may enable the fiduciary to 'shake off the character' of fiduciary office and deal with the beneficiary on a plane of equality. But can it be said that there is ever a fiduciary 'duty to disclose'? There is much dicta in the authorities to suggest that there is such a duty. ...
>
> The 'duty of disclosure' idea seems to be gathering strength. ...
>
> Writers on this subject, however, mostly do not share this view. Paul Finn and Len Sealy are two who are of the opinion that there is no disclosure duty. This seems to be the academically orthodox position.
>
> It is submitted here, too, that there is no duty to disclose. Such a duty would be inconsistent with the general fiduciaries jurisdiction of equity ... Equity forbids things rather than commands them. What may be happening in some authorities is that the conflicts rule is conceived as a double negative. That is, the conflicts rule is treated as a rule to avoid breach of a rule which requires that there be no conflicts. To the extent that the disclosure exception avoids breach of the rule, there is said to be a duty to disclose. A duty to attract the exception to the rule is implied. This is given the same form as the duty to obey the rule itself: not to allow conflicts of interest and duty to occur. This can be seen in *Moore v Regents of the University of California*. It was said there that:
>
> > The duty of disclosure ... is a fiduciary duty intended to prevent personal interests from affecting the physician's judgment.
>
> Certainly the virtue of free judgment is a strong rationalisation of the conflicts rule. But it does not directly bear on the disclosure exemption. Disclosure has more to do with honesty than freeing the discloser's judgment.

411 I agree, and I do not think the Court of Appeal is on a different page in *Ng Eng Ghee* and *N K Rajarh*. It is noteworthy that the Court of Appeal in both cases cited Prof Finn's views in *Fiduciary Obligations* on the conflict rules with approval (see *Ng Eng Ghee* at [146]–[147]; *N K Rajarh* at [43]), and that Prof Finn had, in *Fiduciary Obligations* (at pp 227–228 and 242) and elsewhere (see *Equity, Fiduciaries and Trusts* (T G Youdan ed) (Toronto: Carswell, 1989) at pp 28–29), taken the position that the obligation to disclose is not a stand-alone duty. In my view, there can be no obligation to disclose unless the fiduciary has a personal interest or duty that may potentially conflict with the duty owed to the principal. Since Nava Bharat cannot show that there is an actual or potential conflict, there can be no obligation on the part of Rajaram to disclose his relationship with Chandra to Nava Bharat.

412 In any case, there is some evidence that Nava Bharat was aware of the relationship between Chandra and Rajaram. Bhushan had, as early as 1999, been made aware of the relationship between Chandra and Rajaram [note: 861] and Bhushan and Lakshman knew that Rajaram was Chandra's brother-in-law because Chandra mentioned it to them over dinner. [note: 862] As directors of Agora (see [9] above), it would not have been unusual for Chandra to have dinner together with Bhushan

and Lakshman. In addition, Ashwin had been informed casually, at least twice, by Rajaram in 2009 about his relationship with Chandra. [note: 863]

413 Having addressed the claims against SLP and Rajaram, I now proceed to consider the claims brought against Chandra, starting with the claim for unlawful means conspiracy.

Claim against Chandra for unlawful means conspiracy

414 Nava Bharat's first claim against Chandra is in conspiracy by unlawful means. It alleges that there is a combination between Chandra, Jason Tan and Dicky Tan to defraud Nava Bharat by selling it a "legally non-operational mine" which caused Nava Bharat to pay US$3m for which they received nothing, as well as other losses. [note: 864] According to Nava Bharat, the circumstances of this case are peculiar because it involves "a continuing series of agreements" in the conduct of the Transaction to commit acts to cause loss to Nava Bharat. [note: 865] The sole objective, however, was to get money from Nava Bharat. [note: 866] It relies essentially on the following points to prove its claim in unlawful means conspiracy against Chandra:

(a) Chandra engineered the appointment of Rajaram as Nava Bharat's solicitor so that Chandra can use Rajaram as a "tool" to defraud Nava Bharat. [note: 867]

(b) Dicky Tan and Jason Tan were dealing with other parties in relation to the same interest in the Mine (*ie*, the Lanna Transaction and the Belfield Loan), and Chandra was aware and actively involved in them. [note: 868]

(c) Chandra worked with Dicky Tan and Jason Tan to sell the Mine to Nava Bharat by representing that it was legally operational when he knew that it was not because there was no Forestry Licence. [note: 869]

(d) Chandra worked with Dicky Tan and Jason Tan to drive the Transaction towards completion to obtain the substantial upfront payment, even though the Forestry Licence was outstanding. [note: 870]

(e) Chandra fabricated the existence of the undertaking by Dicky Tan to obtain the Forestry Licence if it was required, in order to perpetrate the fraud and "mask the conspiracy". [note: 871]

(f) Chandra falsely represented to Nava Bharat that efforts were being made to procure the Forestry Licence so as to string Nava Bharat along and extract more money from it. [note: 872]

(g) Chandra requested Nava Bharat to exercise its exit option under the Master Agreement as a "false front to hide the conspiracy". [note: 873]

(h) Chandra knew of Jason Tan's plan to reverse the ownership of the shares in PTIC. [note: 874]

(i) Chandra structured the loan to be given to Dicky Tan instead of PTIC as part of the conspiracy to obtain payment from Nava Bharat. [note: 875]

415 Nava Bharat concedes that there is no direct evidence of the conspiracy, but claims that

conspiracy can be inferred from the objective facts (citing *Asian Corporate Services (SEA) Pte Ltd v Eastwest Management Ltd (Singapore Branch)* [2006] 1 SLR(R) 901).

416 In response, Chandra contends that Nava Bharat's claim must fail for two broad reasons, namely: [note: 876]

(a) first, there was no "agreement" between Chandra and Dicky Tan or Jason Tan to defraud Nava Bharat; and

(b) second, even if there was a conspiracy to defraud Nava Bharat, the chain of causation was broken by Nava Bharat's own subsequent actions.

417 For the reasons that follow, I find that Nava Bharat's claim in unlawful means conspiracy must fail.

Conspiracy to defraud

Law on unlawful means conspiracy

418 The legal elements necessary for the tort of conspiracy by unlawful means were clearly outlined by the Court of Appeal in *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 ("*EFT Holdings (CA)*") at [112]:

> ... To succeed in a claim for conspiracy by unlawful means of conspiracy, the appellants must show that:
>
> (a) there was a combination of two or more persons to do certain acts;
>
> (b) the alleged conspirators had the intention to cause damage or injury to the plaintiff by those acts;
>
> (c) the acts were unlawful;
>
> (d) the acts were performed in furtherance of the agreement; and
>
> (e) the plaintiff suffered loss as a result of the conspiracy ...

(1) Combination

419 On the first element (*ie*, a combination of two or more persons to do certain acts), the Court of Appeal in *Seagate Technology Pte Ltd and another v Goh Han Kim* [1994] 3 SLR(R) 836 ("*Seagate (CA)*") at [15] said that the "essence of conspiracy is an agreement". The question is whether there is in existence an agreement or at least some arrangement between the alleged conspirators to defraud the plaintiff. The Court of Appeal in *EFT Holdings (CA)* accepted at [113] that the parties must be "sufficiently aware of the surrounding circumstances *and* share the object for it properly to be said that they were acting in concert at the time of the acts complained of" [emphasis added]. In other words, the alleged conspirator must not only have the requisite knowledge but also share the common objective.

420 In *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and others* [2013] 1 SLR 1254 ("*EFT Holdings (HC)*") at [125], Ang J observed "for the sake of argument" that a person

who *knew* that unlawful acts were being committed but did nothing to stop those acts was not *ipso facto* a party to a conspiracy to carry out those acts. The Court of Appeal in *EFT Holdings (CA)* did not expressly consider Ang J's observation, but found at [114] that there was no agreement or combination because there was an "absence of a common understanding of the material facts being shared by all the alleged conspirators". In my view, Ang J's observation in *EFT Holdings (HC)* is consistent with the general rule laid down in *EFT Holdings (CA)*. Put simply, the mere knowledge of the commission of an unlawful act, without more, is not sufficient to find that there is an agreement or combination. However, the court may infer from the circumstances that a defendant with such knowledge had agreed to participate in the conspiracy.

(2) Unlawful acts

421 As for the "unlawful acts" in question, Nava Bharat is relying on fraud or the tort of deceit. The essential elements of the tort of deceit were set out in *Bradford Third Equitable Benefit Building Society v Borders* [1941] 2 All ER 205, and endorsed by the Court of Appeal in *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 ("*Panatron*") at [14]. The elements are as follows:

(a) first, there must be a representation of fact made by words or conduct;

(b) second, the representation must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which includes the plaintiff;

(c) third, it must be proved that the plaintiff had acted upon the false statement;

(d) fourth, it must be proved that the plaintiff suffered damage by so doing; and

(e) fifth, the representation must be made with knowledge that it is false; it must be wilfully false, or at least made in the absence of any genuine belief that it is true.

422 The Court of Appeal in *Panatron* at [13] accepted *William Derry, J C Wakefield, M M Moore, J Pethick and S J Wilde v Sir Henry William Peek, Baronet* (1889) 14 App Cas 337 (more commonly cited as *Derry v Peek*) where it was held that the plaintiff "must prove actual fraud" and that fraud is proven only when it is shown that (a) a false representation has been made knowingly, or (b) without belief in its truth, or (c) recklessly, without caring whether it be true or false. In *Trans-World (Aluminium) Ltd v Cornelder China (Singapore)* [2003] 3 SLR(R) 501 at [84]–[85], Ang J held that the question was whether the party making the representation genuinely and honestly believed it to be true, even if such a belief was legally wrong.

(3) Standard of proof

423 The standard of proof that a party has to meet in order to succeed on a claim for fraud is the civil standard of proof on a balance of probabilities. The courts have nevertheless been more willing to scrutinise the evidence in such cases. In *Tang Yoke Kheng (trading as Niklex Supply Co) v Lek Benedict and others* [2005] 3 SLR(R) 263, the Court of Appeal was faced with the question of the standard of proof required in civil fraud cases. It reiterated that the standard of proof in such cases is that based on a balance of probabilities but added that "the more serious the allegation, the more the party, on whose shoulders the burden of proof falls, may have to do if he hopes to establish his case" (at [14]). Shortly thereafter, in *Chua Kwee Chen and others (as Westlake Eating House) and another v Koh Choon Chin* [2006] 3 SLR(R) 469 at [39], Andrew Phang Boon Leong J, after having carefully reviewed the authorities, said that:

> In summary, the standard of proof in civil proceedings where fraud and/or dishonesty is alleged is the civil standard of proof on a balance of probabilities. However, where such an allegation is made (as in the present proceedings), *more* evidence is required than would be the situation in an ordinary civil case. Such an inquiry lies, therefore and in the final analysis, in the sphere of practical application (rather than theoretical speculation). In this regard, a distinction ought not, in my view, to be drawn between civil fraud and criminal fraud. [emphasis in original]

424 The same applies to a claim in conspiracy to defraud. In *Interschiff Schiffahrtsagentur GmbH v Southern Star Shipping & Trading Pte Ltd* [1981–1982] SLR(R) 601 ("*Interschiff*") at [32], Lai Kew Chai J said that:

> ... in view of the high degree of proof required to make good any allegation of fraud as stated by *Phipson on Evidence* (Sweet & Maxwell, 12th Ed, 1976) in para 123, the owners of the vessel would not, on the facts disclosed in this case, be able to prove any conspiracy to defraud or any fraudulent misrepresentation against the plaintiffs.

425 *Interschiff* was cited with approval by the High Court in *Seagate Technology (S) Pte Ltd and another v Heng Eng Li and another* [1994] 1 SLR(R) 1 at [54], and endorsed on appeal in *Seagate (CA)* at [15].

Application to the facts

426 As I have alluded to earlier (see [414] above), Nava Bharat relies on a number of points to support its case against Chandra in unlawful means conspiracy. I do not agree that the evidence would support an inference that there was an agreement between Chandra, Dicky Tan and Jason Tan to defraud Nava Bharat. I set out my reasons below.

(1) Appointment of Rajaram

427 One of Nava Bharat's allegations is that Chandra had engineered the appointment of Rajaram as Nava Bharat's solicitor so that Chandra can use Rajaram as a "tool" to defraud Nava Bharat. This consists of two parts. The first is that Chandra engineered the appointment of Rajaram, and the second is that Chandra influenced Rajaram in the course of the Transaction to further the conspiracy to defraud Nava Bharat. I find that the facts do not support Nava Bharat's allegation.

428 I have earlier found at [407] that Chandra had not exercised any influence over the appointment of Rajaram. In light of Ashwin's email to Chandra on 7 October 2008 (see [407] above), I find it hard to accept Nava Bharat's allegation that Chandra had engineered the appointment of Rajaram. To my mind, the evidence shows that Ashwin exercised his own judgment over the appointment of solicitors.

429 It is equally baseless to assert that Chandra had exerted influence over Rajaram in order to manipulate Nava Bharat's decisions in the Transaction. Nava Bharat relies on two examples to show that Chandra had actual influence over Rajaram in the course of the Transaction. [note: 877] The first was the change of the loan of US$3m from PTIC to Dicky Tan. The second was the completion of the Transaction without the Forestry Licence. I have earlier found that these decisions were made by Nava Bharat having received legal advice from ABNR. As such, I do not see any merit in the assertion. Moreover, as I have explained earlier at [405], I am unpersuaded by Nava Bharat's suggestion that the relationship between Chandra and Rajaram *per se* allowed Rajaram to be influenced by Chandra. [note: 878] I do not see how it necessarily follows. In any case, the relationship cannot be looked at in isolation and must be considered in light of their respective age and experience. As Chandra explained

at the hearing, Rajaram was a "senior lawyer" of 30 years practice and was older than Chandra. [note: 879] I should state that from the demeanour of each of them on the witness stand, I find that Rajaram is the more dominant personality. These factors militate against a finding that Rajaram would have been easily influenced by Chandra. In addition, I have explained earlier at [405] that Nava Bharat's allegation is also inconsistent with the documentary evidence. I should add that it would be artificial to expect transactional lawyers on opposing sides to have an antagonistic relationship since they are, after all, working towards a common goal (in the sense that their clients would no doubt have some degree of overlapping interests in the completion of the transaction).

(2) Lanna Transaction and Belfield Loan

430 Nava Bharat also alleges that Chandra was aware that Dicky Tan and Jason Tan were dealing with other parties in relation to the same interest in the Mine (*ie*, the Lanna Transaction and the Belfield Loan) and was involved in those transactions. [note: 880] In my view, the evidence does not support this allegation.

(a) Lanna Transaction

431 Nava Bharat claims that the structure envisaged under the Lanna Transaction was such that Lanna Resources would give a loan to Dicky Tan to be repaid with coal and underlying it was the right given to Lanna Resources to operate the mine through its Indonesian subsidiary. [note: 881] It says that Dicky Tan received the US$2m and simply "took the money and ran". [note: 882] Nava Bharat asserts that Chandra and Dicky Tan knew that the Lanna Transaction "had not been resolved" when they approached Nava Bharat. [note: 883]

432 The facts surrounding the Lanna Transaction have been set out above at [126]–[130]. Prior to the Lanna Transaction, around 2007, Dicky Tan was already selling coal to Lanna Resources *via* Saraburi (one of Dicky Tan's companies) under two coal supply agreements in 2007 (the "2007 Coal Arrangements"). [note: 884] Chandra was not involved in this. [note: 885] The 2007 Coal Arrangements did not require Saraburi to supply Lanna Resources with coal specifically from the Mine; it would suffice as long as the coal meets the agreed specifications and originates from "South Kalimantan, Indonesia". [note: 886] Later, Dicky Tan wanted to upgrade the coal mining infrastructure and needed funds to do so. [note: 887] Lanna Resources was willing to fund Dicky Tan in exchange for supply of additional coal. [note: 888] This eventually manifested in the form of two coal supply agreements (the "2008 Coal Arrangements"). At the same time, a memorandum of agreement ("MOA") was concluded between Saraburi, PT Saraburi Batu Hitam ("SBH") (another of Dicky Tan's companies) and Lanna Resources on 25 April 2008. [note: 889] The principal terms of the MOA were as follows: [note: 890]

(a) In return for Saraburi's sale of coal to Lanna Resources under the 2008 Coal Arrangements, Lanna Resources would provide a loan of US$4m to Saraburi payable in two tranches of US$2m each;

(b) The first tranche was payable on 5 May 2008.

(c) The second tranche was payable within 30 days from 5 May 2008, and subject to satisfactory performance by Saraburi of its obligations under the 2008 Coal Arrangements, which included providing a plan, programme and budget ("PP&B") the purpose of which is to describe and set out how the loans would be utilised in respect of the infrastructure upgrading at the

Mine.

433 The loan by Lanna Resources was documented by the loan agreement dated 29 May 2008, [note: 891] and the forms of security provided for the Lanna Loan included personal guarantees from Dicky Tan and Tanakorn, the share charges over the shares in Saraburi and SBH, and a deed of assignment ("Deed of Assignment") which assigned to Lanna Resources all of Dicky Tan's present and future rights, title and interest in and to the agreement between Dicky Tan and PTBHM under which PTBHM agreed to sell the KP Concessions to Dicky Tan ("PTBHM Sale and Purchase Agreement"). [note: 892] I should clarify that the KP Concessions were *not* transferred to Dicky Tan. [note: 893] The KP Concessions were later transferred to PTIC in the course of the Transaction (see [31] above).

434 Under the Lanna Transaction, Lanna Resources's interest was only in the coal (as opposed to an economic participatory interest in the Mine and/or its KP Concessions) to be supplied under the 2008 Coal Arrangements. Further, the security for the loan by Lanna Resources did not provide it with an economic participatory interest in the Mine and/or its KP Concessions. The Deed of Assignment purported to assign Dicky Tan's interest in the PTBHM Sale and Purchase Agreement to Lanna Resources. However, the Deed of Assignment was concluded between Lanna Resources and SBH (as opposed to Dicky Tan). In other words, the Deed of Assignment could not have assigned Dicky Tan's interests to Lanna Resources. I should add that Lanna Resources appears to be, at the material time, represented by its own solicitors in the Lanna Transaction. [note: 894] Contrary to Nava Bharat's assertion, I find that the Lanna Transaction was not similar to the Transaction between Nava Bharat and Dicky Tan. The Lanna Transaction does not provide that Lanna Resources was entitled to share the profits generated from the sale of the coal in the Mine. The right of Lanna Resources to manage the mining operations under the MOA only extended to the coal that Saraburi had undertaken to sell to Lanna Resources (at a pre-determined quantity and price). [note: 895] Indeed, it is telling that Lanna Resources had taken the position in subsequent litigation and arbitration arising out of the dispute between them that Dicky Tan had committed a breach of contract for the supply of coal. [note: 896]

435 By August 2008, and *before* the commencement of the Transaction, all of the contracts under the Lanna Transaction (which did *not* include the 2007 Coal Arrangements) had been purportedly terminated by Dicky Tan. Lanna Resources disbursed the first tranche of the loan on 5 May 2008, but refused to disburse the second tranche of the loan on the basis that Dicky Tan had allegedly failed to provide a full account and statement demonstrating the usage of the first tranche of the loan (the "Statement of Usage"). [note: 897] This was conveyed to Dicky Tan by way of an email dated 19 June 2008. [note: 898] In response, Chandra on behalf of Dicky Tan wrote to Lanna Resources on 25 June 2008 stating that Dicky Tan was "surprised" by the request for the Statement of Usage which is not required under the MOA. [note: 899] Dicky Tan's position, which was apparent from the email, was that the conditions for the disbursement of the second tranche have been fulfilled. [note: 900] It is also pertinent to note that the email highlighted the fact that the refusal to disburse the second tranche of the loan "impeded and delayed [Dicky Tan's] construction plans for the coal port and jetty" and if Lanna Resources was unwilling to disburse the second tranche then Dicky Tan would have to "make other alternative financing arrangements". [note: 901] While cl 1.4 of the MOA states that the PP&B must be approved by Lanna Resources, Dicky Tan was of the view that he had done all that he could to complete the PP&B and Lanna Resources was acting unreasonably in refusing to disburse the second tranche of the loan. [note: 902] Notwithstanding the email dated 25 June 2008, Lanna Resources did not disburse the second tranche of the loan. [note: 903] Dicky Tan took the position that this amounted to a repudiatory breach of the MOA and the loan agreement, and thus,

purported to terminate the Lanna Transaction. [note: 904] This was in August 2008. [note: 905] There was no reason for Chandra to issue a formal letter of termination after having been instructed by Dicky Tan that the Lanna Transaction was "dead in the water". [note: 906] There also appears to be no basis for Chandra to doubt Dicky Tan's consistent instructions. I pause to note that Dicky Tan maintained the same position in the court and arbitration proceedings which took place subsequently. [note: 907] Consequently, no coal was supplied to Lanna Resources under the 2008 Coal Arrangements, [note: 908] and Dicky Tan had to look for a new investor to provide him with funds necessary for the infrastructure upgrading at the Mine. [note: 909] It was only *after* the Lanna Transaction had been purportedly terminated that Chandra was asked by Dicky Tan to assist in the Transaction. Subsequently, Nava Bharat came into the picture in September 2008 (see [9] above).

436 Nava Bharat contends that Chandra would have known that the Lanna Transaction had not, in fact, been terminated. [note: 910] This appears to be based on four points, namely:

(a) Dicky Tan was still communicating with Lanna Resources around August 2008. [note: 911]

(b) Chandra was unable to state a specific date on which the termination occurred. [note: 912]

(c) The termination of the Lanna Transaction was not raised with Lanna Resources after August 2008 or as a defence in the course of the arbitration. [note: 913]

(d) The representative of Lanna Resources remained stationed at the site of the Mine from June to November 2008. [note: 914]

437 I find Nava Bharat's contention to be unmeritorious. Taking Nava Bharat's case at its highest, it would only demonstrate that the parties to the Lanna Transaction were in dispute over the purported termination. Dicky Tan informed Chandra that he "told [Lanna Resources] that the deal was off". [note: 915] There was no apparent reason for Chandra to doubt the instructions of Dicky Tan. Moreover, I do not think that the evidence supports all of the points that Nava Bharat had raised.

438 As I have alluded to earlier, the evidence shows that Dicky Tan had, in substance, raised the issue of termination in the court and arbitration proceedings arising out of the Lanna Transaction.

439 In addition, neither of the other two points that were raised by Nava Bharat (see [436(a)] and [436(b)] above) is necessarily inconsistent with the fact that the Lanna Transaction was in fact terminated. The mere fact that Chandra accepted the instructions of Dicky Tan notwithstanding that Lanna Resources was taking a contrary position is *not* evidence that he knew that Dicky Tan was not entitled to terminate the Lanna Transaction *or* that the Lanna Transaction was not actually terminated. Nava Bharat refers to a series of communication between Lanna Resources and Saraburi to prove that Chandra was acting with Dicky Tan (and Jason Tan) to cheat Lanna Resources of US$2m with the hollow promise that it would get coal from the Mine. [note: 916] These include (a) a series of emails from Lanna Resources to Saraburi complaining that the PP&B was deficient and asking for the return of the US$2m to which Chandra did not reply, [note: 917] and (b) a draft email prepared by Chandra on 23 January 2009 which appears to show that Dicky Tan was willing to offer certain concessions to Lanna Resources. [note: 918] In my view, there was no need for Chandra to respond to Lanna Resources after Dicky Tan had informed him that he would take care of the issue personally. [note: 919] This is consistent with the fact that Chandra was asked to prepare the email on

23 January 2009 which was never eventually sent to Lanna Resources. [note: 920] It is not uncommon for parties to choose to negotiate with each other directly without the involvement of lawyers, and the fact that Dicky Tan was taking a hard stance against Lanna Resource did not appear to be out of the ordinary. Taken in the proper context, I am of the view that the draft email on 23 January 2009 was nothing more than a "without prejudice" offer by Dicky Tan to reach an "amicable settlement" with Lanna Resources "in relation to the first tranche of US$2 million" which had been disbursed. [note: 921] Pertinently, it did *not* involve Dicky Tan offering Lanna Resources an interest in the Mine. [note: 922]

440 As for the representative of Lanna Resources who was stationed at the site of the Mine (see [436(d)] above), I find that it does not show that the Lanna Transaction had not been terminated or that Chandra must have known about it. Nava Bharat essentially relies on the AEIC of Prasert Promdech, an employee of Lanna Resources, filed in the suit brought against Dicky Tan and Tanakorn. He explained that Lanna Resources stationed one Khun Samran at the site of the Mine between June and November 2008. [note: 923] There is nothing to indicate that Dicky Tan invited Lanna Resources to send a representative or if Dicky Tan even consented to it. I do not think that the fact that Khun Samran was stationed at the Mine would suggest that Chandra fabricated his evidence as to the termination of the Lanna Transaction in August 2008. On the contrary, I think that it is consistent with Chandra's evidence. Khun Samran was instructed to monitor the Mine's operations and report on the progress and records of any shipments or deliveries made by Saraburi or SBH. [note: 924] This could have been necessary because Lanna Resources had received no coal under the 2008 Coal Arrangements. It is noteworthy that Khun Samran had reported that the Mine continued to be operational in August 2008 but Lanna Resources did not receive any coal. [note: 925] This is consistent with Chandra's evidence that the Lanna Transaction had been purportedly terminated by Dicky Tan around August 2008.

441 Nava Bharat also argues that the alleged termination of the Lanna Transaction in August 2008 was a fabrication because Chandra had only raised it for the first time in his supplemental AEIC on 29 April 2013. [note: 926] Having considered the sequence of events preceding the filing of Chandra's supplemental AEIC, [note: 927] as well as the evidence available before me, I do not think that it was wrong for Chandra to adduce further evidence as Nava Bharat amended its pleadings to introduce new matters that were not previously raised.

442 Since the 2007 Coal Arrangements had not been terminated, Dicky Tan sought to honour his obligations thereunder. It was in this respect that Chandra wrote to Lanna Resources on 9 December 2008 informing it that Saraburi and PTBHM shall "honour the commitment they have made to you under the 2 contracts to supply 300,000 tons of coal to you". [note: 928] While the letter from Chandra did not specify if he was referring to the 2007 or 2008 Coal Arrangements, it was clear that only the former and not the latter concerned 300,000 tons of coal. [note: 929] Even though it appears that the parties must have intended for the coal to come from the Mine, I have earlier mentioned that there appears to be no such specification under the 2007 Coal Arrangements (see [432] above). In other words, it was possible that Dicky Tan had some other plans to fulfil those obligations to Lanna Resources notwithstanding the Transaction. Moreover, Nava Bharat was aware of Dicky Tan's commitment to supply coal from the Mine to Lanna Resources. On 16 September 2008, Bhushan had informed Prasad *via* a conference call that the "[c]urrent production level is 30,000mt pm and this volume is committed to Thailand till dec. 08". [note: 930] On 23 December 2008, in the course of the due diligence exercise, Chandra also pointed out to Nava Bharat that his instructions were that Dicky Tan had been "operating the mine since December 2007 and have been exporting to Thailand". [note:

[note: 931] Bob Sundaram also testified during the hearing that he and Ashwin knew that Dicky Tan was shipping coal to Lanna Resources in 2008 when Tanakorn was providing them with coal samples from the Mine around April 2009. [note: 932] I find that Nava Bharat was fully aware that Dicky Tan was shipping coal to Lanna Resources in Thailand between 2007 and 2008.

443 After the Lanna Transaction was purportedly terminated by Dicky Tan, Lanna Resources commenced (a) an action in the Singapore High Court against Dicky Tan and Tanakorn based on the guarantees and (b) an arbitration against Saraburi and SBH based on cl 7.2 of the MOA. Chandra was not involved in the proceedings except to recommend his sister-in-law, Bhargavan Sujatha ("Sujatha") of Toh Tan & Partners, to Dicky Tan. [note: 933] He did so because Dicky Tan wanted a cheaper alternative to TPC. [note: 934] It is pertinent to note that the communications between Chandra, Dicky Tan and Jason Tan had *no* specific references to the proceedings involving Lanna Resources. [note: 935] This was conceded by Nava Bharat. [note: 936] Nava Bharat asks for an inference to be drawn that Chandra knew and was involved in the proceedings involving Lanna Resources simply because he was involved in the Lanna Transaction, [note: 937] but I see no basis to do so. On the contrary, it is consistent with the fact that Sujatha had taken over both the suit as well as the arbitration.

444 To be complete, I should add that Lanna Resources had not relied on the Deed of Assignment to assert any rights in the nature of an "economic interest" in the Mine (leaving aside the question of whether it would have been entitled to do so; see [434] above). It appears from the records that Lanna Resources had only sued for breach of contract and asked for the repayment of the first tranche of the loan as well as interest. [note: 938]

445 Nava Bharat contends that Dicky Tan's alleged mode of operation in perpetrating fraud was to take money from investors and then renege on his end of the bargain. [note: 939] However, this is not supported by the evidence. The purpose of the loan from Lanna Resources was clear to both parties, namely, to provide financing for the intended infrastructure improvements at the Mine. By claiming that Dicky Tan "took the money and ran", Nava Bharat is insinuating that the first tranche of the loan was never used for the intended purpose. This is contrary to the evidence which shows that Saraburi was in fact facing claims from contractors after Lanna Resources defaulted on the second tranche of the loan. Apart from Chandra's evidence, [note: 940] there is also evidence from the arbitration arising out of the Lanna Transaction which shows that Saraburi had to halt the construction of the infrastructure improvements at the Mine due to shortage of funds. [note: 941] Indeed, it would be odd for Dicky Tan to supply substantial amount of coal (approximately 127,000 tons) to Lanna Resources under the 2007 Coal Arrangement, [note: 942] *or* consider making a "without prejudice" offer (see [439] above), if he was intending to defraud Lanna Resources. I also note that there is a complete dearth of evidence supporting Nava Bharat's assertion. Dicky Tan may or may not be *legally* entitled to terminate the Lanna Transaction, but that is not pertinent for the present case. The crucial point is whether the evidence supports Nava Bharat's assertion that Chandra knew and was involved in the alleged conspiracy with Dicky Tan and Jason Tan to defraud Nava Bharat. There is no temporal overlap between the Lanna Transaction and the Transaction. Chandra understood Dicky Tan to have taken the position that the Lanna Transaction was terminated and wanted to find an alternative arrangement for financing the infrastructure upgrading. All that was left was the 2007 Coal Arrangements, and Nava Bharat knew about it. In these circumstances, I find it difficult to accept that Dicky Tan's conduct in relation to the Lanna Transaction supports Nava Bharat's allegation that Chandra is part of a conspiracy to defraud Nava Bharat.

(b) Belfield Loan

(b) Belfield Loan

446 Nava Bharat also contends that Chandra's involvement in the "shady dealings" with Jason Tan and Dicky Tan is exemplified by the Belfield Loan. [note: 943] Nava Bharat claims that Chandra did not question the need for the Belfield Loan despite knowing that Dicky Tan had earlier received US$3m as upfront payment from Nava Bharat, [note: 944] and went on to say that Chandra deliberately kept information about the Belfield Loan from Nava Bharat and secured a further US$250,000 as upfront payment from Nava Bharat for the same purpose (*ie*, to obtain the Forestry Licence). [note: 945] Nava Bharat suggests that Chandra knew that the Mine was used as security for the Belfield Loan but did not disclose to Nava Bharat because he was involved in the conspiracy to defraud Nava Bharat. [note: 946]

447 The Belfield Loan, which concerned a relatively small sum of US$200,000, [note: 947] was purportedly meant to finance the procurement of the Forestry Licence. It was repaid in full. [note: 948] PTIC was never subject to any claims from Belfield and the Mine was not exposed to enforcement proceedings. On this set of facts alone, it is difficult to see how the Belfield Loan supports the allegation that there is a conspiracy to defraud Nava Bharat or Chandra's involvement in it. This is true even if it might have been wrong for Dicky Tan to have used PTIC to obtain a loan without informing Nava Bharat about it. [note: 949] In fact, it militates against Nava Bharat's case that there was a conspiracy to defraud Nava Bharat. If there was any such a conspiracy, Dicky Tan would not have tried to procure the Forestry Licence *or* repay the Belfield Loan.

448 In any case, Nava Bharat could not show that Chandra was actually involved in the Belfield Loan. Chandra's evidence was that he had nothing to do with the Belfield Loan other than to introduce Dicky Tan to Belfield and witnessing the signing of the documents. The communications between Chandra, Dicky Tan and Jason Tan do not make any reference to the Belfield Loan. The *sole* piece of evidence that Nava Bharat seeks to rely on to prove that Chandra was involved in the Belfield Loan is the similarities between the guarantee prepared by Chandra in the Lanna Transaction and the guarantee in the Belfield Loan. [note: 950] Nava Bharat asserts that the similarities must lead to the conclusion that the documents were prepared "by the same person". [note: 951] On this basis, Nava Bharat claims that Chandra had used Sujatha as a front and had personally conducted the transactions. [note: 952] However, there appears to be a reasonable explanation for the similarities. Chandra explained on cross-examination that both guarantees are similar because they are based on the "DBS small and medium enterprise guarantee format". [note: 953] I am not persuaded by Nava Bharat's response that Sujatha is a general litigation practitioner and therefore could not possibly have handled a simple task such as the drafting of a guarantee based on a standard template. [note: 954]

(3) Completion without Forestry Licence

449 Nava Bharat raises several points in attempt to show that the completion of the Transaction without a Forestry Licence was actually part of a conspiracy to defraud it (see [414(c)]–[414(g)] above). Nava Bharat claims that the conspiracy was to "sell [it] a mine that was not readily operational", and more specifically, to induce Nava Bharat to pay for the rights to a mine which they knew Nava Bharat would never receive. [note: 955] I note that the conspiracy, as alleged by Nava Bharat, is inherently inconsistent. If the conspiracy was to deprive Nava Bharat of its rights to the Mine from the start, then it does not appear to cohere well with the fact that, among other things,

Dicky Tan tried and eventually obtained the AIP and the Forestry Licence for Nava Bharat.

450 Nevertheless, I will deal with Nava Bharat's arguments below and show why I am not persuaded by them.

(a) Falsely representing that Mine was legally operational

451 Nava Bharat asserts that, as part of the alleged conspiracy, Chandra represented to Nava Bharat that the Mine was legally operational when he knew that it was not because there was no Forestry Licence. There are two parts to the assertion, namely, that Chandra had represented (as opposed to conveying the position of Dicky Tan) that the Mine was legally operational and that Chandra knew that the Mine was *not* legally operational because there was no Forestry Licence.

452 Nava Bharat relies on Chandra's involvement in the Lanna Transaction in its attempt to show that Chandra knew that the Forestry Licence was necessary for mining operations to commence legally. [note: 956] In particular, Nava Bharat says that the Deed of Assignment, which assigned the rights of Dicky Tan under the PTBHM Sale and Purchase Agreement to Lanna Resources, was drafted by Chandra and that one of the items in the list of assets in the PTBHM Sale and Purchase Agreement was the Forestry Licence for the Mine. [note: 957] Chandra's evidence was that he did not know that a Forestry Licence was required at the outset of the Transaction. [note: 958] He explained that he did not read the PTBHM Sale and Purchase Agreement given to him because it was in "Bahasa Indonesia", [note: 959] and he was not proficient in it. [note: 960] Apart from the language, it appears that there is no real need for Chandra to refer to the PTBHM Sale and Purchase Agreement. The Deed of Assignment that Chandra prepared was a short five-page document which comprised mostly of boilerplate clauses. [note: 961] Chandra's evidence was that the Deed of Assignment was meant to assign the chose in action and *not* the list of assets, [note: 962] such that there was no need for him to undertake an analysis of the list of assets under the PTBHM Sale and Purchase Agreement. He also testified that he verified the content and authenticity of the PTBHM Sale and Purchase Agreement with his client, Dicky Tan as well as the letter from Wira Yustitia Law Office, an Indonesian law firm, on 27 March 2008 confirmed that the PTBHM Sale and Purchase Agreement was "binding and valid". [note: 963] In addition, I note that Chandra is not trained in Indonesian law. [note: 964] Even if it was true that Chandra had read the PTBHM Sale and Purchase Agreement *and* found out that the Forestry Licence was one of the items on the list of assets, I do not think that he would have necessarily known that it was a legal prerequisite for PTIC to operate the Mine.

453 At this juncture, it is apposite to refer to the Court of Appeal's observations in *Bachoo Mohan Singh v Public Prosecutor and another matter* [2010] 4 SLR 137 at [119] in relation to a solicitor's duty to verify his client's instructions:

> Where ... the client's instructions are consistent and unwavering, the answer must surely be that there is no peculiar requirement to take extraordinary steps to assess the veracity of the client's story. …

I find that, in light of Dicky Tan's consistent instructions as well as the view of Jason Tan (who Chandra understands to be an Indonesian lawyer), there was no reason for Chandra to doubt the truth or veracity of Dicky Tan's instructions.

454 Chandra became aware of the possibility that a Forestry Licence might be required when ABNR stated in its email dated 7 October 2008 to Chandra that "a search with the Ministry of Energy and

Mineral Resources is made to ensure that the mine location is not overlapping with the forest area". [note: 965] Notwithstanding that, Dicky Tan's instructions to Chandra had consistently been that the Forestry Licence was *not* required to operate the Mine. [note: 966] Dicky Tan claims that he has always been extracting and shipping coal from the Mine without a Forestry Licence, and this was corroborated by Jason Tan, who was an Indonesian lawyer. [note: 967] Chandra, who was not trained in Indonesian law, had no basis to doubt the instructions of Dicky Tan as well as the view taken by Jason Tan. As such, he acted in accordance with Dicky Tan's instructions and conveyed the same to Rajaram. [note: 968] In doing so, I find that Chandra had *not* made such representations with knowledge that it was false, without belief in its truth, or recklessly without regard to whether it was true or false.

455 In any case, I have earlier found that Nava Bharat was fully aware that the Forestry Licence was required before the initial completion. In fact, Bob Sundaram had informed Ashwin on 24 December 2008 that it was not proper to continue mining without a Forestry Licence simply because it had been done previously by Dicky Tan. [note: 969] The relevant part of the email reads:

> Mines located on Production Forest with conversion status can be issued with a [*sic*] exploitation as well as transport and export license ... It is the obligation of the mine owner to obtain the approval letter from the Minister of Forestry prior to start [of] mining.
>
> The new mine owner may not be aware about it or the original owner may have kept the information hidden so as to negotiate a better deal (only assumption), we don't know
>
> One cannot just claim that, "this is a producing mine where the coal has been exported out so there is no problem". ...

456 Despite that, Nava Bharat was willing to proceed with the undertaking from Dicky Tan that he would obtain the Forestry Licence if it was required. I should add that Dicky Tan eventually accepted that the Forestry Licence was necessary. [note: 970]

(b) Rushing towards completion despite lack of Forestry Licence

457 Nava Bharat also argues that Chandra worked with Dicky Tan and Jason Tan to drive the Transaction towards completion in order to obtain the substantial upfront payment, even though the Forestry Licence was outstanding.

458 Contrary to Nava Bharat's allegation, I find that Chandra was only acting in accordance with Dicky Tan's instructions and conveying the same to Rajaram when he expressed Dicky Tan's desires to push for completion of the Transaction. I accept Chandra's evidence that it was Dicky Tan who was setting the deadlines and pressing for the completion of the Transaction. [note: 971] This is corroborated by documentary evidence. On 18 December 2008, Jason Tan wrote, on behalf of Dicky Tan, to Chandra stating that he would "wish [for] the Agreement [to] be executed before Christmas". [note: 972] One day later, Jason Tan again wrote to convey Dicky Tan's instructions to push for initial completion within tight deadlines. The relevant part of the email reads: [note: 973]

> Dear Chandra,
>
> *Dicky just called me few minutes ago and asking me to convey* his disappointment for the delay of the execution of the Agreement due to the end of the year's holiday of Nava Bharat's Jakarta

lawyers. As what have been agreed during the last meeting in Raja's office, Raja has confirmed with Dicky to obtain the transfer of KP Eksplolitasi Licence before 19 December 2008 in order to execute the Agreement as scheduled on 19 December 2008 in Nava Bharat's Jakarta lawyers office.

...

PT. Indoasia Cemerlang are really exhausted to pursue all the documentations to be deemed for the execution but it is very disappointed to learn that the execution has to be halted after the documentations are in order for execution. In this respect, *Dicky and I have decided and confirmed to call off the Agreement if the Agreement is not executed by today*, 19 December 2008 at 17:00 hours of Jakarta time = 18:00 hours Singapore time ...

[emphasis added]

459 Chandra was acting on Dicky Tan's instructions when he wrote to Lakshman on 15 January 2009 stating that "[w]e must close [the Transaction] next week with a definite date given to all parties". [note: 974] This is supported by Rajaram's response on 16 January 2009 where he said to Chandra that "[y]ou had indicated to me that your client's [*sic*] want the transaction to be completed before the Chinese New Year or the deal will be called off". [note: 975]

460 It appears from the evidence that there were no representations made independently by Chandra that did not emanate from Dicky Tan or Jason Tan. Nava Bharat was unable to point to any evidence in the correspondence between Chandra and Jason Tan or Dicky Tan to show that Chandra had taken the initiative to push for completion. In fact, Ashwin agreed at the hearing that Chandra had sought to facilitate meetings between Dicky Tan and Nava Bharat to resolve any outstanding issues prior to the initial completion. [note: 976] Therefore, contrary to the allegation by Nava Bharat, I find that Chandra was acting on the instructions of Dicky Tan or Jason Tan.

461 Nava Bharat appears to be suggesting that Chandra ought to have advised against haste in light of the absence of the Forestry Licence and the uncertainty in the new mining law, [note: 977] and in this regard, Nava Bharat alleges that Chandra must have been acting in concert with Dicky Tan and Jason Tan because there was "not one single email showing that Chandra had commented that parties should perhaps slow down and reflect". [note: 978] In the same vein, Nava Bharat claims that there was no email between Chandra and Jason Tan in which he addressed the issue of Forestry Licence with Jason Tan, because it did not matter to him. [note: 979] Nava Bharat asserts that Chandra had aligned himself with Dicky Tan and Jason Tan, and that they represented that the Forestry Licence was not required in order to induce Nava Bharat to complete the Transaction. [note: 980] However, I do not see how any of these allegations would advance Nava Bharat's case. As I have mentioned earlier, Chandra was acting on the instructions of his client, Dicky Tan. Nava Bharat also alleges that Chandra was part of a conspiracy to defraud Nava Bharat because he came up with a "defensive posture" for Dicky Tan to deal with Nava Bharat. [note: 981] In this respect, Nava Bharat refers to Dicky Tan's email dated 6 January 2009. [note: 982] The email, however, relates to advice by Chandra to Dicky Tan on how to "walk away" from the Transaction. It is farfetched to say that the email shows that Chandra is part of a conspiracy to defraud Nava Bharat. In fact, Chandra was advising Dicky Tan as to his obligations under the Transaction (see [490] below).

(c) Fabricating undertaking by Dicky Tan

462 I turn to Nava Bharat's next point, namely, that Chandra fabricated the existence of the undertaking by Dicky Tan to obtain the Forestry Licence if it was required, in order to perpetrate the fraud and "mask the conspiracy". [note: 983] I have earlier found that Nava Bharat knew that there was a need for the Forestry Licence and that it had decided to proceed with the undertaking from Dicky Tan to obtain the Forestry Licence if it was required. There is, therefore, no basis for Nava Bharat's allegation that the undertaking was a "smoke screen" to perpetrate the fraud. [note: 984]

(d) Falsely representing that efforts were made to obtain Forestry Licence

463 Nava Bharat also contends that after the initial completion, Jason Tan, Dicky Tan and Chandra adopted a "different strategy to further their conspiracy". [note: 985] In particular, Chandra falsely represented to Nava Bharat that efforts were being made to procure the Forestry Licence so as to string Nava Bharat along and extract more money from it. [note: 986]

464 Before I address the contention, I should first deal with the "letter of authority" which allegedly authorised the extraction of 50,000 tons of coal by March 2009. Nava Bharat claims that Chandra ignored Rajaram's reference to the letter of authority in his emails on 11 and 12 March 2009 after the initial completion because he knew that it was part of a ruse to influence Rajaram to get Nava Bharat to complete without the Forestry Licence. [note: 987] On the other hand, Chandra's evidence was that he did not know about the "letter of authority" at the time of the completion. [note: 988] He was only informed that Tanakorn had a "temporary licence" in March 2009. [note: 989] As for the emails from Rajaram, Chandra explained that he spoke to Rajaram over the phone and agreed that there was no need to be concerned with the "letter of authority" because Dicky Tan had, at that point in time, acknowledged that the Forestry Licence was required. [note: 990] Again, I fail to see how Nava Bharat can possibly suggest that, on these facts, Chandra knew and was involved in some alleged conspiracy to defraud Nava Bharat. In my view, the fact that Rajaram had stopped asking about the letter of authorisation after the two emails in March 2009 suggests that Chandra had addressed the concerns of Rajaram as well as Nava Bharat. This is more in line with Chandra's explanation. It simply does not make sense that Rajaram (and more importantly, Nava Bharat) would stop raising the issue because Chandra had ignored his emails. [note: 991]

465 I return to the issue of whether Chandra had represented to Nava Bharat that efforts were being made to obtain the Forestry Licence, even though he knew that it was not true, in order to string Nava Bharat along and to extract more money. Nava Bharat points to three instances where Chandra informed that Dicky Tan was out of funds and needed further financing to obtain the Forestry Licence, namely, the meeting on 16 March 2009 followed by the email dated 23 March 2009 (see [61]–[62] above), the Variation Agreement and the Addendum Agreement. [note: 992] In particular, Nava Bharat emphasises that US$250,000 was paid upfront to Dicky Tan under the Addendum Agreement. [note: 993]

466 At this juncture, I pause to note that Nava Bharat was advised *before* the initial completion by Bob Sundaram on the possible difficulties and issues that could arise in the course of applying for the Forestry Licence. On 19 December 2008, Bob Sundaram wrote an email to Ashwin in which he said:

> The procedure to get the approval letter from Federal Forestry Dept
>
> – Recommendation letter from Bupati required (already available)

– Recommendation letter from state forestry dept is required

– Recommendation letter from the Governor is required

According to forestry officer once all the recommendation papers are in place then it is not a problem to issue this approval from Federal Forestry dept. *Money need to be spent to get this entire recommendation letter both at state and federal level. This situation has been quite normal in the mining industry.*

[emphasis added]

467 At the hearing, Bob Sundaram clarified that there are other steps that had to be completed *after* receiving the recommendation letters in order to obtain the Forestry Licence. [note: 994] He also explained that the money to be spent to get the recommendation letters were payments to expedite the process for the Forestry Licence: [note: 995]

Q: ... can you tell the court why it is stated here that money needs to be spent to get this entire recommendation letter both at the state and federal levels?

A: Yes, because if we need to get the letter from the – say, for example, the head of the province, the governor, we have to go through different channels, and in Indonesia the bureaucracy is such -- the bureaucracy is such and it will take very, very long time. Mainly to expedite, it is normal that money is spent. That's what I meant.

468 Even if such payments were made, Bob Sundaram acknowledged that the time required for the procurement of the Forestry Licence was uncertain because of the many variables involved. [note: 996] He accepted that if the application was not properly managed, then there is a possibility that the process may take a long time even if payments had been made. [note: 997]

469 In the circumstances, I find that Nava Bharat was clearly aware of the potential issues that could arise in the procurement of the Forestry Licence. Nevertheless, despite knowing that there was no Forestry Licence *and* the potential issues that might arise when applying for it, Nava Bharat was minded to push forward with the Transaction. It is in this light that I now turn to consider the allegation that Chandra was, as part of a conspiracy, trying to string Nava Bharat along.

470 True to Bob Sundaram's warning in his email of 19 December 2008, the application process for the Forestry Licence turned out to be slow and expensive. I accept Chandra's evidence that he was not personally involved in the procurement of the Forestry Licence. [note: 998] As I have earlier mentioned, he was not trained in Indonesian law. His role was therefore only to convey instructions that he received from Dicky Tan (or Jason Tan purportedly on behalf of Dicky Tan) to Rajaram. As he explained at the hearing, he was given periodic updates by Dicky Tan and Jason Tan on the progress of the application. [note: 999] This is corroborated by the correspondence which show that Jason Tan wrote to Chandra to update him on the procurement of the AIP and the Forestry Licence:

(a) On 5 September 2009, Jason sent an email to update Chandra on the status of the AIP. He said that Dicky Tan was "in full speed to obtain the AIP and hopefully it could be issued on time". [note: 1000] He also said that he would keep Chandra "informed and updated on the issuance of AIP". [note: 1001]

(b) On 17 September 2009, Jason sent an email to inform Chandra that PTIC had obtained an explanation letter from the Forestry Ministry to "prove to Nava Bharat that the application of [the Forestry Licence] [was] really under process". [note: 1002] He also asked Chandra to convey his regrets and "ask the understanding from Nava Bharat in due course as [Dicky Tan and Jason Tan] [were] also very exhausted by this unforeseen bureaucracy". [note: 1003]

(c) On 16 October 2009, Jason sent an email to inform Chandra that the approval process was "very tiring ... and fund consuming due to the inefficient bureacracy", which he felt was more aptly termed as "bureaucrazy for money". [note: 1004]

471 Notwithstanding the delays, and having been advised on the exit option, Nava Bharat made the commercial decision to continue and press for better commercial terms from Dicky Tan (see [349]–[362] above). This is evident from, *inter alia*, the "without prejudice" discussions which led to the draft Tripartite Agreement which would have required the valuation of the Mine to be revisited based on "present market conditions" (see [98]–[99] above). Notably, the valuation of the Mine would have been further reduced from US$19m (as agreed in the Supplemental Master Agreement) to US$17.5m. [note: 1005] Even though the draft Tripartite Agreement was never concluded, it was clear evidence demonstrating Nava Bharat's desire to capitalise on the delay in obtaining the Forestry Licence.

472 Pertinently, and contrary to Nava Bharat's allegation of a conspiracy to defraud, Dicky Tan eventually obtained the Forestry Licence on 19 October 2010. [note: 1006] After obtaining the Forestry Licence, there is no dispute that PTIC was able to commence mining operations legally at the Mine. [note: 1007]

(e) Requested Nava Bharat exercise exit option to "hide the conspiracy"

473 As a result of the delay in obtaining the Forestry Licence, Chandra informed Nava Bharat on 21 December 2009 that it may exercise its exit option under the Master Agreement. [note: 1008] Nava Bharat claims that it was a "false front to hide the conspiracy". [note: 1009]

474 To put things in their proper context, I should note that the evidence shows that Nava Bharat was aware of its right to exercise the exit option and terminate the Transaction in light of the difficulties in the procurement of the Forestry Licence. I have earlier discussed a number of instances where Rajaram had advised Nava Bharat about the exit option *before* Chandra's email dated 21 December 2009 (see [351]–[354] above).

475 In that email, Chandra proposed that Nava Bharat could exit in return for repayment of the investment in coal. Nava Bharat claims that the email illustrates Chandra's involvement in the conspiracy as he was apparently acting without instructions from Dicky Tan or Jason Tan and he could not have honestly believed in the offer given that no coal had been produced since initial completion. [note: 1010] I do not agree. For a start, I find it strange that Nava Bharat is suggesting that the proposal was so absurd that Chandra could not have honestly believed that it was possible. If this was true, then it would have been an outrageous offer that Nava Bharat, fully aware of the circumstances, would most certainly reject. I find this to be unlikely. The simple answer, in my view, appears to be that the proposal was nothing more than an invitation for parties to negotiate over the terms if Nava Bharat was keen on exercising the exit option. The terms of the offer shows that Dicky Tan was trying to cut a better deal but this is common in business. I do not think that it is necessarily an indication of fraud *or* a conspiracy to defraud Nava Bharat. Indeed, I note that this was not the first time that Chandra had conveyed Dicky Tan's message for Nava Bharat to reconsider

the Transaction – on 30 October 2008, before the initial completion (and the payment of the US$3m), Chandra had on instructions of Dicky Tan told Nava Bharat to consider deferring equity injection if it "does not feel comfortable or has concerns about Dicky". [note: 1011]

476 In any case, I have earlier found that Chandra was not trained in Indonesian law (see [452] above) and not involved in the application process for the Forestry Licence (see [470] above). He conveyed the instructions of his client, Dicky Tan, to Nava Bharat for its consideration. [note: 1012] While it may be easy to criticise with the benefit of hindsight, I do not think that it is appropriate to do so. Taking the circumstances as they were at that point in time, I find that there is insufficient evidence to show that Chandra was not acting with honest belief that the proposal might have been feasible under Indonesian law.

(4) Loan to Dicky Tan instead of PTIC

477 Nava Bharat also alleges that Chandra structured the loan to be given to Dicky Tan instead of PTIC as part of the conspiracy to obtain payment from Nava Bharat, [note: 1013] and at the same time deprive Nava Bharat of the shares of PTIC. Specifically, the allegation is that Chandra exerted influence over Rajaram to act against the advice of ABNR. [note: 1014] To recapitulate, ABNR had advised Nava Bharat that the conversion of the loan to shares in PTIC may not be possible if the debtor was Dicky Tan instead of PTIC (see [316] above).

478 I do not think that there is any basis for Nava Bharat's allegation that Chandra had worked towards changing of the debtor from PTIC to Dicky Tan as part of a conspiracy to defraud Nava Bharat. I have earlier found that Nava Bharat and Dicky Tan agreed, notwithstanding their earlier intentions, to make Dicky Tan the debtor to the loan (see [317] above). It appears that Dicky Tan needed the money for the expenses incurred in getting the transfer and to pay for jetty and the road works. Pertinently, Chandra did *not* represent on the impact of the change in the debtor to the loan from PTIC to Dicky Tan. Instead, he made the suggestion to Nava Bharat based on his client's instruction. [note: 1015] The instructions appeared in the circumstances to be wholly reasonable. ABNR's advice for the loan to be given to PTIC instead of Dicky Tan appears to be based on the impression that the loan would be converted into shares through the issuance of *new* shares by PTIC. [note: 1016] However, as Chandra explained, the Transaction was meant to be a "sale" of the shares in PTIC held by Dicky Tan to Nava Bharat, and Chandra understood that, as a result, the money ought to have been paid to Dicky Tan instead of PTIC. [note: 1017] I do not think that there is anything inherently sinister about it. After having been advised by ABNR on the implications of the change in the debtor from PTIC to Dicky Tan (see [316] above), Nava Bharat agreed to Dicky Tan's request. To be very clear, I should say that I am unconvinced by Nava Bharat's attempt to blame Chandra (and Rajaram) for the change of the debtor from PTIC to Dicky Tan. If Nava Bharat was prepared to act against the advice of ABNR (assuming, for the sake of argument, that ABNR advised against giving the loan to Dicky Tan), then there was nothing that Chandra or Rajaram could have done. I do not think that the evidence would demonstrate that there was a conspiracy to defraud Nava Bharat *or* that Chandra was a part of it.

479 In any case, I note that the change of the debtor from PTIC to Dicky Tan did not prevent Nava Bharat from exercising the share pledges and acquiring the shares in PTIC (see [122] above).

(5) Indonesian legal proceedings

480 By way of background, I should point out that the Transaction had led to a series of legal

proceedings in Indonesia, and the ones that are relevant for the present purposes are Case No 1, Case No 72 and Case No 98 (see [386] above). The key focus of Nava Bharat's case is on Case No 1, which involves the Central Jakarta District Court invalidating the transfer of the shares in PTIC to Dicky Tan and thereby effectively rendering void the transfer of the PTIC shares, by virtue of the share pledges, to Nava Bharat's Indonesian nominees.

481 Before I go into my analysis, it would be helpful to set out the key facts that Nava Bharat seeks to rely on for its allegation. On 4 January 2010, Bhushan informed Ashwin through email that there was a family dispute brewing between Dicky Tan and his brothers over the ownership of the PTIC shares. [note: 1018] The material parts of the email read:

> Background – he claims his middle brother holding 50pct of equity in this mine has now given POA to Jason hence dicky is helpless with jason also having put in separate moneys.
>
> ...
>
> With the above, he can discuss with his middle brother and get the POA and get going with us.

At around the same time, in January 2010, Case No 1 was commenced in Indonesia. [note: 1019] On 23 March 2010, the Central Jakarta District Court decided against Dicky Tan and in favour of the previous shareholders of PTIC. On 1 October 2010, a meeting was held between Ashwin and Jason Tan to resolve issues arising out of the draft settlement agreement. The relevant parts of the minutes of the meeting read: [note: 1020]

> **Agenda: To understand from CC and Jason reasons for delay in signing the documents for transfer of shares in P.T. Indoasia Cemerlang (PTIC) to Nava Bharat Singapore Pte Ltd (NBS) and to resolve any issues which might impediment obtaining of the Forestry Licence by NBS.**
>
> MR brought forward pertinent issues which need to be resolved by Dicky Tan (DT), and requested CC to enlighten AD and BR on the reason for delay in signing the Settlement Agreement and the documents for transfer of shares in PTIC.
>
> MR furthered [*sic*] stated that CC had on various occasions from 7 August till date informed MR that DT was waiting for Jason's consent to sign the documents, therefore requested Jason to explain the delay.
>
> CC represented that DT will not be able to execute any document with respect to PTIC as he has been stripped of his powers in PTIC by the other shareholders of PTIC.
>
> MR highlighted that as per the shareholders register of PTIC, DT holds 90% of shares in PTIC therefore it is difficult to understand how he has been striped [*sic*] of his powers to act on behalf of PTIC.
>
> Jason explained that there are some agreements between the prior shareholders and DT under which DT owes them money and DT is in breach of those agreements. It was further informed by Jason that the prior shareholders have threatened to take legal action against DT if the monies owed to them are not paid by DT.
>
> ...

482 Nava Bharat's allegation comprises a number of parts which are difficult to comprehend. To my understanding, they are as follows:

(a) Chandra knew or would have known that Dicky Tan's rights in PTIC had been compromised as a result of a "family dispute", before it was first revealed by Bhushan on 4 January 2010, because of his close association with Jason Tan and Dicky Tan and failure to "[ask] questions" when the situation arose. [note: 1021]

(b) Chandra knew about Jason Tan's plan to deprive Nava Bharat of the shares in PTIC because he was neither concerned nor surprised with the adverse claim to the PTIC shares by Jason Tan. [note: 1022]

(c) Chandra knew about the alleged fraud perpetrated through Case No 1 because of his close association with Jason Tan and Dicky Tan, his knowledge of the family dispute, and the failure to seek clarification. [note: 1023]

(d) Dicky Tan and Jason Tan chose January 2010 to reverse the ownership of the shares in PTIC because Nava Bharat was taking steps to exercise the share pledges, and they knew about it because Chandra found out about it through Rajaram. [note: 1024]

(e) The circumstances were indicative of a conspiracy to defraud Nava Bharat, including Jason Tan's involvement in both the family dispute as well as Case No 1. [note: 1025]

483 I find that Nava Bharat's allegation must fail. There is no evidence to show that Chandra was in any way involved in the alleged fraud perpetrated through Case No 1. Even though Chandra knew about the family dispute, I do not think that it follows that he must have known about or was involved in the alleged fraud perpetrated through Case No 1. Even if Chandra came to know about Case No 1 subsequently (as Nava Bharat did), it did not mean that he must have known that it was a fraudulent manoeuvre by Dicky Tan and/or Jason Tan, or that he was part of a conspiracy to defraud Nava Bharat. I will elaborate below.

484 Nava Bharat submits that Chandra must have known about the alleged fraud perpetrated through Case No 1. [note: 1026] However, I do not think that the allegation is supported by evidence. I accept Chandra's evidence that he had no knowledge of Case No 1 in March or April 2010. [note: 1027] Significantly, Chandra's evidence is consistent with the communications between Chandra, Dicky Tan and Jason Tan which shows that Chandra did not know and was not involved in Case No 1.

485 I begin with the ABNR's Third Draft Report dated 22 December 2008, where it was stated that: [note: 1028]

H SHARE CERTIFICATE AND COLLECTIVE SHARE CERTIFICATE

Based on Article 5 of the Articles of Association, *as the evidence of the ownership of shares*, the Company may issue share certificate or collective share certificate. Share certificate or collective share certificate shall be signed by the Board of Directors.

The Company has issued share certificates, *i.e.*:-

a. Shares Certificate No.001/IAC/2008 – No. 080/IAC/2008 under the name of Mr. Tan Beng

Phiau Dick.

b. Shares Certificate No.081/IAC/2008 – N[o.] 100/IAC/2008 under the name of Mr. Ridwan Halim.

[emphasis added]

486 The ABNR's Third Draft Report clearly stated that Dicky Tan was the legal owner of the PTIC shares. It is undisputed that Ridwan Halim was holding the shares as Dicky Tan's nominee. Indeed, Nava Bharat agrees that there is no reason to doubt the accuracy of the due diligence findings. [note: 1029]

487 I go on to consider the correspondence exchanged between the parties from the date of the ABNR's Third Draft Report to January 2010 (when Case No 1 was commenced in Indonesia). I find that the correspondence indicate that Chandra genuinely believed that Dicky Tan was the legal owner of the PTIC shares. On 28 November 2008, Jason Tan sent an email to Chandra. The email was sent around the time when the Master Agreement was being finalised by the parties for execution. After having reviewed the draft Master Agreement, Jason Tan informed Chandra to remove his name from it as he is not listed as a shareholder or official of PTIC or PTAEI. [note: 1030] After the Master Agreement was executed in January 2009, PTIC had to engage a mining contractor. As such, Jason Tan sent an email to Chandra on 24 February 2009 informing him that Dicky Tan would be signing the Master Agreement on behalf of PTIC. [note: 1031] These emails would have confirmed Chandra's belief, in accordance with the ABNR's Third Draft Report, that Dicky Tan was the legal owner of the PTIC shares. In light of the First Notice of Default, Jason Tan sent an email to Chandra on 29 July 2009 in which Jason Tan was adamant that control of PTIC should not be ceded over to Nava Bharat. [note: 1032] However, I do not think that Chandra would have known or suspected that something was amiss based on the email alone. Subsequently, on 12 August 2009, Chandra sent an email to Jason Tan to explain that PTIC was in default. [note: 1033] He highlighted that Nava Bharat was entitled to exercise its security rights if PTIC failed to obtain the AIP on time. [note: 1034] Significantly, he pointed out that PTIC had "no defence in view of the series of default". [note: 1035] In my view, there was no need for Chandra to advise PTIC and Dicky Tan on their legal rights in or around August 2009 if he knew about or was part of the conspiracy to defraud Nava Bharat.

488 The correspondence between the parties in and after January 2010 (when Case No 1 was commenced) would also reveal that Chandra was unaware of the alleged fraud perpetrated through Case No 1. This is notwithstanding that he might have known about the family dispute. Chandra's evidence was that having read Bhushan's email on 4 January 2010, he approached Dicky Tan for a clarification on the matter. [note: 1036] This contradicts Nava Bharat's allegation that Chandra had failed to "[ask] questions" on the family dispute. Chandra's explanation on the family dispute is pertinent, and I set it out below: [note: 1037]

Q: What was the basis that you came to know that Jason Tan's approval must be obtained by Dicky Tan for Dicky Tan to sign the share transfer forms?

A: He told me that he needed Jason's approval. Then I call Jason up subsequently. Jason said, yes, there is a dispute going on, so the middle brother and the family decided that Dicky is not allowed to sign, unless Jason's – who is the family lawyer -- consent was obtained, your Honour.

...

Q: So if Dicky Tan had no capacity to transfer the shares, any transfer he makes to Nava Bharat can easily be cancelled, right?

A: What is your definition of capacity? He has the capacity, your Honour, except that procedurally, because of the family issues, procedurally he had to obtain Jason's consent.

...

Q: ... [D]id you or did you not know that Dicky Tan no longer could deal with his shares ...

A: No, your Honour. Dicky wasn't deprived of his shares. All he needed was to have a consent of Jason.

...

A: ... I did not at any point, you know, state that he has been stripped of all his powers, he has been stripped of his shares. I never said that. In the context of execution of documents.

Q: So as far as execution of documents are concerned, he needs Jason Tan's approval?

A: Yeah, to that extent he had lost his power, your Honour.

489 Chandra did not, at that point in time, find the explanation to be suspicious. [note: 1038] He further explained that he had advised Dicky Tan that he could choose not to seek Jason Tan's approval before exercising his rights as a shareholder of PTIC. [note: 1039] However, Dicky Tan felt that it was a family dispute and he did not want to "rock the boat" so he would go through the procedure of getting Jason Tan's consent notwithstanding the legal position. [note: 1040] I find his explanation to be a reasonable one. I note, for completeness, that Nava Bharat probably came to know about the family dispute but nevertheless decided during a meeting in or around February 2010 for the Transaction to proceed as before since Dicky Tan remained the owner of PTIC on record. [note: 1041] This is likely in light of Bhushan's email on 4 January 2010 informing Nava Bharat of the family dispute (see [481] above) as well as the parties' conduct after February 2010. At around that point in time, the parties were in "without prejudice" discussions (which eventually culminated in the draft Tripartite Agreement).

490 On 6 January 2009, Chandra sent an email to Jason Tan, and the material part of the email reads: [note: 1042]

> I think it is important that you, Dicky and I meet NB ... at the earliest possible date. Reason is there is an existing legal agreement which does not allow either NB or [PTIC] to walk away from the deal without a valid legal reason. ...
>
> For [PTIC] to walk away from the deal in circumstances where NB is ready and willing to complete would tantamount to a breach of the Agreement of 13 October 2008. It is my legal duty to advise Dicky and [PTIC] of the consequences of the breach. ...

491 Chandra's evidence at the hearing was that Dicky Tan was upset about the lack of progress in the Transaction and wanted to "walk away" from it. [note: 1043] Chandra therefore wrote to advise

Dicky Tan that it would be a breach of his obligations if he chose to do so. [note: 1044] Leaving aside the question of whether it was appropriate for Chandra to advise Dicky Tan to take a "defensive posture" against Nava Bharat and essentially lie about his motivations for wanting to "walk away" from the Transaction, I think it is too far a stretch to say that the email is evidence that Chandra is involved in a conspiracy to defraud Nava Bharat. In fact, I am of the view that the email, read as a whole, would suggest that there was, at least on 6 January 2009, no conspiracy to defraud Nava Bharat. At that point in time, notably, Dicky Tan had wanted to "walk away" from the Transaction despite *not* having received the US$3m which, as Chandra said in the email, Nava Bharat was *ready and willing* to pay.

492 Following that, Chandra continued to act on the basis that Dicky Tan is the legal owner of the shares in PTIC. On 9 February 2010, Chandra sent an email to Dicky Tan enclosing an English translation of the minutes of PTIC's extraordinary general meeting of shareholders. [note: 1045] The minutes recorded that Dicky Tan and Ridwan Halim were still the legal shareholders of PTIC. [note: 1046] There is no indication that Chandra knew about Case No 1.

493 Significantly, the correspondence between Chandra and Jason Tan after Case No 1 was decided (on 23 March 2010 (see [386] above)) indicate that Chandra did not know about the alleged fraud perpetrated through Case No 1 and genuinely believed, at that point in time, that Dicky Tan still owned the shares in PTIC. On 24 March 2010, Jason Tan sent an email to Chandra enclosing the share certificates of PTIC and stated that "there are 100 shares and 80 shares owned by Dicky and another 20 shares owned by Ridwan Halim". [note: 1047] This reaffirmed Chandra's belief that Dicky Tan was the legal owner of the PTIC shares, and the family dispute did not affect that. On 26 March 2010, Chandra sent an email to Jason Tan enclosing a number of documents, including the draft share transfer form for Dicky Tan to transfer the shares to the nominee of Nava Bharat. [note: 1048] In my view, this is evidence that Chandra was acting on his belief that Dicky Tan was still the owner of the PTIC shares. It also implies that Chandra did not know about the alleged fraud perpetrated through Case No 1. Pertinently, pursuant to the draft Tripartite Agreement, Chandra requested for the original share certificates of PTIC to be surrendered to him. Jason Tan replied on 29 March 2010, and the email reads: [note: 1049]

> I was surprised when informed by Dicky that *you are expecting the original share certificates of* [*PTIC*] *to be surrendered to you* before receiving the confirmation from NB on our latest proposal but on the contrary, I was expecting the confirmation from NB prior the surrender of original certificates of [PTIC] to you ... There should be no point for me to surrender the original share certificates as long as NB does not confirm their acceptance. [emphasis added]

494 I find the email dated 29 March 2010 to be highly indicative that Chandra was not part of a conspiracy to defraud Nava Bharat. If, as Nava Bharat claims, Chandra was aware of Case No 1 which was decided on 23 March 2010, then there would be no reason for him to ask for the share certificates. Indeed, he would have refrained from doing so. Chandra's email to Jason Tan on 8 June 2010 is also telling. In that email, Chandra said that: [note: 1050]

> As you are aware we need to transfer a portion of the equity interest in PTIC to the nominee of NB at the time of the [disbursement] of the US$6 million. For these purposes we need to execute transfer forms and the certificates. The idea now is to execute these transfer forms and these togehter [*sic*] with the certificates will be kept by me under escrow arrangement until disbursement of the US$6 million

> Could you kindly forward these certificates to me as part of the escrow arrangement upon signing of the new agreement to document the latest proposals ...

495 In my view, the correspondence shows that Chandra was not part of a conspiracy to defraud Nava Bharat. He was acting with the honest belief that the family dispute was nothing more than a procedural arrangement between family members. This is also evident from the email dated 17 September 2010 in which Chandra reminded Jason Tan to give Dicky Tan the necessary approval for him to sign the proposed settlement agreement that had been finalised between the parties. [note: 1051]

496 I turn now to the minutes of the meeting on 1 October 2010 (see [114] and [481] above) which recorded that Chandra had informed that Dicky Tan would not be able to execute any documents in relation to PTIC as he had been "stripped of his powers in PTIC by the other shareholders of PTIC". [note: 1052] This follows after Rajaram's point that Chandra had on various occasions since 7 August 2010 informed that Dicky Tan required the consent of Jason Tan to sign documents relating to PTIC. [note: 1053] Nava Bharat claims that this shows that Chandra knew and was involved in Case No 1 as part of a conspiracy to defraud Nava Bharat. [note: 1054] I do not agree. Chandra's position is that Nava Bharat had conflated two different matters in issue, *ie*, the family dispute and Case No 1. [note: 1055] Chandra knew about the family dispute. He also knew that Dicky Tan and Ridwan Halim were the only shareholders of PTIC. His evidence is that when Jason Tan informed him about the dispute involving "other shareholders", he took it at "face value" and understood him to mean the family dispute involving the brothers. [note: 1056] Chandra further explained that the email dated 17 September 2010, in which he asked for Jason Tan's approval for Dicky Tan to sign certain documents on behalf of PTIC, stemmed from the family dispute which did not affect Dicky Tan's shareholding in PTIC. [note: 1057] Crucially, Chandra understood it to be a family dispute which did not alter Dicky Tan's legal right as a shareholder of PTIC. [note: 1058] I accept Chandra's evidence.

497 Nevertheless, even if I assume that Nava Bharat was right and that the minutes show that Chandra knew about Case No 1, I do not think that it would have advanced Nava Bharat's case. Nava Bharat must show that Chandra knew about and was involved in Case No 1 which, it alleges, is a fraud perpetrated by Jason Tan and/or Dicky Tan. Taken at its highest, and in light of the other evidence (which suggests that Chandra did not know about Case No 1), the minutes would only show that Chandra might have known about Case No 1 shortly before 1 October 2010. At the point in time, the alleged fraud had already been perpetrated. Furthermore, it does not show that Chandra knew that Case No 1 was a fraudulent manoeuvre by Dicky Tan and/or Jason Tan. Neither does it show that Chandra was involved in it.

498 On the whole, it appears that Chandra understood the situation to be a family dispute. In this regard, I do not think that Chandra knew about or was involved in the alleged fraud perpetrated through Case No 1 just because he was aware that there was a family dispute between the brothers. Such a view is consistent with the correspondence.

499 For completeness, I find that there is insufficient evidence to show that Chandra knew about or was involved in Case No 72 or Case No 98. For Case No 98, the evidence shows that Chandra was not involved in it. Nava Bharat had not adduced any evidence to suggest otherwise. Instead, Bob Sundaram's evidence was that it did not look like Chandra was involved in the alleged fraud perpetrated in Case No 98 by Dicky Tan and/or Jason Tan. [note: 1059] The same applies to Case No

72. [note: 1060]

500 In light of the foregoing, I find that Nava Bharat has failed to establish that Chandra knew about the alleged fraud that Dicky Tan and/or Jason Tan was perpetrating in Indonesia *or* that he was in any way involved in them.

(6) Privileged communications between Chandra, Dicky Tan and Jason Tan

501 At the start of the hearing, Ashwin stated under cross-examination that he was of the belief that Chandra was aware of and hence a party to the alleged fraud committed by Dicky Tan and/or Jason Tan by commencing Case No 1 to deprive Nava Bharat of the shares in PTIC. [note: 1061] He added that he had no evidence as privileged communications between Chandra, Dicky Tan and Jason Tan were not disclosed. [note: 1062] Chandra was subsequently ordered on 2 October 2013 to disclose the privileged communications, and did so on 4 October 2013. [note: 1063] Notwithstanding the disclosure of the privileged communications, Nava Bharat has been unable to point to any evidence to show an agreement between the parties or a common intention between the parties to defraud Nava Bharat. Not only is there no proverbial smoking gun, the evidence appears to contradict Nava Bharat's case that Chandra was a party to a conspiracy to defraud it.

502 Nava Bharat further alleges that Chandra had not given full disclosure of the privileged communications, and an adverse inference should be drawn against Chandra. [note: 1064] Nava Bharat highlights that there are "significant gaps in terms of time period" in the disclosed privileged communications, and there is no reasonable explanation for the gaps. [note: 1065]

503 In response, Chandra's position is that his style of practice did not involve the keeping of attendance notes for meetings and telephone calls. [note: 1066] He explained that his primary mode of communication with Dicky Tan and Jason Tan was through telephone calls and face-to-face meetings. [note: 1067] He would communicate with Jason Tan through emails whenever he was not in Singapore. [note: 1068] He also testified that Dicky Tan would seldom communicate with him by way of email because he was not tech-savvy. [note: 1069] According to Chandra, this explains for the limited number of emails.

504 I accept Chandra's explanation. As I have mentioned earlier, the disclosed privileged communications suggest that there is no conspiracy involving Chandra to defraud Nava Bharat. There is nothing to suggest that the emails were used as a front for the alleged conspiracy. If the emails were meant to act as a veil of propriety, then there would not have been gaps in the communications. In any case, Nava Bharat's case is simply that Chandra had not made full disclosure. I find it most unusual, if Nava Bharat is right, that Chandra would have disclosed emails that *appear* to be detrimental to his case, *eg*, the "defensive posture" email dated 6 January 2009 (see [461] above) and the minutes dated 1 October 2010 (see [481] and [496] above). This goes against Nava Bharat's contention that Chandra had failed to give full disclosure.

(7) Summary on Nava Bharat's claim in unlawful means conspiracy

505 Nava Bharat's case is that, notwithstanding the lack of direct evidence, the objective facts would suffice to support an inference that Chandra knew about and was involved in a conspiracy with Jason Tan and Dicky Tan to defraud Nava Bharat. I do not find this to be the case. The evidence does not show that Chandra knew or was involved in a conspiracy with Jason Tan and Dicky Tan to defraud Nava Bharat. Neither do I consider it appropriate to draw an adverse inference from the gaps

in the disclosed privileged communications. Accordingly, I find that Nava Bharat's claim against Chandra for unlawful means conspiracy must fail. Notwithstanding that, I shall proceed to consider briefly the arguments raised by the parties on the issue of causation.

Causation

506 Chandra argues, as an alternative, that the losses suffered by Nava Bharat, if any, were the result of the unilateral subsequent actions of Dicky Tan and/or Jason Tan and thus not directly caused by the alleged conspiracy. [note: 1070] The crux of the argument is that it was Case No 1 and the consequences flowing therefrom that caused the losses allegedly suffered by Nava Bharat. This is apparent from the line of questioning adopted by the counsel for Chandra, Mr Ang Cheng Hock SC, when he was cross-examining Bob Sundaram. [note: 1071] Not surprisingly, Bob Sundaram was reluctant to admit that Case No 1 was the *sole* cause, but eventually accepted that Nava Bharat would have had control of the PTIC shares if not for the court order obtained in Case No 1. [note: 1072]

507 I have some difficulties with Chandra's alternative argument on causation. The argument is based on the premise that Case No 1 is *not* part of the conspiracy. Nava Bharat's case is that Case No 1 forms part of the conspiracy. I have found against Nava Bharat on this point, but if I had agreed with Nava Bharat, then Chandra's alternative argument would have failed as well. In this sense, it is not exactly an *alternative* argument. In addition, some of the alleged losses suffered by Nava Bharat do not result from Case No 1. For instance, Nava Bharat had sought to recover, *inter alia*, expenses incurred in anticipation of commencing mining operations at the Mine. [note: 1073] Even if I assume that there is a conspiracy but Case No 1 does not form part of it, it does not mean that Nava Bharat would not be entitled to recover *any* of the alleged losses (if proven). Nevertheless, since I have found that Chandra is not part of an alleged conspiracy to defraud Nava Bharat, I need not decide on this issue.

508 I will now turn to address the next claim against Chandra.

Claim against Chandra for negligence

509 Nava Bharat's alternative claim is that Chandra has breached his duty of care in negligence owed to Nava Bharat. It claims that Chandra owes a duty of care because he had held himself out as looking after Nava Bharat's interest throughout his conduct of the Transaction. [note: 1074] According to Nava Bharat, the duty of care was breached by Chandra because he allowed the Transaction to proceed without the Forestry Licence and shut his eyes to the risk that Jason Tan and Dicky Tan were perpetrating a fraud on Nava Bharat. [note: 1075]

510 Chandra, on the other hand, denies that there was a duty of care owed to Nava Bharat, and that in any case the alleged losses were neither caused by Chandra nor foreseeable by him. [note: 1076]

Solicitor's duty of care owed to a counterparty in a transaction

511 The present claim gives rise to the issue of whether a lawyer representing a party to a transaction owes a duty of care to the counterparty in a transaction. I will approach this issue in two parts, starting with proximity followed by the policy considerations.

Proximity

512 While the Singapore courts have, on several occasions, examined the issue of whether a lawyer owes a duty of care in negligence to a third party (see, *eg*, *AEL* and *Anwar*), the circumstances in those cases are starkly different from the facts of the present case.

513 The case of *Anwar* involves the children of one Agus Anwar ("Agus") suing his solicitors for negligence. One of the issues was whether the solicitors owed a duty of care to Agus' children. In that case, Agus owed money to the bank. After negotiations, the bank agreed to forbear from suing Agus if he procured, *inter alia*, further collateral including mortgages of properties owned by his children. A forbearance agreement and related security documents were signed. The bank initially wanted Agus' children to be personally liable for the loans but this was eventually dropped. Nevertheless, the personal guarantee clause found its way into the security documents. Agus' solicitors did not point this out to Agus or his children. The bank eventually relied on the personal guarantee clause to claim against Agus' children. They settled the claim with the bank and sued Agus' solicitors for, *inter alia*, negligence.

514 Having found that there was an *implied retainer* between Agus' solicitors and his children, the Court of Appeal held at [145] that there is sufficient proximity necessary to impose a duty of care. For the sake of argument, however, the Court considered that there was sufficient proximity even if there was *no* implied retainer. It explained at [146] that:

> … Where a solicitor's instructions from a client include or has as its *effect* the conferment of a benefit or negativing a detriment to a third party, and the solicitor undertakes *to the client* to fulfil that instruction, he would have brought himself into a direct relationship with the third party, even if the latter may not have personal knowledge of the transaction or the solicitor. [emphasis in original]

The Court found at [147]–[150] that there were "two levels of proximity at play", namely, the relational or circumstantial proximity and the causal proximity. Furthermore, it appeared to have accepted at [154] that the elements of control *and* vulnerability were sufficient to satisfy the proximity limb under the *Spandeck* test. Notably, the Court of Appeal was clearly reluctant to use the language of assumption of responsibility and reliance to find proximity between the lawyer and the third party (at [155] and [157]).

515 In *AEL*, the plaintiffs were the intended beneficiaries of the testator's new will. The second defendant was the lawyer who drafted the new will, which was intended to replace an earlier will. The new will turned out to be defective, and the plaintiffs sued for negligence. Chan J allowed the plaintiffs' claim. The "nub of the dispute" was whether the second defendant owed a duty of care to the plaintiffs. Guided by the Court of Appeal's decision in *Anwar* (where the Court expressed its view on *White and another v Jones v another* [1995] 2 AC 207 in light of the *Spandeck* test), Chan J found that the plaintiffs and the second defendant were in a sufficiently proximate relationship. He accepted at [84] that there was relational or circumstantial proximity between the plaintiffs and the second defendant because the latter knew that if the instructions from the testator were not properly carried out, the economic well-being of the plaintiffs would be adversely affected. In addition, like in *Anwar*, Chan J found that there was causal proximity between the plaintiffs and the second defendant on the basis that the plaintiffs' entitlement to the testator's estate (which the testator intended for them to receive) was wholly dependent on the effectiveness of the new will. This was a task entrusted to the second defendant, and he knew that if the new will was defective, then the plaintiffs would suffer loss. Furthermore, Chan J found that the proximity between the plaintiffs and the second defendant

can also be established on the proximity factors of control and vulnerability. In this respect, he said at [90] that:

> ... In that vein, I note that, as the solicitor responsible for preparing the New Will, [the second defendant] is in complete control over whether the plaintiffs do or do not receive their respective shares in the Testator's estate. This, in turn, means that the plaintiffs are wholly and inescapably dependent on [the second defendant's] proper discharge of his obligations to the Testator to receive their respective entitlements. In my view, the presence of "control" on the part of [the second defendant] and "vulnerability" on the part of the plaintiffs serve to increase and strengthen the links between them. This buttresses my earlier finding that there is sufficient proximity in the present case.

516 Neither *Anwar* nor *AEL* address the issue that is before me, namely, whether a lawyer acting for a party to the transaction owes a duty of care to the counterparty to the transaction, as opposed to a "third-party associate of the client" (see *Anwar* at [71]) such as an intended beneficiary of a testator (as in *AEL*) or a guarantor of a debtor (as in *Anwar*). In the latter cases, the third party in question was not, figuratively speaking, on the *other* side of the fence. Neither was the third party represented by his own lawyers and other advisers. In light of these crucial differences, I do not think that it would be appropriate to say that the reasoning in *Anwar* or *AEL* can be extended to apply to the facts of the present case.

517 In my view, there is and should be no rule that a lawyer owes or does not owe a duty of care to third parties. It should ultimately depend on the facts of the case. The question is whether there is sufficient proximity between the lawyer and the third party for a duty of care to exist (assuming that there is no policy consideration militating against the imposition of such a duty).

518 Before I turn to consider the facts, I would set out the general observation that it may well be easier for proximity to be established in a case where there is a commonality (as opposed to conflict) of interests between the client and the third party in question. As I have mentioned earlier, some of the local examples include the testator and the intended beneficiaries of his will (see *AEL*) as well as the debtor and his guarantors (see *Anwar*). The English cases provide some support for this view (see, *eg*, *Clarke v Bruce Lance & Co (a firm) and others* [1988] 1 WLR 881 ("*Clarke*") at 888–890 and *Dean v Allin & Watts (a firm)* [2001] PNLR 39 at [31]–[33] and [38]–[40]).

519 I would also discuss two English cases which I have found to be instructive. The first is *Memery Crystal v O'Higgins* [1998] ECC 299 ("*Memery Crystal*"). It concerned the funding for the production of a film. The second defendant, Mr O'Halloran, was seeking to persuade the first defendant, Mr O'Higgins, to fund the endeavour. Mr O'Halloran was represented by Mr Westaway, a lawyer from the plaintiff law firm and Mr O'Higgins was represented by the third defendant, Mr Snelling. Mr Westaway was "a lawyer who for most of his professional life has specialised in the field of entertainment and who was very familiar with the film industry" (at [6]). On the other hand, Mr Snelling had "no expertise in this field" (at [9]) and this was made known to Mr Westaway. For the present purposes, I am only concerned with the counterclaim by the first defendant against the plaintiff for negligence. Bathurst-Norman, sitting as a High Court Judge, opined (at [26]) that "under normal circumstances a solicitor is bound to do all that he properly can for his client and does not owe a duty of care to anyone who is not his client", but noted (at [27]) the exception "where a solicitor voluntarily assumes a duty of care towards a third party, for instance, by answering a question or tendering advice where he knows that that answer or advice will be relied upon by the third party". On the facts, the judge found (at [29]) that:

> … Mr Westaway's sole duty was to Mr O'Halloran. A solicitor in these circumstances, where he

could be held to owe a duty to a third party, would be in an impossible position. He would have to risk either complying with his client's instructions if they did not accord with the agreement or breaching his client's privilege if the client decided that he did not want the other side informed of anything by informing them of the precise nature of his instructions by revealing those instructions to the third party.

He also considered (at [33]) that:

> … I believe, however, the true principle applicable to this case, where each of the principals, Mr O'Higgins and Mr O'Halloran, has a solicitor acting for him, is to be found in the judgment in *Allied Finance v Haddow* where Cooke J. puts the matter in this way:
>
> > Applying the principles to the present case, I agree with Pritchard J. that the relationship between two solicitors acting for their respective clients does not normally of itself impose a duty of care on one solicitor to the client of the other. *Normally the relationship is not sufficiently proximate. Each solicitor is entitled to expect the other party will look to his own solicitor for advice and protection*. Lord Roskill says in *Junior Brooks* at page 214. 'The concept of proximity must always involve, at least in most cases, some degree of reliance.' Lord Roskill illustrates this by citing observations in the Hedley Byrne case [1964] A.C. 465, and he attaches importance to where 'the real reliance was placed'. And even if prima facie there were sufficient proximity for a duty of care, the consideration that the other party has a solicitor to protect his interests would normally negative a duty. That is to say, the second of Lord Wilberforce's questions in *Anns v. Merton London Borough Council* [1978] A.C. 728, at page 752, would have to be answered against the duty even if the first was not.
>
> In circumstances such as these I believe that the law is slow to import a duty of care on a solicitor to a third party *where the third party has his own solicitor acting for him and where the matter concerned is potentially a contentious matter*. ...
>
> [emphasis added]

520 The next case is *BDG Roof-Bond Ltd (in liquidation) v Douglas and others* [2000] BCC 770. The plaintiff was a company with two equal shareholders, one of whom was the first defendant, Mr Douglas. The relationship between the shareholders soured and Mr Douglas decided to sell his shares to the other shareholder, Mr Bailey. It was decided that the transaction would take the form of an own-shares purchase (*ie*, where the company buys its own shares), but the transaction failed to take place due to the non-compliance with statutory requirements. One of the questions was whether the second defendant, Dunn & Baker, the law firm representing Mr Douglas in the transaction, owed a duty of care to the plaintiff. Park J held that it did not. He made the preliminary observation at 785 that there is an extensive body of case law in England which has developed around "situations in which someone who has suffered loss in a transaction seeks to recover his loss by suing a professional adviser who was not his own (the claimant's) adviser but rather was the adviser of another party", and noted that the "general trend of the cases is to be reluctant to find that a professional adviser owes a common law duty to someone who is not his own client" (at 786). On the question of proximity, he was of the view that there was no sufficient proximate relationship between the plaintiff company and the second defendant because the plaintiff was on the *opposite side of the transaction* from the second defendant's client (*ie*, the first defendant). It is noteworthy that Park J found at 787 that the second defendant had not assumed responsibility to the plaintiff and the plaintiff had *not* relied on the advice of the second defendant.

521 Having considered the above authorities, and bearing in mind the universal two-stage test laid

down by the Court of Appeal in *Spandeck*, I am of the view that the commonality of interests between the client of the lawyer and the third party in question is not *per se* a determinative factor as to whether there is sufficient proximity between the lawyer to the third party for the imposition of a duty of care. However, the fact that there is a conflict of interest between the client and the third party, especially in cases where they are on opposite sides of a transaction, would generally indicate a lack of proximity. This is because in cases where the client and the third party are on *opposite* sides of the transaction (in the sense that their interests may conflict), it would ordinarily be difficult to find that there has been voluntarily assumption of responsibility and reliance or control and vulnerability such as to satisfy the proximity limb of the *Spandeck* test. In this regard, I find the view expressed in Hugh Evans, *Lawyers' Liabilities* (Sweet & Maxwell, 2nd Ed, 2002) at para 2-05 to be helpful:

> As a result of the potential conflict of interest in most cases, it will be uncommon for a solicitor to wish or intend to assume any general responsibility to the other side, and rare for the other side to be able to consider reasonably that he has done so. In general, it may only be reasonable to conclude that there has been an assumption of responsibility if:
>
> (1) the circumstances suggest that the words or acts of the solicitor are intended to benefit the other side; and
>
> (2) there is no or no obvious conflict with his duties to his client; or
>
> (3) the circumstances make it apparent that the solicitor's client has expressly or impliedly waived any obligation to himself where there may be a conflict.

Notably, this view appears to be consistent with the position taken in *Anwar* at [146] (see [514] above).

522 I come back to the question of whether there is sufficient proximity between Nava Bharat and Chandra in the present case.

523 At this juncture, I find it appropriate to consider Nava Bharat's reference to *Lee Siew Chun v Sourgrapes Packaging Products Trading Pte Ltd and others* [1992] 3 SLR(R) 855 ("*Lee Siew Chun*"). In that case, Michael Hwang JC observed at [85] that he preferred the New Zealand case of *Allied Finance and Investments Ltd v Haddow & Co* [1983] NZLR 22 ("*Allied Finance*") over the English case of *Gran Gelato Ltd v Richcliff (Group) Ltd and others* [1992] Ch 560 ("*Gran Gelato*"). Nava Bharat cites *Lee Siew Chun* presumably because *Gran Gelato* is generally referred to as the leading English case for the proposition that no duty is owed to the counterparty in a non-contentious transaction (see *Jackson & Powell* at para 11-061). In that case, the first defendant sold an underlease to the plaintiff. Both parties were separately represented by lawyers for the transaction. The plaintiff's lawyer sent enquiries before the contract was concluded, and this included an enquiry on whether there were any rights affecting the superior leases which would inhibit the enjoyment of the underlease. The first defendant's lawyer (also the second defendant) replied "[n]ot to the lessor's knowledge" (at 565). This turned out to be untrue. Sir Donald Nicholls VC found that the second defendant was not liable for misrepresentation. He considered at 570 that:

> In my view, in normal conveyancing transactions solicitors who are acting for a seller do not in general owe to the would-be buyer a duty of care when answering inquiries before contract or the like. ...

He considered that the answers were given on behalf of the seller, and that the law provides the

buyer with a remedy against the seller in respect of any misrepresentation in the answers given on his behalf. In this respect, he found that there is no good reason for the law to impose a duty of care "when the agent already owes to his principal a duty which covers the same ground and the principal is responsible to the third party for his agent's shortcomings" (at 571).

524 The case of *Allied Finance* appears, at least to Hwang JC, to be inconsistent with *Gran Gelato*. The plaintiffs in *Allied Finance* lent money to Hill on the security of a yacht which he was buying. The yacht was in fact bought by a company owned and controlled by Hill. Hill's lawyers wrote to the plaintiffs before the transaction and stated that they certify "that the Instrument by way of Security is fully binding on Roger Kenneth Hill" and "on behalf of our client, that there are no other charges whatsoever on the yacht" (at 23). The letter did not disclose that Hill was not buying the yacht in his own name. The English Court of Appeal accepted that the lawyers owed a duty of care to the plaintiffs. Cooke J considered at 24 that:

> … I agree ... that the relationship between two solicitors acting for their respective clients does not normally of itself impose a duty of care on one solicitor to the client of the other ...
>
> But surely the result of the established principles is different when on request a solicitor gives a certificate on which the other party must naturally be expected to act. That is a classic duty of care situation ...

525 The learned editors of *Jackson & Powell* at paras 11-063–11-064 distinguish *Gran Gelato* and *Allied Finance* on the basis that the latter is an exception to the general rule in *Gran Gelato* given that there was reasonable reliance in *Allied Finance.*

526 It is not necessary for me to decide if *Gran Gelato* or *Allied Finance* should be preferred, for both cases must now be considered in light of the universal test laid down in *Spandeck*. I would only observe that the Court of Appeal in *Spandeck* accepted at [81] that the twin criteria of voluntary assumption of responsibility *and* reliance are "two different (yet inextricably connected) sides of the same coin".

527 As I have alluded to earlier (see [509] above), Nava Bharat contends that Chandra had "held himself out" as looking after Nava Bharat's interest throughout his conduct of the Transaction. In this regard, it alleges that:

(a) Chandra was the person who "brought the deal to the table" as he put the potential deal to Bhushan who, in turn, approached Nava Bharat. [note: 1077]

(b) Chandra presented the potential deal to Nava Bharat (before Rajaram and ABNR were appointed), including advising it on the relevant features of the Transaction *and* vouching for Dicky Tan "as a client, a friend and a reputable businessman". [note: 1078]

(c) Chandra represented to Nava Bharat that it could obtain equity interest in the Mine *via* a nominee arrangement. [note: 1079]

(d) Chandra was involved in the appointment of Rajaram and ABNR as the lawyers for Nava Bharat. [note: 1080]

(e) Chandra was running the Transaction as a whole, and Rajaram and ABNR were merely assisting him. [note: 1081]

(f) Chandra engaged in direct communication with Bhushan and Ashwin on various matters relating to the Transaction. [note: 1082]

528 In my view, the facts do not support Nava Bharat's contention that there is a sufficiently proximate relationship between Chandra and Nava Bharat.

529 I have earlier mentioned the twin criteria of voluntary assumption of responsibility and reliance which are well recognised as "essential factors in meeting the test of proximity" (*Spandeck* at [81]). It is also useful to recall that the Court of Appeal in *Anwar* had accepted that control and vulnerability may, where the facts support them, form the essential factors in meeting the test of proximity. These proximity factors assist the court in determining whether there is sufficient proximity between the parties such that a duty of care ought to be imposed. How then should one decide which proximity factors would be relevant in any particular case? The answer, I think, is simple: it depends on the facts (see *Spandeck* at [81], where the Court of Appeal referred to the twin criteria of voluntary assumption of responsibility and reliance as capable of meeting the test of proximity "where the facts support them"). I would only observe that in relying on these factors in finding proximity, one should not lose sight of the purpose of the inquiry, *ie*, whether there is sufficient proximity for a duty of care to arise on the part of one party *vis-à-vis* the other (see *Spandeck* at [77]).

530 For a start, I am not persuaded that a lawyer acting for a party to the transaction should, without more, be considered as having assumed responsibility to the other party to the transaction simply because that other party is unrepresented. On the facts of the present case, I find that Chandra was *not* advising Nava Bharat prior to the appointment of Rajaram and ABNR. It was apparent that Chandra was putting forward his client's proposal to Nava Bharat and it was fully entitled to take it back and consult its own lawyers (which it did). It would be a complete and disingenuous mischaracterisation of the facts to claim that Chandra was *advising* all parties (including Nava Bharat) on the way to proceed with the Transaction. It may well be open to Nava Bharat to consider and agree with Dicky Tan's proposal (which was conveyed through Chandra) but that does not make it an advice upon which Nava Bharat was expected to rely on. This brings us to the next point, that is, Nava Bharat could not be said to have relied on Chandra for advice on matters of Indonesian law. At that point in time, Ashwin knew that legal advice as regards the structure of the Transaction and due diligence must be done by an Indonesian law firm. This is apparent from his email to Rajaram on 6 October 2008 (see [19] above) where he acknowledged the importance of engaging Indonesian counsel to perform legal due diligence. Indeed, it would have been most unusual for Nava Bharat to engage Rajaram and ABNR to represent it for the purpose of the Transaction if it had genuinely considered that Chandra was acting on behalf of all parties (and thus relied on him).

531 The position became even clearer after Rajaram and ABNR were appointed to represent Nava Bharat for the purpose of the Transaction. There is nothing on the evidence to show that Chandra had given any advice which was intended to be relied on by Nava Bharat. The matters which Chandra had to convey to Nava Bharat on behalf of his client, Dicky Tan, as well as any communication between the lawyers for the purpose of the Transaction cannot reasonably be considered as advice. Indeed the nature and context of the communication between Chandra and Nava Bharat clearly revealed that there was no assumption of responsibility on the part of Chandra or reliance on the part of Nava Bharat.

532 It was also pertinent that Ashwin knew all along that Chandra was acting for Dicky Tan, the counterparty to the Transaction and could not therefore rely on him for advice. This was acknowledged during the cross-examination: [note: 1083]

Q: Right. So you knew from the start that Dicky Tan's lawyers will be acting for Dicky Tan, right?

A: Yes, your Honour, they would be acting for Dicky Tan, that's the definition, yes.

Q: Yes. And Dicky Tan's lawyers, you can't rely on them because whatever they come up with has to be reviewed by your own legal experts, correct?

A: I cannot rely solely on them, your Honour, yes.

...

Q: Whatever Dicky Tan's lawyers say as to the structure or how the deal would proceed, you've got to double-check that with your own lawyers, correct?

A: Yes, your Honour.

533 In this regard, I find the Canadian case of *Patriquin v Laurentian Trust of Canada Inc* (2002) 96 BCLR (3d) 318 ("*Patriquin*") to be instructive. The case involves a mortgage transaction as a result of which Mr Patriquin, the plaintiff, suffered losses. Mr Patriquin sued the counterparty's lawyer, Mr Jackie. Mr Patriquin was represented by his own lawyer, Mr Hara. One of the issues that the British Columbia Court of Appeal had to decide was whether Mr Jackie owed a duty of care to Mr Patriquin. It held that there was no duty of care owed by Mr Jackie to Mr Patriquin. The Court of appeal agreed with the trial judge that no relationship of proximity existed between Mr Jackie and Mr Patriquin because it was "clear to everyone" that Mr Jackie was *not* assuming any responsibility for the plaintiff. The critical fact was that Mr Patriquin had retained Mr Hara in connection with the transaction. As such, it would have been Mr Hara's responsibility to advice Mr Patriquin.

534 In the same vein, I find the English decision of *Memery Crystal*, which I have discussed earlier at [519] above, to be pertinent. As in *Patriquin*, the judge accepted the view of Cooke J in *Allied Finance* where he said that "[e]ach solicitor is entitled to expect that the other party will look to his own solicitor for advice and protection" (at 24).

535 On the facts of the present case, I find that it was undoubtedly clear to everyone, including Ashwin (see [532] above), that both parties to the Transaction (*ie*, Nava Bharat and Dicky Tan) were represented by their respective lawyers. Chandra was entitled to expect that Nava Bharat would look to Rajaram and ABNR for advice and to protect its interests in the Transaction.

536 It is noteworthy that the Court of Appeal in *Anwar* was reluctant to find that the twin criteria of voluntary assumption of responsibility and reliance were present between a lawyer and the third party (at [71] and [155]–[162]). The Court of Appeal succinctly observed at [71] that:

> ... it would be pushing the boundaries of sensible argument to suggest that a solicitor in advising his client, with such advice potentially being of benefit to a third-party associate of the client, had undertaken to *that third party* a responsibility to take care in the giving of his advice. Similarly, it would strain the realm of reasonableness to argue that such a third party who might have been ignorant of the solicitor's existence (as was the case in *White*) had *in fact* relied on the solicitor's exercise of due care and skill in advising his client. … [emphasis in original]

537 In my opinion, it would be equally preposterous to suggest, in a case where both parties to a transaction are represented by their own lawyers, that there can ordinarily be assumption of responsibility and reliance between the lawyer and the *other* party to the transaction.

538 I turn next to the question of whether Nava Bharat has shown that the proximity limb of the *Spandeck* test has been satisfied on the basis of control and vulnerability. As I have mentioned earlier, both control and vulnerability have been considered in *Anwar* and *AEL* as essential factors for finding proximity under the *Spandeck* test.

539 In David Tan and Goh Yihan, "The Promise of Universality - the Spandeck Formulation Half a Decade on" (2013) 25 SAcLJ 510 ("*Tan & Goh*") at para 33, the learned authors explained that:

> Control is often discussed in relation to the defendant's control over the source of the risk of harm to the claimant or a class of individuals of which the claimant is a member. ... The *capacity* of the defendant to control the situation that might give risk to the risk of harm is a critical consideration. ... Nonetheless, the capacity of the defendant to control or the actual control exercised by the defendant over the risk of harm of the claimant may not of itself be sufficient to establish a *prima facie* duty, and control has to be assessed in the light of other proximity factors. For example, the greater the degree of exclusive control over the risk of harm by the defendant may indicate a corresponding increased vulnerability on the part of the claimant. ...
>
> [emphasis in original]

540 They also considered at paras 34–35 that:

> ... It is important to note that vulnerability is usually considered with the element of control. ...
>
> In *Woolcock Street Investments v CDG Pty Ltd* ("*Woolcock*"), a case involving economic loss as a consequence of structural distress to a building, the joint judgment of Gleeson CJ, Gummow, Hayne and Heydon JJ held that vulnerability is "to be understood as a reference to the plaintiff's inability to protect itself from the consequences of a defendant's want of reasonable care, either entirely or at least in a way which would cast the consequences of loss on the defendant". ...

541 The decision of the High Court of Australia in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd and another* (2004) 216 CLR 515 is instructive on the meaning of "vulnerability" in the context of determining if there is sufficient proximity to impose a duty of care. In that case, the plaintiff was a purchaser of a commercial building that had latent defects. The plaintiff could have appointed experts to inspect the building for defects, but did not do so. The High Court of Australia took the view that a party who is ordinarily in a position to protect itself but chooses not to do so should not be treated as vulnerable. The observations of the Court at [31]–[32] and [110] are pertinent and I set them out below:

> 31 Neither the facts alleged in the statement of claim nor those set out in the case stated show that the appellant was, in any relevant sense, vulnerable to the economic consequences of any negligence of the respondents in their design of the foundations for the building. *Those facts do not show that the appellant could not have protected itself against the economic loss it alleges it has suffered*. ...
>
> 32 It may be accepted that the appellant bought the building not knowing that the foundations were inadequate. It is not alleged or agreed, however, that the defects of which complaint now is made could not have been discovered. ... That the defects now alleged were not discovered by a local authority asked to certify whether the building was "a ruin or so far dilapidated as to be unfit for use or occupation or [was] ... in a structural condition prejudicial to the inhabitants of or to property in the neighbourhood" says nothing about what other investigations might have been undertaken or might have revealed.

...

110 But the most powerful reason for rejecting the proposed duty is that *the first owners and purchasers of commercial buildings are ordinarily in a position to protect themselves from most losses that are likely to occur from defects in the construction of such buildings*. Occasionally, a commercial building may be built or bought for an emotional rather than an economic reason. But in the overwhelming number of cases, commercial buildings are constructed or bought to make money. A commercial building is constructed or bought because it is perceived to be a suitable vehicle for investment. The prudent first owner or purchaser of such a building will compare the likely return on the capital investment with the potential risks including falls in the value of the building that may result from various factors, economic, social and physical. And no prudent purchaser would contemplate buying a building without determining whether it has existing or potential construction defects. Knowledge of its defects, actual or potential, is central to any evaluation of its worth as an investment. *In so far as risks are uncertain or unknown, the prudent purchaser will factor the risk into the price or obtain contractual protections or, if necessary, walk away from the negotiations.*

[emphasis added]

542 On the present facts, I find that Nava Bharat had not shown that Chandra was in control over the *source* of the risk of harm to Nava Bharat. For the present claim, Nava Bharat's allegations relate primarily to the alleged fraud perpetrated by Dicky Tan and Jason Tan. [note: 1084] In other words, the source of the risk of harm to Nava Bharat must have been the fraudulent conduct of Dicky Tan and Jason Tan. In this regard, there certainly can be no control on the part of Chandra given that I have earlier found that he neither knew nor was involved in any alleged conspiracy to defraud Nava Bharat. To be complete, I should mention that I do not accept that Chandra was in control of the manner in which the Transaction was structured – insofar as Nava Bharat is *also* suggesting that it was the source of the risk of harm. [note: 1085] This is not a case where Chandra was, on his own, dictating the terms or the structure of the Transaction. On the contrary, Nava Bharat was fully involved (with the advice from its own lawyers and other advisors) throughout the entire period and *consented* to the terms and structure of the Transaction. In this regard, and this is an example of how control and vulnerability are often intertwined and can likewise be fairly said to be "two different (yet inextricably connected) sides of the same coin" (Andrew Phang, Saw Cheng Lim & Gary Chan, "Of Precedent, Theory and Practice - The Case for a Return to Anns" [2006] SJLS 1 at 47, cited in approval in *Spandeck* at [81]), I find that there is no vulnerability on the part of Nava Bharat. Indeed, it can hardly be considered as a party who could not have protected itself against the losses that it has allegedly suffered. Like most parties to a commercial transaction, Nava Bharat was well-placed to protect itself from losses that are likely to occur if the Transaction went awry. Not surprisingly, Nava Bharat had taken steps to protect itself against the risks involved in the Transaction, including the appointment of legal counsel (*ie*, Rajaram and ABNR) as well as consultations with Bob Sundaram and Nava Bharat's Indonesian team. It follows that there can be neither control on the part of Chandra nor vulnerability on the part of Nava Bharat.

543 At this point, I pause to note that while the Court of Appeal in *Anwar* relied primarily on relational or circumstantial proximity and causal proximity in determining if the proximity limb of the *Spandeck* test has been satisfied (and this has been followed by Chan J in *AEL*), this approach has drawn some criticisms (see David Tan, "Debunking a Myth: A Rejection of the 'Assumption of Responsibility' Test for Duty of Care" (2014) 22 Torts Law Journal 183 at 192. In particular, Assoc Prof Tan opines at 192 and 194 that:

> The reference to 'physical, circumstantial and causal proximity' as a yardstick for determining legal proximity can be confusing and perhaps courts should avoid using these terms but focus instead on five factual situational factors. Circumstantial proximity requires an examination of the relationship between the parties in dispute, which further entails a closer analysis of the presence or absence of certain elements in that relationship. The phrase appears to be used interchangeably with 'relational proximity'. Causal proximity tends to be broadly defined and seems to overlap with notions of factual foreseeability of 'knock-on effects' and causation. In many novel situations, the content of proximity can be elucidated by a set of non-exhaustive enumerated factors which can have *universal* application to different factual scenarios, without the need to invoke the terms 'circumstantial proximity' or 'causal proximity'.
>
> ...
>
> ... the repeated invocation of the notion of 'physical, circumstantial and causal proximity' as *factors* can be confusing. ***With respect, these are concepts rather than factors.*** For example, the presence of factors like assumption of responsibility, reliance, control and vulnerability in the interaction between doctor and patient results in a relational closeness or circumstantial proximity. In a defective will scenario, a solicitor knows of the consequences of an improperly executed will, has control over the valid execution of a will and the inability of the intended beneficiaries to take precautions renders them vulnerable; thus there is causal proximity in the sense that a defective will would inevitably lead to the economic loss suffered by the intended beneficiaries. *The notion of 'physical, circumstantial and causal proximity' is an indeterminate reference*, and it is unsurprising that the High Court of Australia has unequivocally renounced it in favour of the salient features approach. While this methodology of commingling of factual and normative features has been criticised, it obviates the use of labels like 'circumstantial', 'relational' and 'causal' proximity and more transparently presents a list of factual factors for judicial examination.
>
> [emphasis in italics in original, emphasis in bold italics added]

544 In this regard, it is apposite to note that the Court of Appeal in *Anwar*, having expressed its views in relation to circumstantial proximity and causal proximity, observed that the learned authors in *Tan & Goh* have in mind the "same idea, albeit under a different label" when they discuss "control" and "vulnerability" as essential factors for satisfying proximity (see *Anwar* at [147]–[154]). Similarly, the discussion by Chan J in *AEL* at [84]–[85] on circumstantial proximity and causal proximity, in essence, reflects the proximity factors of control and vulnerability (as well as the knowledge thereof (see also *Anwar* at [148])):

> 84 First, I find that there is relational or circumstantial proximity between the plaintiffs and Cheo. This is not merely because of the nature of the Testator's instructions but also because Cheo *knew* full well at that time that *if those instructions were not properly carried out, the economic well-being of the plaintiffs would be adversely affected*. The plaintiffs are therefore clearly in Cheo's direct contemplation even though he has no direct interaction with them (save for AEL). In this connection, I note that Megarry VC has also stated in *[Ross v Caunters [1980] Ch 297 at 308F-H]* that the question of whether a negligent solicitor "ought" to have had the disappointed beneficiaries in his contemplation does not even arise in cases such as this. This is because the solicitor's contemplation of the beneficiaries is of such a close and immediate nature; it is "*contemplation by contract*" [emphasis added] though that contract was with the testator client. Therefore, it is this degree of knowledge which Cheo has of the plaintiffs and the surrounding circumstances which leaves me in no doubt that there is relational or circumstantial proximity between the parties.

> 85 I also find that there is causal proximity between Cheo and the plaintiffs. *The plaintiffs' entitlement to the Testator's estate, in the shares which the Testator intended for them to receive, is wholly dependent on the New Will being effective*. That task of making an effective will, in turn, was entrusted by the Testator to Cheo. It must thus have been plain to Cheo that if the New Will was defective, then that will lead inevitably, upon the death of the Testator, to economic loss suffered by the plaintiffs. Accordingly, causal proximity between the plaintiffs and Cheo is clearly evident.
>
> [emphasis added]

545 On the facts of the present case, it suffices for me to say that, having found that there is neither assumption of responsibility and reliance nor control and vulnerability between Chandra and Nava Bharat, there is likewise insufficient relational, circumstantial or causal proximity.

546 In light of the finding that there is insufficient proximity, Nava Bharat's claim against Chandra in negligence must fail. Nevertheless, I proceed to consider if there are any policy considerations that would militate against the imposition of a duty of care.

Policy considerations

547 Chandra contends, as an alternative, that there are strong reasons against the imposition of a duty of care on the present circumstances. He raises three main points, namely, that there would be an "indeterminate extension of third party liability in cross-border transaction with a Singapore element", [note: 1086] that it is "unfair and unjust" for a lawyer to owe a duty of care to a third party in a case where the third party had failed to take reasonable care of itself, [note: 1087] and that there is adequate alternative remedy available to the third party (or in other words, there might be double recovery by the third party). [note: 1088] In response, Nava Bharat claims that there is no concern with indeterminacy of liability given the "peculiar facts" of the present case. [note: 1089]

548 The Court of Appeal in *Spandeck* explained at [85] that the second stage of the test concerns the consideration of pertinent and relevant policy considerations which involve "value judgments which reflect differential weighing and balancing of competing moral claims and broad social welfare goals". As observed by the learned authors in *Tan & Goh* at para 37:

> At this stage, the court is expected to evaluate the anticipated impact of a holding of a duty of care upon a diverse range of legal persons, including persons who will, in future, occupy positions similar to the claimant and defendant, and those who will be indirectly affected by the rule applicable as between the present parties in dispute.

549 The focus of the policy limb under the *Spandeck* test is therefore predominantly concerned with the *potential* individuals (as opposed to the actual parties before it) who might be affected by the court's decision in the future. This is also explained in Christian Witting, "Duty of Care: An Analytical Approach" (2005) 25 OJLS 33 at 38:

> The policy 'test' is concerned with the imposition of appropriate norms rather than with the evaluation of factual states ... the focus of the policy test *need not* be upon the claimant and the defendant. Indeed, courts ordinarily are not concerned with the policy implications of recognizing a duty of care as between any particular claimant and defendant. Their concern is with the potential impact that the recognition of a duty might have upon a number (if not innumerable) parties who are *not before the court*. The courts might consider the potential

> impact upon parties who will, in the future, occupy positions similar to those of the claimant and/or defendant. … [emphasis in original]

550 With this in mind, I turn to consider the specific arguments raised by the parties.

551 The concern with indeterminate liability has been acknowledged in Singapore as a relevant policy consideration that might negate the imposition of a duty of care by the Court of Appeal in *Spandeck* at [73]. The question, however, is whether such a concern is a valid one on the present circumstances.

552 In *Clarke*, the English Court of Appeal was reluctant to impose a duty of care on the defendant solicitor on the basis that doing so might impose indeterminate liability on other solicitors in similar position in the future. Balcombe LJ said at 889 that:

> If the defendants were under a liability to a potential beneficiary of the property, it cannot have been to the plaintiff alone. As a matter of logic, the plaintiff, at the time of the grant of the option, was in no different a position *vis-à-vis* the defendants than anyone to whom the testator might have given the property during his lifetime, or to whom it might pass under his will or intestacy. So if the defendants owed a duty to anyone other than their client, the testator, it must have been to the whole of this indeterminate class of potential donees or beneficiaries. It would indeed have exposed them "to a liability in an indeterminate amount for an indeterminate time to an indeterminate class".

553 In the present case, I understand Chandra to be saying that *if* proximity can be established between a lawyer and a counterparty in the transaction on the present circumstances, then there would be a risk that there might be an indeterminate extension of third party liability in future similar cases. I have earlier found that Nava Bharat had failed to establish proximity. For the sake of argument, however, I would assume that Chandra did hold himself out as working towards a win-win situation for the mutual benefit of all parties (albeit without *any* specific representation or advice upon which Nava Bharat relied upon), and at the same time bear in mind that Nava Bharat is on the other side of the Transaction and represented by its own lawyers. If a lawyer owes a duty of care to anyone who has an interest in the transaction, other than his client, simply because the lawyer demonstrates that he is moving the transaction towards completion, then it would be near impossible to limit liability from extending indiscriminately to any *other* third party whose interest might potentially be affected by the transaction. Accordingly, I am of the view that the policy consideration against indeterminate liability must operate to militate against the imposition of a duty of care.

554 Chandra also argues that it is unfair and unjust to impose a duty of care on him *vis-à-vis* Nava Bharat where it had the primary duty or responsibility of verifying or checking all aspects of the Transaction. [note: 1090] In this respect, Chandra cites the English Court of Appeal decision of *Philcox v Civil Aviation Authority*, The Times, 8 June 1995 (transcript available on LexisNexis). [note: 1091] The case concerned a claim in negligence brought against the Civil Aviation Authority for the failure to inspect an aircraft properly and in issuing a Certificate of Airworthiness. The Civil Aviation Authority was required under statute to issue a Certificate of Airworthiness (which is a mandatory requirement before an aircraft can fly) if it is satisfied that the aircraft is "fit to fly" having regard to a list of matters. A certificate was issued for an aircraft, but the aircraft which was piloted by the plaintiff crashed. Staughton LJ held, *inter alia*, that it would not be fair, just or reasonable to impose a duty of care on the Civil Aviation Authority "to inform [the plaintiff] if it were the case that he had not carried out his *primary duty* of maintaining his own aircraft properly" [emphasis added]. Similarly, Millett LJ considered that:

> The owners and operators of the aircraft are not within the class of persons for whose protection the scheme has been established; they are the persons against whose imprudent activities the scheme is designed to protect the public. They are not entitled to rely on the issue of the certificate to exonerate them from their own responsibility to ensure that their aircraft are fit to fly.
>
> It follows that the test of proximity is not satisfied. It would also follow that it would be unjust and unreasonable to impose a duty of care on the defendant to protect the owner of the aircraft for his *own failure to maintain it and protect it from unworthy condition.* But I prefer to rest my decision on the fact that the statutory scheme brings into existence a relationship which does not satisfy the proximity test for the purposes of the test of negligence.
>
> [emphasis added]

555 Chandra submits that it would not be fair or just to impose a duty of care when the alleged losses resulted entirely from Nava Bharat's own failure to ensure that the Transaction was genuine and legitimate. [note: 1092] On my part, and bearing in mind the distinction between the nature of the proximity and policy limbs of the *Spandeck* test (see [548]–[549] above), I agree with Millett LJ that the better view is to consider that there is insufficient proximity to justify the imposition of a duty of care.

556 Chandra further argues that there is adequate alternative remedy available to the third party or, put differently, a risk of double recovery. The concern with double recovery often features in cases relating to defective wills – the question is whether the estate *or* the disappointed beneficiaries should be entitled to sue for the wrongdoing of the lawyer in relation to the defective will (see *Jackson & Powell* at paras 11-056 to 11-057). It was also one of the factors expressed by the Court of Appeal in *Clarke* in support of its conclusion that there should be no duty of care owed by the lawyer of the testator to the potential beneficiary to advise that the testator was acting in a manner which might be adverse to his interest. Specifically, Balcombe LJ explained at 889 that:

> This is not a case where, if the plaintiff has no cause of action in negligence, there is no other effective remedy. If the defendants were negligent in failing to advise the testator that the grant of the option was an improvident act, then he during his lifetime had, and his personal representatives after his death have (subject to any limitation period), a cause of action against them. (If the personal representatives are unwilling to institute proceedings against the defendants the plaintiff, as a beneficiary under the will, has his remedy.) If the plaintiff has also a cause of action in tort, then the defendants are at risk of having to pay damages twice over, since any damages awarded to the estate would not enure to the benefit of the plaintiff as a specific devisee, unless he were also the general residuary beneficiary. ...

557 On the present facts, I appreciate that, for the alleged losses that it had suffered as a result of the Transaction, Nava Bharat is not only suing its own lawyer, Rajaram but also the counterparty to the Transaction, Dicky Tan (in Singapore and Indonesia (see [135]–[136] above)) as well as his lawyer, Chandra. However, I do not think that the mere fact that Nava Bharat is suing multiple parties for the same alleged losses would, *per se*, suffice as a reason for refusing to impose a duty of care on one or more of those parties. Unlike the situation discussed in *Jackson & Powell* as well as *Clarke* (namely, that the *same* wrongdoing by the lawyer led to losses suffered by two possible parties – the estate of the testator *and* the intended beneficiaries – for which the losses may not always coincide), the present case involves *distinct* wrongdoings by various alleged wrongdoers (including lawyers acting for both parties and Dicky Tan) which led to the same alleged losses suffered by Nava Bharat. In my view, there is no good policy reason why Nava Bharat should be prevented from suing for each

and every wrongdoing, albeit recovering no more than the losses that it had suffered.

Causation

558 For completeness, I shall proceed to consider the issue of causation.

559 Like in S 846/2011, Nava Bharat contends that the evidential burden is on Chandra insofar as he is arguing that Nava Bharat's losses arose independently of the alleged conspiracy or negligence. [note: 1093] For the reasons that I have stated earlier (see [367]–[372] above), I find that Nava Bharat must adduce some evidence to show that the losses suffered were caused by the alleged conspiracy or negligence before the *evidential* burden shifts over to Chandra.

560 Chandra submits that even if he was negligent, his negligence was *not* the effective cause of the losses alleged suffered by Nava Bharat. [note: 1094] Instead, Chandra claims that the losses were the result of Dicky Tan and/or Jason Tan's "unilateral subsequent actions in Jakarta" (*ie*, the commencement of Case No 1 to reverse the shares in PTIC). [note: 1095] In the alternative, Chandra submits that Case No 1 was a *novus actus interveniens* which broke the chain of causation. [note: 1096]

561 Nava Bharat's response is that Chandra's contention is misconceived because it had "suffered the loss even before the reversal [of the PTIC shares]". [note: 1097] As for the argument on *novus actus interveniens*, Nava Bharat's reply is similarly that its loss "had already crystallised" when Chandra pressed for the completion of the Transaction without the Forestry Licence. [note: 1098] In particular, Nava Bharat claims that Case No 1 should not be considered as a *novus actus interveniens* because it was "part of Chandra's conspiracy with [Dicky Tan] and [Jason Tan]". [note: 1099]

562 I start by expressing my difficulty with Nava Bharat's response. I understand Nava Bharat to be saying that it was bound to suffer the alleged losses because the entire chain of events (including Chandra's alleged breaches and Case No 1) was part of a conspiracy by Chandra, Dicky Tan and Jason Tan to defraud Nava Bharat. [note: 1100] This explains why Nava Bharat claims that it had suffered the loss even *before* the reversal of the PTIC shares (even though it had full ownership of the shares as a result of the share pledges), and why it says that the loss was "crystallised" once the Transaction was completed without the Forestry Licence. Nava Bharat presupposes that the acts of Chandra throughout the entire course of the Transaction and the acts of Jason Tan and/or Dicky Tan in Case No 1 (which effectively deprived Nava Bharat of the shares in PTIC) were part of a conspiracy. Since I have earlier found that Chandra neither knew nor was involved in any alleged conspiracy to defraud Nava Bharat, it follows that Nava Bharat's argument in this respect must fail.

563 I turn now to address Chandra's submission. I find that the cause of the alleged losses suffered by Nava Bharat was the acts of Dicky Tan and/or Jason Tan in Jakarta, and in particular, the procurement of the reversal of the shares in PTIC by virtue of Deed No 8 (see [124]–[125] above) and Case No 1 (see [386] above) which Chandra was not involved in. This was accepted by Ashwin [note: 1101] and Bob Sundaram [note: 1102] at the hearing. Furthermore, I accept Bob Sundaram's evidence that Nava Bharat would still be holding on to the shares in PTIC *but for* the order made in Case No 1. [note: 1103]

564 In any event, I find that the reversal of the shares in PTIC was a *novus actus interveniens* which broke the chain of causation. In *Lamb and another v Camden London Borough Council and*

another [1981] QB 625, which was cited with approval by the Court of Appeal in *Chong Yeo and Partners and another v Guan Ming Hardware and Engineering Pte Ltd* [1997] 2 SLR(R) 30 at [58], Oliver LJ at 640 said that:

> … What is referred to as the "chain of causation" may be broken and the most common example of a break in the chain is the intervening act of a third person over whom the tortfeasor can exercise no control. Such an intervention does not always break the chain and, in particular, it will not do so where the very breach of duty relied on is the duty of the defendant to prevent the sort of intervention which has occurred ...

565 I also find the observations of Carnwath J in *British Racing Drivers' Club Ltd and another v Hextall Erskine & Co (a firm)* [1996] 3 All ER 667 at 681 to be pertinent:

> The question is whether the negligence of Hextall Erskine was 'an effective cause' of the loss which is claimed. It needs of course to be borne in mind that, in cases of solicitor's negligence, it is unlikely that the conduct of the solicitor will itself be the direct cause of the damage which is suffered. More usually the basis of the claim is the solicitor's failure to protect the client against some other effective cause. The question, therefore, is whether the particular loss was within the reasonable scope of the dangers against which it was the solicitor's duty to provide protection (see eg *Barnes v Hay* (1988) 12 NSWLR 337). In *Roe v Ministry of Health, Woolley v Ministry of Health* [1954] 2 All ER 131 at 138, [1954] 2 QB 66 at 85 Denning LJ put the question thus: 'Is the consequence fairly to be regarded as within the risk created by the negligence?' Earlier he had said ([1954] 2 All ER 131 at 138, [1954] 2 QB 66 at 84–85):
>
> > '… causation, as well as duty, often depends on what you should foresee. The chain of causation is broken when there is an intervening action which you could not reasonably be expected to foresee …'
>
> Similar statements as to the relevance of foreseeability are made in *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] 2 All ER 769 at 855, [1995] QB 375 at 420.

566 On the evidence before me, I find that the acts of Jason Tan and Dicky Tan in reversing the shares in PTIC were *not* reasonably foreseeable by Chandra. As I have mentioned earlier, Chandra neither knew nor was involved in the alleged conspiracy to defraud Nava Bharat. In addition, he could not have reasonably foreseen that Sofwan Rahman and Suhendra would have commenced Case No 1 in Indonesia. Furthermore, Chandra was *not* under a duty to protect Nava Bharat from fraud. This was conceded by Nava Bharat. [note: 1104]

567 Accordingly, even if Chandra was negligent, I find that his negligence was *not* the effective cause of the losses alleged suffered by Nava Bharat or alternatively, that the acts of Jason Tan and Dicky Tan in reversing the shares in PTIC broke the chain of causation.

Familial relationship

568 Nava Bharat asserts that Chandra ought to have disclosed his relationship with Rajaram when he advised Nava Bharat and recommended Rajaram to it. [note: 1105] In particular, Nava Bharat claims that it was not just a potential conflict of interests but Nava Bharat was in fact prejudiced by the appointment of Rajaram (which Nava Bharat insists was part of the strategy to further the conspiracy to defraud). [note: 1106]

569 It is difficult to understand the gist of Nava Bharat's contention. Insofar as Nava Bharat is

suggesting that Chandra had engineered the appointment of Rajaram and used him as a tool to perpetrate the conspiracy to defraud Nava Bharat, I have dealt with it (see [407]–[409], [414(a)], [427]–[429] above). Indeed, I have found that Chandra neither knew nor was involved in any alleged conspiracy to defraud Nava Bharat. In light of this, Nava Bharat appears to be contending that Chandra had breached his fiduciary duty owed to Nava Bharat in failing to disclose his relationship with Rajaram to Nava Bharat. However, it is difficult to see how such a contention can be sustained. Nava Bharat claims that there is a conflict of interest but abjectly fails to identify the conflicting interests (see [400]–[401] above). It appears from the submissions that Nava Bharat's objection lies with Chandra's relationship with Rajaram and Rajaram's alleged incompetence. [note: 1107] Yet, there is no general duty to disclose (see [410]–[411] above). Unless Nava Bharat can show that there is a conflict of interest, there is no obligation for Chandra to disclose his relationship with Rajaram to Nava Bharat. It is apparent that the present circumstances do not fall within the rule against conflict of duty and interest *or* the double employment rule. Hence, I find that Nava Bharat's allegation that Chandra ought to have disclosed his relationship with Rajaram is not supported by the law.

570 For completeness, I should also explain why Nava Bharat's contention is not supported on the facts. I have earlier found that Chandra had not engineered the appointment of Rajaram as Nava Bharat's lawyer (see [407]–[408] and [428] above). Nava Bharat asserts that Chandra had gained access to email correspondence between Ashwin and Baker & Mckenzie in order to engineer Rajaram's appointment. [note: 1108] The *sole* basis for this assertion is Chandra's evidence that he had perused emails which showed that Ashwin had sought a quote for legal services in relation to the Transaction from Chew Chin of Baker & McKenzie. [note: 1109] According to Nava Bharat, Chandra must have accessed the email correspondence at the material time because "Chandra had functions to perform for Agora" and must have used it to help him engineer Rajaram's appointment. [note: 1110] This is purely speculative, and it is inconsistent with the fact that Chandra was a *non-executive* director of Agora. [note: 1111] In addition, Chandra explained during the hearing that he had not perused the emails at the material time but only *after* the present suit was commenced so as to defend the claim against him. [note: 1112] In any case, Nava Bharat had not justified its assertion that Chandra had surreptitiously accessed the email correspondence to engineer Rajaram's appointment. It is also difficult to see how the information in the emails (which comprises of work scope and fee quote) could have been used to engineer the appointment of Rajaram. [note: 1113] Indeed, the fact that the fee quote of SLP was higher than the fee quote by Baker & McKenzie would, to some extent, suggest that Chandra neither accessed the email correspondence nor attempted to engineer Rajaram's appointment. [note: 1114] Indeed, it appears from Ashwin's email to Chandra dated 7 October 2008 (see [407] above) that the decision was made by Nava Bharat after deliberation. On the whole, I am not prepared to accept that Chandra had surreptitiously accessed Agora's email to retrieve information from the communications between Ashwin and Baker & McKenzie to help him engineer Rajaram's appointment.

571 Nava Bharat also alleges that Chandra had exercised his influence over Rajaram in order to advance the conspiracy to defraud Nava Bharat. [note: 1115] The allegation encompasses the completion of the Transaction despite the absence of the Forestry Licence and the uncertainty arising out of the new mining law, the structure of the loan such that it was given to Dicky Tan instead of PTIC in spite of ABNR's advice, the various alternative arrangements, the failure to take "any concerted action to terminate the deal and/or enforce [Nava Bharat's] rights", as well as the failure to object even when Dicky Tan's interest in the PTIC shares were compromised. [note: 1116] Nava Bharat suggests that Rajaram would not have acted as he did unless he was influenced by Chandra. [note: 1117] Nevertheless, I find that such an inference is unjustified on the evidence, which

shows that Rajaram and Chandra had on various occasions taken different views on the manner in which the Transaction was to move forward. I have earlier mentioned two instances which showed that Rajaram was *not* influenced by Chandra but, on the contrary, was acting to protect Nava Bharat's interest (see [405] above). Moreover, Rajaram had also, on 12 March 2009, wrote to Chandra to demand that he provide "on an urgent basis, the course of action that [Dicky Tan] intends to take to remedy the situation" due to the delay in obtaining the Forestry Licence. [note: 1118] I should add that it would be unreasonable to expect lawyers representing opposite sides to a non-contentious transaction to be constantly at odds with each other, and in many cases, it might well be in the interests of the client for the lawyer to act in a cooperative manner. In my view, the circumstances, on the whole, do not show that Chandra had exercised influence over Rajaram in the course of the Transaction.

572 I accordingly find Nava Bharat's allegation that Chandra ought to have disclosed its relationship with Rajaram to Nava Bharat to be wholly without merit. Perhaps the lesson to be learnt from this episode is that solicitors ought to be careful in instances involving relatives acting for counterparties to avoid the kind of allegations by clients when the transaction sours.

Conclusion

573 For the reasons above, I dismiss Nava Bharat's claims in S 846/2011 and S 847/2011. I will hear counsel on the issue of costs.

ANNEX A – List of Key Persons and Entities

Name	Abbreviation (if any)
Agora International Trading Pte Ltd	Agora
Ashok Devineni	Ashok
Ashwin Devineni	Ashwin
Ali Budiardjo, Nugroho, Reksodiputro	ABNR
Baker & McKenzie	-
Belfield International (Hong Kong) Limited	Belfield
Bhargavan Sujatha	Sujatha
Bhushan Rao	Bhushan
Bill Sullivan	Bill
Chew Chin	-
Chidambaram Chandrasegar	Chandra
Christian Teo & Associates	-
Debora Viseka	Debora
Dicky Tan Beng Phiau	Dicky Tan
G R K Prasad	Prasad

Gunawan Sukardis Subur	Gunawan
Indo Coal Ventures Pte Ltd	-
Indra Sulisto	Indra
Jason Tan	-
Lanna Resources Public Co Ltd	Lanna Resources
Leela Velayuthan	Leela
M Rajaram	Rajaram
Mohana Sundaram Paranjothy	Bob Sundaram
Muralli Rajaram	Muralli
N Lakshman	Lakshman
Nafis Adwani	Nafis
Narayanan Sreenivasan	Sreenivasan
Nava Bharat (Singapore) Pte Limited	Nava Bharat
Nava Bharat Ventures Limited	NBVL
PT Adiperkasa Ekabakti Industry	PTAEI
PT Batu Hitam Mulia	PTBHM
PT Indoasia Cemerlang	PTIC
PT Nava Bharat Indonesia	-
PT Nava Bharat Sungai Cuka	NBSC
Ridwan Halim	-
STX Corporation	STX
Suria Nataadmadja	Suria
Saraburi Resources Pte Ltd	Saraburi
Softwan Rahman	-
Straits Law Practice LLC	SLP
Suhendra	-
Tan Peng Chin LLC	TPC
Tanakorn Pitisatien	Tanakorn
Tansree Tjandra	Tansree
Thamotharhan Karupiah	Karupiah
Thangarajan Paranjoti	Paranjoti
Vincent Ariesta Lie	Vincent

Wira Yustitia Law Office	-
Woody Pananto	Woody

[note: 1] SOC (Amendment No 3) for S 846/2011 ("SOC for S 846/2011") at para 1; SOC (Amendment No 3) for S 847/2011 ("SOC for S 847/2011") at para 1.

[note: 2] SOC for S 846/2011 at para 1; SOC for S 847/2011 at para 1.

[note: 3] Ashwin's AEIC at para 1.

[note: 4] SOC for S 846/2011 at para 2.

[note: 5] SOC for S 846/2011 at para 3.

[note: 6] Ashwin's AEIC at para 39.

[note: 7] SOC for S 847/2011 at para 2.

[note: 8] Chandra's AEIC at para 9.

[note: 9] Memorandum of Service for S 847/2011 dated 13.4.2012.

[note: 10] SOC for S 847/2011 at para 3.

[note: 11] Chandra's AEIC at paras 29 and 36.

[note: 12] Ashwin's AEIC at para 9.

[note: 13] 4 PE.

[note: 14] 4 PE.

[note: 15] Ashwin's AEIC at para 11.

[note: 16] Chandra's AEIC at para 29.

[note: 17] Ashwin's AEIC at paras 12–14.

[note: 18] Ashwin's AEIC at para 13 and AD-3.

[note: 19] Ashwin's AEIC at para 13; Chandra's AEIC at para 34.

[note: 20] Ashwin's AEIC at para 10; Chandra's AEIC at para 29.

[note: 21] Chandra's AEIC at paras 30–31; Ashwin's AEIC at para 11.

[note: 22] Chandra's AEIC at para 29.

[note: 23] NE, 27.5.14, p 96 line 11 and p 98 line 8.

[note: 24] Chandra's AEIC at para 40.

[note: 25] Chandra's AEIC at paras 4041 and CC-6 (p 221).

[note: 26] Ashwin's AEIC at paras 16–17; Chandra's AEIC at para 49.

[note: 27] Ashwin's AEIC at para 17; Chandra's AEIC at para 49.

[note: 28] Ashwin's AEIC at para 18.

[note: 29] Ashwin's AEIC at para 17.

[note: 30] Ashwin's AEIC at para 21.

[note: 31] Ashwin's AEIC at para 21.

[note: 32] Ashwin's AEIC at para 24.

[note: 33] Ashwin's AEIC at paras 19, 20, 22–24.

[note: 34] Ashwin's AEIC at para 25.

[note: 35] Ashwin's AEIC at paras 27–28.

[note: 36] Ashwin's AEIC at para 30.

[note: 37] Ashwin's AEIC at para 31; NE, 3.10.13, p 5 line 1.

[note: 38] NE, 27.09.13, p 40 line 8.

[note: 39] Ashwin's AEIC at para 35.

[note: 40] Ashwin's AEIC at paras 34–35.

[note: 41] Chandra's AEIC at paras 55–56

[note: 42] Chandra's AEIC at para 57.

[note: 43] Rajaram's AEIC at para 7.

[note: 44] Rajaram's AEIC at paras 5 and 14.

[note: 45] Rajaram's AEIC at para 16.

[note: 46] Ashwin's AEIC at para 37.

[note: 47] Rajaram's AEIC at MR-7.

[note: 48] Rajaram's AEIC at MR-7.

[note: 49] Plaintiff's closing submissions for S 846/2011 ("PCS for S 846/2011") at para 63; Defendant's closing submissions for S 846/2011 ("DCS for S 846/2011") at para 57.

[note: 50] 3 CCB 908.

[note: 51] Ashwin's AEIC at para 41 and AD-8.

[note: 52] Ashwin's AEIC at para 47 and AD-11.

[note: 53] Rajaram's AEIC at para 38.

[note: 54] Rajaram's AEIC at para 40.

[note: 55] Rajaram's AEIC at paras 41–42 and MR-10.

[note: 56] Ashwin's AEIC at paras 63–66.

[note: 57] Ashwin's AEIC at para 56 and AD-18; Rajaram's AEIC at para 43.

[note: 58] Rajaram's AEIC at para 44.

[note: 59] Ashwin's AEIC at para 57 and AD-19.

[note: 60] Ashwin's AEIC at para 57 and AD-20.

[note: 61] Rajaram's AEIC at para 51 and MR-11.

[note: 62] Rajaram's AEIC at para 51 and MR-11.

[note: 63] Rajaram's AEIC at para 52 and MR-11.

[note: 64] Rajaram's AEIC at para 53 and MR-12.

[note: 65] Rajaram's AEIC at MR-13 (p 244).

[note: 66] Rajaram's AEIC at MR-13 (p 556).

[note: 67] Ashwin's AEIC at para 70 and AD-29.

[note: 68] Chandra's AEIC at para 102.

[note: 69] Ashwin's AEIC at para 71 and AD-30.

[note: 70] Ashwin's AEIC at para 72, AD-31 (p 435) and AD-32 (p 453).

[note: 71] Ashwin's AEIC at para 72, AD-31 (pp 435 and 437) and AD-32 (p 453).

[note: 72] Ashwin's AEIC at para 83 and AD-41; Rajaram's AEIC at para 59 and MR-15.

[note: 73] Rajaram's AEIC at MR-15 (p 573).

[note: 74] Rajaram's AEIC at MR-15 (pp 561–563).

[note: 75] Rajaram's AEIC at MR-15 (pp 561–563).

[note: 76] Chandra's AEIC at para 115 and CC-30.

[note: 77] Rajaram's AEIC at para 61 and MR-16.

[note: 78] Rajaram's AEIC at para 61 and MR-16.

[note: 79] Ashwin's AEIC at para 86 and AD-43.

[note: 80] Ashwin's AEIC at para 89 and AD-45.

[note: 81] Ashwin's AEIC at para 93 and AD-49.

[note: 82] Rajaram's AEIC at para 66 and MR-18.

[note: 83] Ashwin's AEIC at para 115 and AD-69.

[note: 84] Ashwin's AEIC at para 116 and AD-70.

[note: 85] Ashwin's AEIC at AD-71.

[note: 86] Ashwin's AEIC at para 117 and AD-71.

[note: 87] Ashwin's AEIC at para 117 and AD-71.

[note: 88] Chandra's AEIC at para 130.

[note: 89] Ashwin's AEIC at para 123 and AD-77.

[note: 90] Ashwin's AEIC at para 123 and AD-77; Bob Sundaram's AEIC at para 26.

[note: 91] Ashwin's AEIC at para 123; Bob Sundaram's AEIC at paras 1 and 3.

[note: 92] Bob Sundaram's AEIC at paras 26–27.

[note: 93] Rajaram's AEIC at para 77.

[note: 94] Rajaram's AEIC at para 77.

[note: 95] Rajaram's AEIC at paras 77–78.

[note: 96] Ashwin's AEIC at para 124 and AD-78 (pp 1584 and 1641).

[note: 97] Ashwin's AEIC at AD-78 (p 1700).

[note: 98] Ashwin's AEIC at para 125 and AD-79.

[note: 99] Ashwin's AEIC at para 125 and AD-79.

[note: 100] Rajaram's AEIC at para 84 and MR-24.

[note: 101] Ashwin's AEIC at para 126 and AD-80; Bob Sundaram's AEIC at para 33.

[note: 102] DCS for S 846/2011 at Annex A (S/N 32).

[note: 103] Rajaram's AEIC at para 92 and MR-25.

[note: 104] Ashwin's AEIC at AD-80. See also Bob Sundaram's AEIC at para 36;

[note: 105] Ashwin's AEIC at para 127 and AD-81; Rajaram's AEIC at para 96 and MR-27.

[note: 106] Ashwin's AEIC at para 127 and AD-81.

[note: 107] Ashwin's AEIC at para 128 and AD-82; Rajaram's AEIC at para 103 and MR-29.

[note: 108] Ashwin's AEIC at para 131 and AD-85; Rajaram's AEIC at para 94 and MR-26.

[note: 109] Ashwin's AEIC at para 131 and AD-85; Rajaram's AEIC at para 101 and MR-26.

[note: 110] Ashwin's AEIC at para 131 and AD-85; Rajaram's AEIC at para 101 and MR-26.

[note: 111] Rajaram's AEIC at para 99 and MR-28.

[note: 112] Ashwin's AEIC at para 132 and AD-86; Rajaram's AEIC at para 105 and MR-30.

[note: 113] Ashwin's AEIC at para 132 and AD-86; Rajaram's AEIC at para 111 and MR-31.

[note: 114] Ashwin's AEIC at para 135 and AD-88.

[note: 115] Ashwin's AEIC at para 137 and AD-90; Rajaram's AEIC at para 138.

[note: 116] Ashwin's AEIC at para 137 and AD-90.

[note: 117] Ashwin's AEIC at para 137 and AD-90; Rajaram's AEIC at para 141 and MR-41.

[note: 118] Rajaram's AEIC at para 142.

[note: 119] Ashwin's AEIC at para 138 and AD-91.

[note: 120] Ashwin's AEIC at para 139 and AD-92.

[note: 121] Ashwin's AEIC at para 139 and AD-92; Rajaram's AEIC at para 143 and MR-41.

[note: 122] Ashwin's AEIC at para 139 and AD-92.

[note: 123] Ashwin's AEIC at AD-93; Rajaram's AEIC at para 150 and MR-44.

[note: 124] Ashwin's AEIC at para 142 and AD-95.

[note: 125] Ashwin's AEIC at para 142 and AD-95.

[note: 126] Ashwin's AEIC at para 142 and AD-95.

[note: 127] Chandra's AEIC at para 156 and CC-49.

[note: 128] Rajaram's AEIC at para 155 and MR-47.

[note: 129] Ashwin's AEIC at para 144 and AD-97.

[note: 130] Ashwin's AEIC at para 144 and AD-97.

[note: 131] Ashwin's AEIC at para 146 and AD-99.

[note: 132] Chandra's AEIC at para 158 and CC-51.

[note: 133] Chandra's AEIC at para 158 and CC-51.

[note: 134] Ashwin's AEIC at para 145 and AD-98.

[note: 135] Ashwin's AEIC at para 147 and AD-100; Rajaram's AEIC at para 158 and MR-48.

[note: 136] Ashwin's AEIC at para 147 and AD-100; Rajaram's AEIC at para 159 and MR-49.

[note: 137] Ashwin's AEIC at para 148 and AD-101; Rajaram's AEIC at para 160 and MR-50.

[note: 138] Ashwin's AEIC at para 148 and AD-101; Rajaram's AEIC at para 160 and MR-50.

[note: 139] Ashwin's AEIC at AD-101; Chandra's AEIC at CC-52.

[note: 140] Ashwin's AEIC at AD-101; Chandra's AEIC at CC-52.

[note: 141] Ashwin's AEIC at para 148 and AD-101.

[note: 142] Ashwin's AEIC at AD-101 (pp 2150–2151).

[note: 143] Rajaram's AEIC at para 162.

[note: 144] Rajaram's AEIC at para 162 and MR-52.

[note: 145] Rajaram's AEIC at para 163 and MR-53; Ashwin's AEIC at para 149 and AD-102.

[note: 146] Rajaram's AEIC at para 164 and MR-54.

[note: 147] Rajaram's AEIC at para 164 and MR-54 (p 1165).

[note: 148] Rajaram's AEIC at para 165 and MR-55.

[note: 149] Rajaram's AEIC at para 165 and MR-55.

[note: 150] Rajaram's AEIC at MR-55.

[note: 151] Rajaram's AEIC at para 167 and MR-57.

[note: 152] Rajaram's AEIC at para 167 and MR-57.

[note: 153] Rajaram's AEIC at para 168 and MR-58; Ashwin's AEIC at para 153 and AD-105.

[note: 154] Ashwin's AEIC at para 158 and AD-108; Rajaram's AEIC at para 172 and MR-60 to MR-66.

[note: 155] Ashwin's AEIC at AD-109.

[note: 156] Ashwin's AEIC at AD-110.

[note: 157] Ashwin's AEIC at AD-110.

[note: 158] Ashwin's AEIC at AD-110.

[note: 159] Rajaram's AEIC at MR-69.

[note: 160] Ashwin's AEIC at para 170 and AD-120; Rajaram's AEIC at para 180 and MR-72; Chandra's AEIC at paras 167–169, CC-67 and CC-68.

[note: 161] Ashwin's AEIC at para 167 and AD-117.

[note: 162] Rajaram's AEIC at para 182; Ashwin's AEIC at para 170.

[note: 163] Rajaram's AEIC at para 181 and MR-73 to MR-79; Chandra's AEIC at para 177 and CC-73; Ashwin's AEIC at para 171.

[note: 164] See, *eg*, Rajaram's AEIC at MR-78. See also Chandra's AEIC at para 165.

[note: 165] See, *eg*, Rajaram's AEIC at MR-74. See also Chandra's AEIC at para 165.

[note: 166] Rajaram's AEIC at para 184.

[note: 167] Chandra's AEIC at para 178 and CC-74.

[note: 168] Rajaram's AEIC at para 184; Chandra's AEIC at para 178 and CC-74.

[note: 169] Rajaram's AEIC at para 197 and MR-80.

[note: 170] Rajaram's AEIC at para 198 and MR-81.

[note: 171] Rajaram's AEIC at para 199 and MR-82.

[note: 172] Rajaram's AEIC at para 200 and MR-83.

[note: 173] Rajaram's AEIC at para 200 and MR-83.

[note: 174] Rajaram's AEIC at para 201 and MR-84.

[note: 175] Rajaram's AEIC at para 201 and MR-84.

[note: 176] Rajaram's AEIC at para 203.

[note: 177] Rajaram's AEIC at para 203 and MR-86.

[note: 178] Rajaram's AEIC at para 209 and MR-88; Chandra's AEIC at para 184 and CC-77; Ashwin's AEIC at para 180 and AD-129.

[note: 179] Rajaram's AEIC at para 210 and MR-89.

[note: 180] Ashwin's AEIC at para 181 and AD-130.

[note: 181] Ashwin's AEIC at para 181 and AD-130.

[note: 182] Ashwin's AEIC at para 181 and AD-130.

[note: 183] Chandra's AEIC at para 189 and CC-79; Ashwin's AEIC at para 181 and AD-130 (p 3496); Rajaram's AEIC at para 215 and MR-92.

[note: 184] Ashwin's AEIC at para 184.

[note: 185] Ashwin's AEIC at para 184 and AD-133.

[note: 186] Ashwin's AEIC at para 186.

[note: 187] Ashwin's AEIC at para 186 and AD-135.

[note: 188] Ashwin's AEIC at para 187 and AD-136.

[note: 189] Ashwin's AEIC at para 187 and AD-136.

[note: 190] Ashwin's AEIC at para 188 and AD-137.

[note: 191] Ashwin's AEIC at para 189 and AD-138.

[note: 192] Ashwin's AEIC at para 189 and AD-138.

[note: 193] Rajaram's AEIC at para 225 and MR-98.

[note: 194] Rajaram's AEIC at para 227.

[note: 195] Rajaram's AEIC at para 229 and MR-100.

[note: 196] Ashwin's AEIC at para 191 and AD-140.

[note: 197] Ashwin's AEIC at para 193 and AD-142.

[note: 198] Ashwin's AEIC at para 193 and AD-142 (p 3692).

[note: 199] Ashwin's AEIC at para 194 and AD-143.

[note: 200] Ashwin's AEIC at para 196 and AD-145.

[note: 201] Rajaram's AEIC at para 230 and MR-101.

[note: 202] Ashwin's AEIC at para 196 and AD-145.

[note: 203] Ashwin's AEIC at AD-145.

[note: 204] Ashwin's AEIC at para 198; Rajaram's AEIC at para 231.

[note: 205] Rajaram's AEIC at para 232 and MR-102.

[note: 206] Ashwin's AEIC at para 200; Chandra's AEIC at para 198.

[note: 207] Rajaram's AEIC at para 234 and MR-103.

[note: 208] Ashwin's AEIC at para 202 and AD-147.

[note: 209] Ashwin's AEIC at para 202 and AD-147.

[note: 210] Chandra's AEIC at para 199.

[note: 211] Chandra's AEIC at para 200 and CC-87.

[note: 212] Chandra's AEIC at para 200 and CC-87.

[note: 213] Chandra's AEIC at para 200 and CC-87.

[note: 214] Ashwin's AEIC at para 205 and AD-149.

[note: 215] Sreenivasan's AEIC at para 14.

[note: 216] Ashwin's AEIC at AD-150 (p 3736).

[note: 217] Ashwin's AEIC at para 207 and 216.

[note: 218] Rajaram's AEIC at paras 236, 241 and MR-105.

[note: 219] Ashwin's AEIC at para 211.

[note: 220] Rajaram's AEIC at para 243 and MR-107.

[note: 221] Ashwin's AEIC at para 213 and AD-154.

[note: 222] Ashwin's AEIC at AD-155 (p 3813).

[note: 223] Ashwin's AEIC at AD-155 (p 3812).

[note: 224] Ashwin's AEIC AD-155 (p 3812).

[note: 225] Bob Sundaram's AEIC at para 56 and AD-155.

[note: 226] 22 DB 869 and 871.

[note: 227] NE, 30.4.14, p 5 line 10.

[note: 228] NE, 30.4.14, p 32 line 14.

[note: 229] Rajaram's AEIC at para 247 and MR-110.

[note: 230] Rajaram's AEIC at para 247 and MR-110.

[note: 231] Rajaram's AEIC at para 248 and MR-111.

[note: 232] Rajaram's AEIC at para 248 and MR-111.

[note: 233] Rajaram's AEIC at para 249 and MR-112.

[note: 234] Ashwin's AEIC at para 217 and AD-157.

[note: 235] Ashwin's AEIC at para 217 and AD-157.

[note: 236] Ashwin's AEIC at para 218, AD-157 (p 3823) and AD-158.

[note: 237] Rajaram's AEIC at para 251 and MR-114.

[note: 238] Bob Sundaram's AEIC at para 63.

[note: 239] Ashwin's AEIC at AD-159.

[note: 240] Chandra's AEIC at para 212(1) and CC-96.

[note: 241] Rajaram's AEIC at MR-115 (p 2212).

[note: 242] Rajaram's AEIC at MR-115 (p 2212).

[note: 243] Rajaram's AEIC at MR-115 (p 2212).

[note: 244] Rajaram's AEIC at MR-115 (p 2212).

[note: 245] Ashwin's AEIC at para 221 and AD-160.

[note: 246] Rajaram's AEIC at MR-115 (p 2213).

[note: 247] Ashwin's AEIC at para 221 and AD-160.

[note: 248] Ashwin's AEIC at para 222 and AD-161.

[note: 249] Rajaram's AEIC at para 255 and MR-117.

[note: 250] Rajaram's AEIC at para 256 and MR-118.

[note: 251] Rajaram's AEIC at para 256 and MR-118.

[note: 252] Rajaram's AEIC at para 257 and MR-118.

[note: 253] Rajaram's AEIC at para 258 and MR-118.

[note: 254] Rajaram's AEIC at para 260 and MR-119.

[note: 255] Rajaram's AEIC at para 260 and MR-119.

[note: 256] Ashwin's AEIC at para 223 and AD-162; Rajaram's AEIC at para 260 and MR-119.

[note: 257] Rajaram's AEIC at para 263 and MR-120.

[note: 258] Ashwin's AEIC at para 225 and AD-164.

[note: 259] Ashwin's AEIC at para 225 and AD-164.

[note: 260] Ashwin's AEIC at para 225 and AD-164.

[note: 261] Rajaram's AEIC at para 264 andMR-121.

[note: 262] Rajaram's AEIC at para 266 and MR-122.

[note: 263] Rajaram's AEIC at para 267.

[note: 264] Rajaram's AEIC at para 269 and MR-124.

[note: 265] Rajaram's AEIC at para 270 and MR-125.

[note: 266] Rajaram's AEIC at para 271 and MR-126.

[note: 267] Ashwin's AEIC at AD-171 (p 3923).

[note: 268] Ashwin's AEIC at para 233 and AD-172 (p 3936).

[note: 269] Ashwin's AEIC at para 233 and AD-172 (pp 3936 and 3940).

[note: 270] Rajaram's AEIC at para 275 and MR-128.

[note: 271] Rajaram's AEIC at para 278.

[note: 272] Rajaram's AEIC at para 279 and MR-129.

[note: 273] Ashwin's AEIC at para 237 and AD-176.

[note: 274] Chandra's AEIC at para 220 and CC-105.

[note: 275] Chandra's AEIC at para 221 and CC-106.

[note: 276] Chandra's AEIC at para 221 and CC-106.

[note: 277] Chandra's AEIC at para 221 and CC-106.

[note: 278] Ashwin's AEIC at para 238 and AD-177.

[note: 279] Ashwin's AEIC at para 238 and AD-177 (p 3987).

[note: 280] Ashwin's AEIC at para 238 and AD-177.

[note: 281] Ashwin's AEIC at AD-177 (p 4025).

[note: 282] Ashwin's AEIC at AD-177 (p 4019).

[note: 283] Chandra's AEIC at para 229.

[note: 284] Chandra's AEIC at para 231 and CC-110.

[note: 285] Chandra's AEIC at para 231 and CC-110.

[note: 286] Chandra's AEIC at para 233.

[note: 287] Ashwin's AEIC at para 241 and AD-179; Chandra's AEIC at para 234 and CC-111; Bob Sundaram's AEIC at para 77.

[note: 288] Ashwin's AEIC at para 241 and AD-179; Rajaram's AEIC at para 289.

[note: 289] Rajaram's AEIC at para 290 and MR-134.

[note: 290] Rajaram's AEIC at para 291 and MR-135; Chandra's AEIC at para 236 and CC-112.

[note: 291] Rajaram's AEIC at para 294 and MR-136.

[note: 292] Rajaram's AEIC at para 296 and MR-137.

[note: 293] Chandra's AEIC at para 239; Rajaram's AEIC at paras 299–300; Ashwin's AEIC at para 244.

[note: 294] Ashwin's AEIC at para 243 and AD-181.

[note: 295] Ashwin's AEIC at para 244 and AD-182.

[note: 296] Ashwin's AEIC at AD-182 (p 4069).

[note: 297] Ashwin's AEIC at para 244 and AD-182.

[note: 298] Ashwin's AEIC at para 244 and AD-182 (p 4067).

[note: 299] Ashwin's AEIC at para 244 and AD-182 (p 4066).

[note: 300] Ashwin's AEIC at para 244 and AD-182 (p 4066).

[note: 301] Ashwin's AEIC at para 245 and AD-183.

[note: 302] Ashwin's AEIC at para 245 and AD-183.

[note: 303] Chandra's AEIC at para 240 and CC-116.

[note: 304] Chandra's AEIC at para 241 and CC-117.

[note: 305] Ashwin's AEIC at para 247 and AD-185.

[note: 306] Ashwin's AEIC at para 247 and AD-185.

[note: 307] Ashwin's AEIC at para 248 and AD-186.

[note: 308] Ashwin's AEIC at para 248; Bob Sundaram's AEIC at para 86.

[note: 309] Ashwin's AEIC at para 248 and AD-186.

[note: 310] Rajaram's AEIC at para 307 and MR-141.

[note: 311] Rajaram's AEIC at para 307 and MR-141.

[note: 312] Rajaram's AEIC at para 309.

[note: 313] Rajaram's AEIC at para 310 and MR-142.

[note: 314] Rajaram's AEIC at para 312 and MR-143.

[note: 315] Ashwin's AEIC at para 252 and AD-190.

[note: 316] Ashwin's AEIC at AD-190 (p 4144).

[note: 317] Ashwin's AEIC at AD-190 (pp 4147–4148).

[note: 318] Ashwin's AEIC at AD-190 (p 4147).

[note: 319] Rajaram's AEIC at para 313 and MR-144.

[note: 320] Rajaram's AEIC at para 317 and MR-144.

[note: 321] Rajaram's AEIC at para 316 and MR-144 (p 2386).

[note: 322] Rajaram's AEIC at para 318 and MR-145.

[note: 323] Rajaram's AEIC at para 319 and MR-146.

[note: 324] Ashwin's AEIC at para 254 and AD-192 (pp 4192–4225).

[note: 325] Ashwin's AEIC at para 254 and AD-192 (pp 4179–4191)

[note: 326] Ashwin's AEIC at para 254.

[note: 327] Ashwin's AEIC at para 254 and AD-192 (pp 4229–4230).

[note: 328] Ashwin's AEIC at para 256 and AD-194.

[note: 329] Ashwin's AEIC at AD-195 (p 4268).

[note: 330] Ashwin's AEIC at para 258 and AD-196 (p 4295).

[note: 331] Ashwin's AEIC at para 258 and AD-196 (p 4320).

[note: 332] Ashwin's AEIC at para 258 and AD-196 (p 4335).

[note: 333] Ashwin's AEIC at para 259 and AD-197 (p 4350)

[note: 334] Ashwin's AEIC at AD-198 (p 4388).

[note: 335] Chandra's AEIC at para 250.

[note: 336] Ashwin's AEIC at para 263.

[note: 337] Ashwin's AEIC at para 262 and AD-200.

[note: 338] Ashwin's AEIC at para 264 and AD-201 (p 4555).

[note: 339] Rajaram's AEIC at para 325 and MR-149.

[note: 340] Rajaram's AEIC at para 327.

[note: 341] Bob Sundaram's AEIC at para 140 and MS-48 (p 438).

[note: 342] Ashwin's AEIC at para 266 and AD-203.

[note: 343] Ashwin's AEIC at para 269 and AD-204.

[note: 344] Chandra's AEIC at para 257 and CC-127.

[note: 345] Ashwin's AEIC at AD-204 (p 4579).

[note: 346] Chandra's AEIC at CC-127 (p 1262).

[note: 347] Chandra's AEIC at para 258 and CC-128.

[note: 348] Rajaram's AEIC at para 330 and MR-151.

[note: 349] Rajaram's AEIC at MR-151 (p 2435).

[note: 350] Chandra's AEIC at para 262 and CC-129.

[note: 351] Ashwin's AEIC at para 272.

[note: 352] Ashwin's AEIC at para 272 and AD-206.

[note: 353] Ashwin's AEIC at para 273 and AD-207.

[note: 354] Ashwin's AEIC at para 273 and AD-207 (p 4617).

[note: 355] Ashwin's AEIC at para 274 and AD-208.

[note: 356] Ashwin's AEIC at para 274 and AD-208.

[note: 357] Ashwin's AEIC at para 274 and AD-208.

[note: 358] Ashwin's AEIC at para 275 and AD-209.

[note: 359] Ashwin's AEIC at para 275 and AD-209 (p 4661).

[note: 360] Ashwin's AEIC at para 276 and AD-210.

[note: 361] Ashwin's AEIC at para 277 and AD-211.

[note: 362] Ashwin's AEIC at para 277 and AD-211.

[note: 363] Ashwin's AEIC at para 277 and AD-211; Rajaram's AEIC at paras 333334 and MR-153.

[note: 364] Ashwin's AEIC at AD-211.

[note: 365] Ashwin's AEIC at para 277 and AD-211.

[note: 366] Chandra's AEIC at para 271; Rajaram's AEIC at para 348.

[note: 367] Rajaram's AEIC at para 350.

[note: 368] Rajaram's AEIC at para 352 and MR-159.

[note: 369] Rajaram's AEIC at para 352 and MR-159.

[note: 370] Rajaram's AEIC at para 353.

[note: 371] Rajaram's AEIC at para 356.

[note: 372] Ashwin's AEIC at AD-213.

[note: 373] Ashwin's AEIC at AD-213 (p 4773); Sreenivasan's AEIC at para 31.

[note: 374] Ashwin's AEIC at AD-213 (p 4775).

[note: 375] Ashwin's AEIC at AD-215.

[note: 376] Ashwin's AEIC at AD-215.

[note: 377] Ashwin's AEIC at AD-216 (p 4789).

[note: 378] Ashwin's AEIC at AD-216 (p 4809).

[note: 379] Ashwin's AEIC at AD-216 (p 4823).

[note: 380] Ashwin's AEIC at AD-216 (p 4823).

[note: 381] Ashwin's AEIC at AD-216 (p 4825).

[note: 382] Rajaram's AEIC at para 335.

[note: 383] Chandra's AEIC at para 265 and CC-132 (p 1319).

[note: 384] Rajaram's AEIC at para 336.

[note: 385] Bob Sundaram's AEIC at para 120 and MS-21.

[note: 386] Rajaram's AEIC at para 359 and MR-162.

[note: 387] Chandra's AEIC at para 270.

[note: 388] Rajaram's AEIC at para 360 and MR-163.

[note: 389] Rajaram's AEIC at para 360 and MR-163.

[note: 390] Ashwin's AEIC at para 296.

[note: 391] Ashwin's AEIC at para 297.

[note: 392] Bob Sundaram's AEIC at para 137 and MS-38. See also Bob Sundaram's AEIC at paras 171–172.

[note: 393] Bob Sundaram's AEIC at para 137 and MS-38.

[note: 394] Bob Sundaram's AEIC at para 138 and MS-39.

[note: 395] Bob Sundaram's AEIC at MS-39.

[note: 396] Bob Sundaram's AEIC at para 140 and MS-40.

[note: 397] Ashwin's AEIC at para 281 and AD-215; Sreenivasan's AEIC at para 41 and NS-16.

[note: 398] Ashwin's AEIC at paras 308.1–308.5.

[note: 399] Chandra's AEIC at para 7.

[note: 400] Chandra's AEIC at paras 4–6.

[note: 401] Chandra's AEIC at para 309(1).

[note: 402] Chandra's AEIC at para 309(2).

[note: 403] Chandra's AEIC at para 309(2).

[note: 404] Chandra's AEIC at para 315.

[note: 405] Chandra's AEIC at paras 316318, CC-151 and CC-152.

[note: 406] Chandra's AEIC at para 319.

[note: 407] Chandra's AEIC at para 321.

[note: 408] Chandra's AEIC at para 323 and CC-153.

[note: 409] Chandra's Supplementary AEIC at para 41.

[note: 410] Chandra's Supplementary AEIC at para 42.

[note: 411] Ashwin's AEIC at para 312.

[note: 412] Bob Sundaram's AEIC at paras 152–153, 156, 158, 160, MS-51 and MS-52.

[note: 413] Bob Sundaram's AEIC at para 161.

[note: 414] Bob Sundaram's AEIC at para 161.

[note: 415] Chandra's AEIC at para 326 and CC-156 (p 1839).

[note: 416] Bob Sundaram's AEIC at para 182.

[note: 417] Chandra's AEIC at para 325 and CC-155.

[note: 418] Chandra's AEIC at para 325 and CC-155.

[note: 419] Bob Sundaram's AEIC at para 177 and MS-67.

[note: 420] Rajaram's AEIC at para 366.

[note: 421] Rajaram's AEIC at para 369. See also 20 PB 12398.

[note: 422] Rajaram's AEIC at para 369 and MR-168 (pp 3083–3086).

[note: 423] Bob Sundaram's AEIC at paras 184 and 186.

[note: 424] Bob Sundaram's AEIC at para 185 and MS-70.

[note: 425] Rajaram's AEIC at para 371 and MR-169.

[note: 426] Rajaram's AEIC at para 374 and MR-170.

[note: 427] SOC for S 846/2011 at para 153

[note: 428] SOC for S 846/2011 at pp 52–53.

[note: 429] Chandra's AEIC at para 288 and CC-144.

[note: 430] Chandra's AEIC at para 289 and CC-145.

[note: 431] SOC for S 847/2011 at para 10.

[note: 432] SOC for S 847/2011 at para 120.

[note: 433] SOC for S 847/2011 at p 54.

[note: 434] SOC (Amendment No 1) for Suit No 917 of 2011 at para 26.

[note: 435] 2nd defendant's closing submissions for S 847/2011 ("2DCS for S 847/2011") at para 474(a).

[note: 436] 4 CCB 1165.

[note: 437] NE, 25.4.13, p 17 line 2.

[note: 438] 1 RCB 370.

[note: 439] NE, 26.4.13, p 17 line 4.

[note: 440] NE, 26.4.13, p 16 line 20.

[note: 441] See, *eg*, NE, 26.4.13, p 41 line 14–p 45 line 15.

[note: 442] Ashwin's AEIC at para 126 and AD-80 (p 1724).

[note: 443] Ashwin's AEIC at AD-80 (p 1724).

[note: 444] NE, 26.4.13, p 67 line 24.

[note: 445] NE, 26.4.13, p 67 line 8– p 70 line 2.

[note: 446] NE, 30.4,13, p 38 line 11; p 39 line 1; p 39 line 15.

[note: 447] NE, 2.5.13, p 28 line 18; p 29 line 16; p 30 line 4; p 37 line 7.

[note: 448] NE, 2.5.13, p 36 line 21.

[note: 449] NE, 30.4,13, p 39 line 1.

[note: 450] Ashwin's AEIC at para 123.

[note: 451] NE, 2.5.13, p 191 line 2.

[note: 452] NE, 2.5.13, p 191 line 15.

[note: 453] NE, 2.5.13, p 191 line 20.

[note: 454] Bob Sundaram's AEIC at para 28.

[note: 455] NE, 3.5.13, p 177 line 9.

[note: 456] NE, 3.5.13, p 178 line 1–p 180 line 9.

[note: 457] NE, 3.5.13, p 186 line 4–p 187 line 2.

[note: 458] NE, 3.5.13, p 167 line 10p 171 line 17; NE, 3.5.13, p 102 line 13.

[note: 459] Sreenivasan's AEIC at para 14.

[note: 460] Sreenivasan's AEIC at para 26.

[note: 461] Chandra's AEIC at paras 295–324.

[note: 462] See, *eg*, 6 BA 3721 and 3752; 7 BA 4053, referred to in NE, 17.9.13, p 80 line 22.

[note: 463] See, *eg*, NE, 17.9.13, p 39 line 3; p 58 line 16; p 60 line 4; p 82 line 25; p 83 line 14; p 83 line 19; p 84 line 7; p 89 line 17.

[note: 464] Chandra's AEIC at para 297.

[note: 465] NE, 17.9.13, p 26 line 3.

[note: 466] NE, 18.9.13, p 7 line 25; p 10 line 8.

[note: 467] NE, 17.9.13, p 133 line 14; p 135 line 6. NE, 18.9.13, p 31 line 1.

[note: 468] 18 PB 11550.

[note: 469] NE, 18.9.13, p 32 line 17.

[note: 470] See, *eg*, NE, 17.9.13, p 18 line 14; p 42 line 12.

[note: 471] Michael Scott Carl's AEIC dated 3.4.2013 ("Carl's AEIC") at para 7.

[note: 472] DCS for S 846/2011 at paras 477–577.

[note: 473] Carl's AEIC at MSC-2 (amended) (para 1.3).

[note: 474] NE, 7.5.13, p 162 line 8.

[note: 475] Michael Scott Carl's affidavit dated 9 May 2013 ("Carl's affidavit") at para 7.

[note: 476] Carl's affidavit at para 16.

[note: 477] See, *eg*, Carl's AEIC at MSC-2 (amended) (paras 3.7, 4.11, 4.21–4.25, 7.3, 7.16, 7.29, 7.36, etc).

[note: 478] Carl's AEIC at MSC-2 (amended) (para 3.7).

[note: 479] Carl's AEIC at MSC-2 (amended) (para 9.13).

[note: 480] Carl's AEIC at MSC-2 (amended) (para 4.15).

[note: 481] DCS for S 846/2011 at paras 481 and 484; Carl's AEIC at MSC-2 (amended) (para 2.10) and NE, 10.5.13, p 68 line 1.

[note: 482] Plaintiff's reply submissions for S 846/2011 ("PRS for S 846/2011") at paras 422–423; Carl's AEIC at MSC-2 (amended) (para 2.10).

[note: 483] Carl's AEIC at MSC-2 (amended) (para 2.9).

[note: 484] PRS for S 846/2011 at paras 425–435.

[note: 485] PRS for S 846/2011 at paras 426–427.

[note: 486] Carl's AEIC at MSC-1.

[note: 487] NE, 10.5.13, p 78 line 4; Carl's AEIC at MSC-1.

[note: 488] NE, 10.5.13, p 78 line 14.

[note: 489] NE, 10.5.13, p 79 line 1.

[note: 490] NE, 10.5.13, p 78 line 10 and p 79 line 12; Carl's AEIC at MSC-1.

[note: 491] PRS for S 846/2011 at para 430.

[note: 492] PRS for S 846/2011 at para 433.

[note: 493] PRS for S 846/2011 at para 428.

[note: 494] NE, 10.5.13, p 68 line 1.

[note: 495] NE, 10.5.13, p 68 line 7.

[note: 496] Carl's affidavit at para 18.

[note: 497] Carl's affidavit at para 12.

[note: 498] Carl's affidavit at para 17.

[note: 499] Carl's affidavit at para 17.

[note: 500] Carl's affidavit at p 12.

[note: 501] Carl's affidavit at p 32.

[note: 502] DCS for S 846/2011 at para 500.

[note: 503] DCS for S 846/2011 at paras 504, 509 and 513.

[note: 504] DCS for S 846/2011 at para 500.

[note: 505] SOC for S 846/2011 at para 153.

[note: 506] NE, 10.5.13, p 12 line 8.

[note: 507] NE, 10.5.13, p 13 line 17.

[note: 508] NE, 10.5.13, p 138 line 17.

[note: 509] NE, 10.5.13, p 16 line 1.

[note: 510] See, *eg*, Carl's AEIC at MSC-2 (amended) (paras 7.12 and 11.1).

[note: 511] NE, 10.5.13, p 139 line 20.

[note: 512] DCS for S 846/2011 at para 560.

[note: 513] Carl's AEIC at MSC-2 (amended) (paras 3.7 and 4.1).

[note: 514] Carl's AEIC at MSC-2 (amended) (paras 4.21, 4.23 and 4.26).

[note: 515] DCS for S 846/2011 at para 561; NE, 10.5.13, 124/6–128/10.

[note: 516] Carl's AEIC at MSC-2 (amended) (paras 7.13(a)).

[note: 517] DCS for S 846/2011 at para 561.

[note: 518] DCS for S 846/2011 at para 562; NE, 10.5.13, p 128 line 11– p 130 line 15.

[note: 519] NE, 10.5.13, p 128 line 15–p 128 line 20.

[note: 520] NE, 10.5.13, p 128 line 21–p 129 line 4.

[note: 521] NE, 10.5.13, p 130 line 12.

[note: 522] DCS for S 846/2011 at para 563.

[note: 523] DCS for S 846/2011 at para 563.

[note: 524] Carl's AEIC at MSC-2 (amended) (para 4.25).

[note: 525] Carl's AEIC at MSC-2 (amended) (para 2.11).

[note: 526] Carl's AEIC at MSC-2 (amended) (para 8.22).

[note: 527] Dipesh Kumar Dipu's AEIC ("Dipu's AEIC") at para 1.

[note: 528] Dipu's AEIC at DKD-1 (p 9).

[note: 529] 6PE; 7PE; 8PE; 9PE at 6; NE, 11.9.13, p 29 line 6; p 30 line 23.

[note: 530] NE, 11.9.13, p 31 line 2.

[note: 531] 9PE at 18.

[note: 532] NE, 11.9.13, p 35 line 1.

[note: 533] NE, 11.9.13, p 35 line 25.

[note: 534] 10 PE.

[note: 535] NE, 11.9.13, p 39 line 2.

[note: 536] NE, 11.9.13, p 40 line 7.

[note: 537] Ken Pendergast's AEIC at KP-1 (p 9).

[note: 538] SOC for S 846/2011 at para 8.

[note: 539] PCS for S 846/2011 at paras 155–156 and 157.

[note: 540] Rajaram's AEIC at MR-6.

[note: 541] Ashwin's AEIC at AD-231 (p 1260).

[note: 542] PCS for S 846/2011 at para 158.

[note: 543] PCS for S 846/2011 at paras 158, 161 and 170; SOC for S 846/2011 at paras 7.3 and 7.6.

[note: 544] PCS for S 846/2011 at paras 187 and 196.

[note: 545] DCS for S 846/2011 at paras 597–633.

[note: 546] NE, 27.05.14, p 21 line 12.

[note: 547] Bob Sundaram's AEIC at paras 8–15.

[note: 548] PCS for S 846/2011 at paras 24–26.

[note: 549] PCS for S 846/2011 at para 25.

[note: 550] PCS for S 846/2011 at paras 16–20 and 177.

[note: 551] PCS for S 846/2011 at para 158.

[note: 552] PCS for S 846/2011 at paras 165–168.

[note: 553] PCS for S 846/2011 at para 161.

[note: 554] Ashwin's AEIC at AD-13 (p 284).

[note: 555] NE, 26.4.13, p 39 line 15.

[note: 556] NE, 26.4.13, p 39 line 19; p 40 line 23; p 54 line 3.

[note: 557] PCS for S 846/2011 at para 216.

[note: 558] PCS for S 846/2011 at para 226.

[note: 559] PCS for S 846/2011 at paras 227–230.

[note: 560] PCS for S 846/2011 at para 235–241.

[note: 561] 3 CCB 875.

[note: 562] Rajaram's AEIC at para 34.

[note: 563] NE, 22.4.13, p 6 line 22.

[note: 564] PCCP 262 at paras 6.4–6.5.

[note: 565] Bob Sundaram's AEIC at para 29; NE, 24.4.13, p 7 line 21.

[note: 566] SOC for S 846/2011 at para 65; SOC for S 847/2011 at para 30.

[note: 567] 4 CCB 978, 979. See also NE, 26.4.13, p 46 line 8.

[note: 568] 5 CCB 1264.

[note: 569] NE, 23.4.13, p 22 line 17.

[note: 570] NE, 29.4.13, p 30 line 12; p 44 line 2; NE, 30.4.13, p 59 line 12.

[note: 571] NE, 23.4.13, p 22 line 22; NE, 26.4.13, p 53 line 19.

[note: 572] NE, 25.4.13, p 7 lines 521.

[note: 573] PCS for S 846/2011 at paras 30–32.

[note: 574] PCS for S 846/2011 at para 244.

[note: 575] Ashwin's AEIC at AD-13.

[note: 576] PCS for S 846/2011 at para 247.

[note: 577] PCS for S 846/2011 at para 252.

[note: 578] NE, 26.4.13, p 39 line 19; p 40 line 23; p 54 line 3.

[note: 579] Rajaram's AEIC at MR-11; MR-12; MR-14.

[note: 580] PCS for S 846/2011 at paras 260–309.

[note: 581] PCS for S 846/2011 at paras 262–263; 307–308.

[note: 582] PCS for S 846/2011 at paras 265–269.

[note: 583] PCS for S 846/2011 at paras 270–272; see also Ashwin's AEIC at AD-21.

[note: 584] PCS for S 846/2011 at paras 273–277.

[note: 585] PCS for S 846/2011 at paras 297–298.

[note: 586] PCS for S 846/2011 at para 285.

[note: 587] PCS for S 846/2011 at para 286–288.

[note: 588] PCS for S 846/2011 at paras 289–296.

[note: 589] PCS for S 846/2011 at paras 299–302.

[note: 590] PCS for S 846/2011 at para 303.

[note: 591] NE, 7.5.14, p 149 line 1.

[note: 592] PCS for S 846/2011 at paras 270–272; NE, 21.5.14, p 112 line 10.

[note: 593] Ashwin's AEIC at AD-49 (p 893) and AD-131 (p 3506).

[note: 594] Ashwin's AEIC at AD-131 (pp 3517–3541).

[note: 595] Ashwin's AEIC at AD-49 (pp 892–895) and AD-131 (pp 3506–3511).

[note: 596] For the opinion dated 7 November 2008, see NE, 16.5.14, p 141 line 22. For SLP's Advice on Structure, see NE, 21.5.14, p 28 line 3; p 29 line 2.

[note: 597] NE, 26.4.13, p 153 line 1. See also 5 CCB 1237.

[note: 598] PCS for S 846/2011 at paras 278–284; NE, 21.5.14, p 12 line 19.

[note: 599] PCS for S 846/2011 at para 285; Ashwin's AEIC at AD-93 (pp 1819–1821 and 1823).

[note: 600] PCS for S 846/2011 at paras 299–302.

[note: 601] PCS for S 846/2011 at paras 286–288.

[note: 602] 7 DB 3601.

[note: 603] PCS for S 846/2011 at paras 289–296.

[note: 604] 2 PB 1191, 1193–1202; NE, 22.5.14, p 173 line 24.

[note: 605] Rajaram's AEIC at para 195, MR-42 and MR-59; NE, 27.5.14, p 43 line 8.

[note: 606] NE, 22.5.14, p 99 line 1.

[note: 607] For Variation Agreement, see Ashwin's AEIC at AD-152 (cl 9.3). For Addendum Agreement, see Ashwin's AEIC at AD-177 (pp 4019–4024).

[note: 608] SOC for S 846/2011 at paras 7.3 and 7.6.

[note: 609] PCS for S 846/2011 at paras 324, 353 and 370.

[note: 610] PCS for S 846/2011 at paras 324–347.

[note: 611] PCS for S 846/2011 at para 348.

[note: 612] PCS for S 846/2011 at paras 349–350.

[note: 613] Rajaram's AEIC at MR-7.

[note: 614] NE, 24.4.13, p 87 line 12.

[note: 615] NE, 26.4.13, p 38 line 12.

[note: 616] PCS for S 846/2011 at paras 326–337.

[note: 617] Rajaram's AEIC at MR-15.

[note: 618] Ashwin's AEIC at AD-16 (p 303) and AD-39 (p 671).

[note: 619] Rajaram's AEIC at MR-16.

[note: 620] NE, 26.4.13, p 39 line 15.

[note: 621] NE, 26.4.13, p 39 line 19; p 40 line 23; p 54 line 3.

[note: 622] Rajaram's AEIC at MR-15 (pp 561–563).

[note: 623] Rajaram's AEIC at MR-15 (p 561).

[note: 624] Rajaram's AEIC at MR-16.

[note: 625] NE, 26.4.13, p 54 line 21; p 55 line 1.

[note: 626] NE, 26.4.13, p 45 line 20; p 47 line 3; p 48 line 21; p 50 line 9; p 50 line 22; p 51 line 7.

[note: 627] NE, 26.4.13, p 47 line 11.

[note: 628] NE, 26.4.13, p 47 line 14.

[note: 629] Rajaram's AEIC at MR-16 (p 583).

[note: 630] NE, 26.4.13, p 48 line 7; p 48 line 21; p 49 line 13.

[note: 631] NE, 26.4.13, p 51 line 18.

[note: 632] NE, 26.4.13, p 48 line 7; p 49 line 13; p 51 line 4.

[note: 633] NE, 26.4.13, p 39 line 19; p 40 line 23; p 54 line 3.

[note: 634] PCS for S 846/2011 at paras 354385.

[note: 635] Defendant's reply submissions for S 846/2011 ("DRS for S 846/2011") at para 177; NE, 8.5.14, p 87 lines 17–21.

[note: 636] PCS for S 846/2011 at paras 361–378.

[note: 637] NE, 26.4.13, p 49 line 14.

[note: 638] NE, 26.4.13, p 49 line 15.

[note: 639] NE, 8.5.14, p 87 line 17.

[note: 640] Rajaram's AEIC at MR-22.

[note: 641] Rajaram's AEIC at MR-23.

[note: 642] Rajaram's AEIC at MR-25 (p 778).

[note: 643] NE, 26.4.13, p 65 line 6.

[note: 644] NE, 26.4.13, p 66 line 3.

[note: 645] PCS for S 846/2011 at para 351.

[note: 646] Rajaram's AEIC at MR-15 (pp 562–563).

[note: 647] Rajaram's AEIC at MR-25 (p 774); NE, 2.5.13, p 166 line 3; p 160 line 11.

[note: 648] PCS for S 846/2011 at para 346.

[note: 649] Ashwin's AEIC at paras 318–319.

[note: 650] PCS for S 846/2011 at para 405.

[note: 651] PCS for S 846/2011 at paras 396–404.

[note: 652] PCS for S 846/2011 at para 406.

[note: 653] PCS for S 846/2011 at para 407.

[note: 654] PCS for S 846/2011 at paras 612–613.

[note: 655] PCS for S 846/2011 at para 613.

[note: 656] DRS for S 846/2011 at para 172.

[note: 657] PCS for S 846/2011 at paras 410, 413 and 600.

[note: 658] Rajaram's AEIC at MR-15 (p 563).

[note: 659] Rajaram's AEIC at MR-16 (p 583).

[note: 660] Ashwin's AEIC at para 86 and AD-43.

[note: 661] NE, 8.5.14, p 100 line 7.

[note: 662] Bob Sundaram's AEIC at paras 26–27; Rajaram's AEIC at para 76 and MR-22.

[note: 663] Ashwin's AEIC at para 123.

[note: 664] Rajaram's AEIC at paras 77–78.

[note: 665] PCS for S 846/2011 at paras 404 and 613.

[note: 666] PCS for S 846/2011 at paras 397, 405–406 and 609; NE, 24.4.13, p 162 line 19.

[note: 667] 1 DB 95.

[note: 668] 1 DB 99.

[note: 669] 3 DB 1713.

[note: 670] NE, 24.9.13, p 72 line 20.

[note: 671] NE, 21.5.14, p 9 line 14.

[note: 672] Bob Sundaram's AEIC at para 30 and MS-1.

[note: 673] Ashwin's AEIC at AD-80 (p 1715).

[note: 674] PCS for S 846/2011 at paras 427–433.

[note: 675] Ashwin's AEIC at AD-80.

[note: 676] Ashwin's AEIC at AD-80.

[note: 677] Bob Sundaram's AEIC at para 39.

[note: 678] PCS for S 846/2011 at paras 452–463.

[note: 679] NE, 2.5.13, p 204 line 4.

[note: 680] NE, 7.5.13, p 13 line 16; p 15 line 16.

[note: 681] NE, 7.5.13, p 160 line 23.

[note: 682] NE, 7.5.13, p 161 line 12.

[note: 683] Bob Sundaram's AEIC at para 45.

[note: 684] Ashwin's AEIC at AD-130 (p 3489).

[note: 685] Ashwin's AEIC at AD-130 (p 3489).

[note: 686] Ashwin's AEIC at AD-130 (p 3488).

[note: 687] Ashwin's AEIC at AD-130 (pp 3488-3499).

[note: 688] NE, 25.4.13, p 62 line 3.

[note: 689] NE, 26.4.13, p 75 line 19.

[note: 690] DCS for S 846/2011 at para 170.

[note: 691] PCS for S 846/2011 at paras 493–497; Ashwin's AEIC at AD-130 (p 3489).

[note: 692] PCS for S 846/2011 at paras 498–501; Ashwin's AEIC at AD-130 (p 3488).

[note: 693] PCS for S 846/2011 at paras 502–503; Ashwin's AEIC at AD-130 (p 3496).

[note: 694] PCS for S 846/2011 at paras 505–507; Ashwin's AEIC at AD-139 (p 3669).

[note: 695] PCS for S 846/2011 at paras 509–513; Ashwin's AEIC at AD-142 (p 3687).

[note: 696] PCS for S 846/2011 at paras 517–518; Ashwin's AEIC at AD-146 (p 3717).

[note: 697] PCS for S 846/2011 at paras 524–533; Ashwin's AEIC at AD-148 (pp 3724 and 3728).

[note: 698] PCS for S 846/2011 at paras 543–548; Ashwin's AEIC at AD-156.

[note: 699] PCS for S 846/2011 at paras 549–551; Ashwin's AEIC at AD-173.

[note: 700] PCS for S 846/2011 at paras 554–556; Ashwin's AEIC at AD-175.

[note: 701] PCS for S 846/2011 at paras 562–564; Ashwin's AEIC at AD-189.

[note: 702] PCS for S 846/2011 at paras 571–572; Ashwin's AEIC at AD-195.

[note: 703] PCS for S 846/2011 at paras 578–580; Ashwin's AEIC at AD-203.

[note: 704] PCS for S 846/2011 at paras 585–588; Ashwin's AEIC at AD-218.

[note: 705] PCS for S 846/2011 at para 593; Ashwin's AEIC at AD-219.

[note: 706] PCS for S 846/2011 at paras 521, 526, 532, 549, 564, 567, 580, 588 and 593.

[note: 707] PCS for S 846/2011 at paras 551, 555–556, 583 and 586–587.

[note: 708] Chandra's AEIC at para 183; Rajaram's AEIC at para 183.

[note: 709] PCS for S 846/2011 at para 471.

[note: 710] PCS for S 846/2011 at para 552.

[note: 711] PCS for S 846/2011 at para 552.

[note: 712] Ashwin's AEIC at AD-142 (p 3687).

[note: 713] Ashwin's AEIC at AD-195.

[note: 714] PCS for S 846/2011 at para 572.

[note: 715] PCS for S 846/2011 at paras 544–545.

[note: 716] NE, 15.5.14, p 146 line 15.

[note: 717] 3 DB 1713.

[note: 718] Ashwin's AEIC at AD-146 and AD-148.

[note: 719] DCS for S 846/2011 at para 763.

[note: 720] PCS for S 846/2011 at paras 643–647, 659 and 669.

[note: 721] PCS for S 846/2011 at paras 645–646.

[note: 722] DCS for S 846/2011 at para 797.

[note: 723] DCS for S 846/2011 at para 801.

[note: 724] PCS for S 846/2011 at para 658.

[note: 725] PCS for S 846/2011 at para 649.

[note: 726] Rajaram's AEIC at MR-42.

[note: 727] NE, 26.4.13, p 173 line 3.

[note: 728] PCS for S 846/2011 at para 685.

[note: 729] PCS for S 846/2011 at para 684, 701–702.

[note: 730] PCS for S 846/2011 at para 705.

[note: 731] 7 DB 3523 (cl 14.5).

[note: 732] Rajaram's AEIC at MR-59 (pp 1440 and 1445).

[note: 733] Rajaram's AEIC at MR-59 (p 1440).

[note: 734] PCS for S 846/2011 at para 701.

[note: 735] Rajaram's AEIC at MR-42.

[note: 736] NE, 26.4.13, p 162 line 4.

[note: 737] SOC for S 846/2011 at para 97.

[note: 738] PCS for S 846/2011 at para 707.

[note: 739] NE, 27.5.14, p 43 line 8.

[note: 740] NE, 26.9.13, p 30 line 7.

[note: 741] NE, 22.5.14, p 50 line 14.

[note: 742] Rajaram's AEIC at MR-41 (p 872); Ashwin's AEIC at AD-117 (pp 32573258).

[note: 743] NE, 26.4.13, p 2 line 2–p 3 line 4.

[note: 744] NE, 26.4.13, p 2 line 2–p 3 line 4.

[note: 745] Rajaram's AEIC at MR-40.

[note: 746] NE, 26.4.13, p 144 line 14; p 149 line 14.

[note: 747] Ashwin's AEIC at para 149.

[note: 748] NE, 26.4.13, p 154 line 20; p 15 line 1.

[note: 749] PCS for S 846/2011 at paras 714 and 745.

[note: 750] Carl's AEIC at MSC-2 (amended) (paras 7.25 and 7.28).

[note: 751] PCS for S 846/2011 at para 716; Rajaram's AEIC at MR-58 (p 1437).

[note: 752] Rajaram's Supplementary AEIC at para 32; NE, 28.5.14, p 25 line 13; NE, 22.5.14, p 163 line 20.

[note: 753] PCS for S 846/2011 at para 720.

[note: 754] NE, 22.5.14, p 74 line 4; p 131 line 8; p 173 line 15; p 175 line 10.

[note: 755] PCS for S 846/2011 at para 722.

[note: 756] DRS for S 846/2011 at para 262.

[note: 757] NE, 22.5.14, p 172 line 18. See also Rajaram's AEIC at MR-78.

[note: 758] PCS for S 846/2011 at para 724.

[note: 759] 7 DB 3523 (cl 14.5).

[note: 760] PCS for S 846/2011 at para 753.

[note: 761] Rajaram's AEIC at MR-74.

[note: 762] Rajaram's AEIC at MR-74 (p 1807).

[note: 763] See, *eg*, Ashwin's AEIC at AD-81 (pp 1730–1731).

[note: 764] Ashwin's AEIC at AD-81 (pp 1730–1731).

[note: 765] Rajaram's AEIC at MR-28.

[note: 766] Ashwin's AEIC at AD-100 (p 2143).

[note: 767] Ashwin's AEIC at AD-100 (p 2143).

[note: 768] Ashwin's AEIC at AD-100 (p 2141).

[note: 769] 7 DB 3602.

[note: 770] 7 DB 36013602.

[note: 771] 7 DB 3601.

[note: 772] 7 DB 3596.

[note: 773] PCS for S 846/2011 at para 756.

[note: 774] NE, 23.5.14, p 102 line 10; p 103 line 17; p 104 line 9; p 105 line 2; p 106 line 12.

[note: 775] PCS for S 846/2011 at para 758.

[note: 776] PCS for S 846/2011 at para 776.

[note: 777] PCS for S 846/2011 at para 825.

[note: 778] 7 DB 3545 (Art 23); 3561 (cl 19); 3574 (cl 19); 3586 (cl 19).

[note: 779] Rajaram's AEIC at MR-72 (p 1761).

[note: 780] PCS for S 846/2011 at paras 800–808.

[note: 781] PCS for S 846/2011 at paras 794–799; Ashwin's AEIC at AD-109 (p 3130).

[note: 782] PCS for S 846/2011 at para 800; Ashwin's AEIC at AD-109 (p 3129).

[note: 783] Ashwin's AEIC at AD-109 (p 3121), Rajaram's AEIC at MR-69 (p 1702) and MR-72 (p 1754).

[note: 784] Ashwin's AEIC at AD-109 (p 3121); Rajaram's AEIC at MR-69 (pp 1702 and 1712) and MR-72 (p 1754).

[note: 785] NE, 27.5.14, p 69 line 11; p 70 line 5.

[note: 786] NE, 27.5.14, p 69 line 20.

[note: 787] PCS for S 846/2011 at paras 778–782.

[note: 788] PCS for S 846/2011 at paras 783–793.

[note: 789] PCS for S 846/2011 at para 817.

[note: 790] PCS for S 846/2011 at paras 809–811 and 814.

[note: 791] PCS for S 846/2011 at para 822.

[note: 792] Sreenivasan's AEIC at NS-9 (p 103).

[note: 793] PCS for S 846/2011 at para 777.

[note: 794] PCS for S 846/2011 at paras 831, 842 and 857.

[note: 795] PCS for S 846/2011 at para 831.

[note: 796] PCS for S 846/2011 at para 857.

[note: 797] NE, 23.5.14, p 127 line 21.

[note: 798] NE, 26.4.13, p 179 line 2.

[note: 799] Rajaram's AEIC at MR-138 (p 2357).

[note: 800] Rajaram's AEIC at MR-138 (p 2357).

[note: 801] Ashwin's AEIC at AD-185 (p 4087).

[note: 802] NE, 28.5.14, p 5 line 21–p 8 line 4.

[note: 803] Rajaram's AEIC at para 256.

[note: 804] Rajaram's AEIC at para 258 and MR-118.

[note: 805] Rajaram's AEIC at para 262.

[note: 806] Rajaram's AEIC at para 263.

[note: 807] Rajaram's AEIC at MR-122 (p 2251).

[note: 808] Rajaram's AEIC at MR-122 (p 2250).

[note: 809] PCS for S 846/2011 at para 857.

[note: 810] NE, 26.4.13, p 178 line 10.

[note: 811] Rajaram's AEIC at MR-106.

[note: 812] NE, 26.4.13, p 181 line 9.

[note: 813] 6 CCB 1407.

[note: 814] NE, 25.4.13, p 78 line 15p 79 line 13.

[note: 815] NE, 25.4.13, p 79 line 15.

[note: 816] Rajaram's AEIC at MR-129.

[note: 817] Rajaram's AEIC at MR-131.

[note: 818] NE, 25.4.13, p 104 line 14.

[note: 819] NE, 25.4.13, p 120 line 5.

[note: 820] Bob Sundaram's AEIC at para 59.

[note: 821] NE, 25.4.13, p 92 line 19.

[note: 822] PCS for S 846/2011 at para 848.

[note: 823] Ashwin's AEIC at AD-183 (p 4073).

[note: 824] PCS for S 846/2011 at paras 1055, 1067 and 1092; PRS for S 846/2011 at paras 351, 356–366, 711, 713 – 716.

[note: 825] PCS for S 846/2011 at para 1048.

[note: 826] PCS for S 846/2011 at paras 1057 and 1060.

[note: 827] PCS for S 846/2011 at paras 1067–1074.

[note: 828] PCS for S 846/2011 at para 1081.

[note: 829] PCS for S 846/2011 at para 1085.

[note: 830] PCS for S 846/2011 at paras 1084–1085.

[note: 831] PCS for S 846/2011 at para 1086.

[note: 832] Bob Sundaram's AEIC at para 140 and MS-40.

[note: 833] NE, 24.4.13, p 32 line 16–p 33 line 3.

[note: 834] Bob Sundaram's AEIC at paras 136–137, 171–172 and MS-38.

[note: 835] See, *eg*, Rajaram's AEIC at MR-15 (pp 573–574); MR-18 (pp 642–643); MR-27 (pp 804–805).

[note: 836] Bob Sundaram's AEIC at para 173.

[note: 837] Bob Sundaram's AEIC at para 173.

[note: 838] Bob Sundaram's AEIC at para 174 and MS-64.

[note: 839] Bob Sundaram's AEIC at para 175.

[note: 840] Bob Sundaram's AEIC at para 175.

[note: 841] NE, 3.5.13, p 75 line 14.

[note: 842] Bob Sundaram's AEIC at para 176 and MS-66.

[note: 843] Bob Sundaram's AEIC at para 176.

[note: 844] PRS for S 846/2011 at paras 352–356.

[note: 845] PRS for S 846/2011 at paras 353–356.

[note: 846] NE, 7.5.13, p 62 line 2.

[note: 847] PCS for S 846/2011 at para 934.

[note: 848] PCS for S 846/2011 at paras 939–940.

[note: 849] PCS for S 846/2011 at paras 935, 963, 970, 1011 and 1045.

[note: 850] NE, 29.4.13, p 76 line 20; p 77 line 5.

[note: 851] NE, 29.4.13, p 76 line 10; p 77 line 8; p 78 line 15.

[note: 852] PCS for S 846/2011 at paras 1011, 1019 and 1042.

[note: 853] PCS for S 846/2011 at paras 1011–1044.

[note: 854] NE, 29.4.2013, p 77 line 22.

[note: 855] Rajaram's AEIC at MR-40.

[note: 856] NE, 25.4.13, p 32 line 23–p 34 line 23.

[note: 857] Chandra's AEIC at para 55.

[note: 858] Chandra's AEIC at para 58 and CC-8.

[note: 859] PCS for S 846/2011 at paras 947–948.

[note: 860] PCS for S 846/2011 at para 952.

[note: 861] Rajaram's AEIC at para 13.

[note: 862] Chandra's AEIC at para 59.

[note: 863] Rajaram's AEIC at paras 133–134.

[note: 864] Plaintiff's closing submissions for S 847/2011 ("PCS for S 847/2011") at para 205.

[note: 865] PCS for S 847/2011 at paras 206–207.

[note: 866] PCS for S 847/2011at para 207.

[note: 867] PCS for S 847/2011 at paras 326 – 327, 395, 406, 410, 423, 505, 509, and 513.

[note: 868] PCS for S 847/2011 at paras 209–257 and 521–555.

[note: 869] PCS for S 847/2011 at paras 259–312.

[note: 870] PCS for S 847/2011 at paras 313–338.

[note: 871] PCS for S 847/2011 at paras 339–381.

[note: 872] PCS for S 847/2011 at paras 383–411.

[note: 873] PCS for S 847/2011 at paras 412–418.

[note: 874] PCS for S 847/2011 at paras 420–495.

[note: 875] PCS for S 847/2011 at paras 496–519.

[note: 876] 2DCS for S 847/2011 at para 327.

[note: 877] Plaintiff's reply submissions for S 847/2011 ("PRS for S 847/2011") at paras 262–264.

[note: 878] PRS for S 847/2011 at para 259.

[note: 879] NE, 24.10.13, p 89 line 5; NE, 2.10.13, p 23 line 7.

[note: 880] PCS for S 847/2011 at paras 209–257 and 521–555.

[note: 881] PCS for S 847/2011 at para 214.

[note: 882] PCS for S 847/2011 at para 217.

[note: 883] PCS for S 847/2011 at para 220.

[note: 884] Chandra's AEIC at para 307.

[note: 885] Chandra's AEIC at para 299.

[note: 886] 2 CCB 531 and 538.

[note: 887] Chandra's AEIC at para 308.

[note: 888] Chandra's AEIC at para 298–308.

[note: 889] Chandra's AEIC at para 309.

[note: 890] Chandra's AEIC at para 309.

[note: 891] 2 CCB 544–550.

[note: 892] Chandra's AEIC at paras 310–312, CC-149 and CC-150.

[note: 893] Chandra's AEIC at para 306.

[note: 894] 19 DB 10418–10419.

[note: 895] 2 CCB 581 (cll 2.1.1 and 2.1.2).

[note: 896] 7 CCB 1648–1649; 8 CCB 2163.

[note: 897] Chandra's AEIC at para 316.

[note: 898] Chandra's AEIC at para 316 and CC-151.

[note: 899] Chandra's AEIC at para 317 and CC-152.

[note: 900] Chandra's AEIC at para 317 and CC-152.

[note: 901] Chandra's AEIC at CC-152.

[note: 902] NE, 7.5.14, p 98 line 18–p 100 line 1; p 101 line14.

[note: 903] Chandra's AEIC at para 319.

[note: 904] Chandra's AEIC at para 319.

[note: 905] NE, 25.09.13, p 24 line 8.

[note: 906] NE, 25.9.13, p 24 line 23.

[note: 907] 7 CCB 1689 (paras 17, 22–23); 8 CCB 2164, 2172–2173.

[note: 908] Chandra's AEIC at para 320.

[note: 909] Chandra's AEIC at para 321.

[note: 910] PCS for S 847/2011 at para 230.

[note: 911] PCS for S 847/2011 at paras 230–244.

[note: 912] PCS for S 847/2011 at paras 232–236.

[note: 913] PCS for S 847/2011 at paras 230–244.

[note: 914] PCS for S 847/2011 at paras 252–253.

[note: 915] NE, 25.9.13, p 25 line 1.

[note: 916] PCS for S 847/2011 at paras 220–221.

[note: 917] PCS for S 847/2011 at paras 220.2–220.7.

[note: 918] PCS for S 847/2011 at paras 220.8220.9.

[note: 919] NE, 26.9.13, p 26 line 21; p 34 line 9; NE, 23.10.13, p 68 line 6.

[note: 920] NE, 23.10.13, p 71 line 24.

[note: 921] 20 DB 233; NE, 23.10.14, p 51 line 20.

[note: 922] 20 DB 233.

[note: 923] 18 PB 11226 (para 49).

[note: 924] 18 PB 11226 (para 49).

[note: 925] 18 PB 11226 (paras 49 and 54).

[note: 926] PCS for S 847/2011 at para 227.

[note: 927] 2nd Defendant's reply submissions for S 847/2011 ("2DRS for S 847/2011") at paras 11–24.

[note: 928] 4 CCB 1082.

[note: 929] 2 CCB 530–543 (2007 Coal Arrangements) and 564–578 (2008 Coal Arrangements).

[note: 930] 3 CCB 787.

[note: 931] 3 DB 1713.

[note: 932] NE, 2.5.13, p 132 line 25.

[note: 933] 7 CCB 1685.

[note: 934] NE, 23.10.13, p 132 line 2.

[note: 935] 2DCS for S 847/2011 at para 369.

[note: 936] PRS for S 847/2011 at para 273.

[note: 937] PRS for S 847/2011 at para 273.

[note: 938] 7 CCB 1648–1649; 8 CCB 2163.

[note: 939] PCS for S 847/2011 at para 217.

[note: 940] NE, 25.9.13, p 54 line 23.

[note: 941] 8 CCB 2168 (paras 4041).

[note: 942] 18 PB 11224–11225 (para 46).

[note: 943] PCS for S 847/2011 at para 521.

[note: 944] PCS for S 847/2011 at paras 527–528.

[note: 945] PCS for S 847/2011 at para 533.

[note: 946] PCS for S 847/2011 at paras 534–537.

[note: 947] 22 DB 870–871.

[note: 948] NE, 24.10.13, p 31 line 18; NE, 7.5.14, p 34 line 24.

[note: 949] PRS for S 847/2011 at para 278.

[note: 950] PCS for S 847/2011 at para 543. See 18 PB 11498 (Lanna Transaction) and 22 DB 885 (Belfield Loan).

[note: 951] PCS for S 847/2011 at para 547.

[note: 952] PCS for S 847/2011 at para 542.

[note: 953] NE, 6.5.14, 158/24–160/8.

[note: 954] NE, 6.5.14, 160/9–161/21.

[note: 955] PCS for S 847/2011 at para 271.

[note: 956] PCS for S 847/2011 at paras 278–311.

[note: 957] PCS for S 847/2011 at para 279.

[note: 958] Chandra's AEIC at paras 72, 89 and 113.

[note: 959] 2 CCB 594–625 (in Bahasa Indonesia) 626–657 (in English).

[note: 960] NE, 24.9.13, p 59 line 21; NE, 17.9.13, p 100 line 10.

[note: 961] 2 CCB 588–592.

[note: 962] NE, 17.9.13, p 100 line 20.

[note: 963] NE, 24.9.13, p 60 line 1; 2 CCB 593.

[note: 964] Chandra's AEIC at paras 72 and 89.

[note: 965] 3 CCB 880.

[note: 966] NE, 25.4.13, p 133 line 5; NE, 24.10.13, p 70 line 25.

[note: 967] NE, 24.10.13, p 49 line 15; p 52 line 14.

[note: 968] NE, 24.10.13, p 43 line 8; 5 CCB 1303.

[note: 969] 4 CCB 1180.

[note: 970] Chandra's AEIC at para 195.

[note: 971] NE, 24.10.13, p 170 line 18.

[note: 972] 4 CCB 1177–1178.

[note: 973] 4 CCB 1119–1120.

[note: 974] 5 CCB 1204.

[note: 975] Chandra's AEIC at CC-26.

[note: 976] NE, 24.4.13, p 137 line 24–p 139 line 11; 4 CCB 1021–1022, 1024.

[note: 977] PRS for S 847/2011 at para 283.

[note: 978] PRS for S 847/2011 at para 283.

[note: 979] PCS for S 847/2011 at para 284.

[note: 980] PRS for S 847/2011 at para 284.

[note: 981] PCS for S 847/2011 at para 330. See also 20 DB 69–70.

[note: 982] 20 DB 69–70.

[note: 983] PCS for S 847/2011 at paras 339–381.

[note: 984] PCS for S 847/2011 at para 343.

[note: 985] PCS for S 847/2011 at para 382.

[note: 986] PCS for S 847/2011 at paras 383–411.

[note: 987] PCS for S 847/2011 at paras 385–393. For 11 and 12 March 2009 letters, see Ashwin's AEIC at AD-139 (p 3669) and AD-142 (p 3687).

[note: 988] NE, 24.10.13, p 146 line 19.

[note: 989] NE, 24.10.13, p 146 line 20.

[note: 990] NE, 24.10.13, p 144 line 19.

[note: 991] PCS for S 847/2011 at paras 393 and 395.

[note: 992] PCS for S 847/2011 at paras 398–400, 406–408.

[note: 993] PCS for S 847/2011 at para 408.

[note: 994] NE, 2.5.13, p 159 line 11; p 160 line 3; p 161 line 25.

[note: 995] NE, 2.5.13, p 156 line 8.

[note: 996] NE, 2.5.13, p 157 line 9; p 160 line 15.

[note: 997] NE, 2.5.13, p 157 line 21.

[note: 998] NE, 7.5.14, p 17 line 10.

[note: 999] NE, 7.5.14, p 17 line 4.

[note: 1000] 6 CCB 1543.

[note: 1001] 6 CCB 1543.

[note: 1002] 6 CCB 1575.

[note: 1003] 6 CCB 1575.

[note: 1004] 6 CCB 1579.

[note: 1005] 7 CCB 1825–1830.

[note: 1006] 8 CCB 2021–2035E (in English).

[note: 1007] NE, 25.4.13, p 117 line 6; NE, 3.5.13, p 43 line 25.

[note: 1008] 6 CCB 1629.

[note: 1009] PCS for S 847/2011 at paras 412–418.

[note: 1010] PCS for S 847/2011 at para 417; PRS for S 847/2011 at para 318.

[note: 1011] Chandra's AEIC at para 121 and CC-33.

[note: 1012] NE, 6.5.14, p 114 line 14.

[note: 1013] PCS for S 847/2011 at paras 496–519.

[note: 1014] PCS for S 847/2011 at para 423.

[note: 1015] NE, 2.10.13, p 14 line 9.

[note: 1016] NE, 2.10.13, p 10 line 16; p 17 line 13.

[note: 1017] NE, 2.10.13, p 10 line 16; p 17 line 13.

[note: 1018] 10 DB 5682–5683.

[note: 1019] 12 PB 7309.

[note: 1020] Ashwin's AEIC at AD-211 (p 4767).

[note: 1021] PCS for S 847/2011 at paras 432–452.

[note: 1022] PCS for S 847/2011 at paras 453–454.

[note: 1023] PCS for S 847/2011 at paras 457–459.

[note: 1024] PCS for S 847/2011 at paras 462–463, 469.

[note: 1025] PCS for S 847/2011 at paras 465–468.

[note: 1026] PCS for S 847/2011 at paras 456–459.

[note: 1027] NE, 1.10.13, p 70 line 3; NE, 7.5.14, p 40 line 20.

[note: 1028] Rajaram's AEIC at MR-27 (pp 809–810).

[note: 1029] PCS for S 847/2011 at para 428.

[note: 1030] 20 DB 22.

[note: 1031] 20 DB 292.

[note: 1032] 21 DB 442.

[note: 1033] 21 DB 448.

[note: 1034] 21 DB 448.

[note: 1035] 21 DB 448.

[note: 1036] NE, 18.10.13, p 103 line 5.

[note: 1037] NE, 18.10.13, p 119 line 17; p 130 line 5; p 121 line 17; NE, 6.5.14, p 136 line 6.

[note: 1038] NE, 6.5.14, p 137 line 1.

[note: 1039] NE, 6.5.14, p 136 line 15.

[note: 1040] NE, 6.5.14, p 136 line 15–p 137 line 10.

[note: 1041] NE, 18.10.13, p 104 line 24; p 126 line 8; NE, 6.5.14, p 117 line 7.

[note: 1042] 20 DB 69–70.

[note: 1043] NE, 24.10.13, p 179 line 21

[note: 1044] NE, 24.10.13, p 179 line 24; p 182 line 11.

[note: 1045] 21 DB 673–678.

[note: 1046] 21 DB 675.

[note: 1047] 21 DB 759.

[note: 1048] 21 DB 766.

[note: 1049] 21 DB 773.

[note: 1050] 21 DB 790.

[note: 1051] 21 DB 818.

[note: 1052] Ashwin's AEIC at AD-211 (p 4767).

[note: 1053] PCS for S 847/2011 at para 472; Ashwin's AEIC at AD-211 (p 4767).

[note: 1054] PCS for S 847/2011 at paras 469470.

[note: 1055] NE, 1.10.13, p 74 line 23–p 76 line 9.

[note: 1056] NE, 1.10.13, p 74 line 23–p 76 line 9.

[note: 1057] NE, 18.10.13, p 119 line 10; p 130 line 8.

[note: 1058] NE, 1.10.13, p 75 line 4; p 75 lines 1215.

[note: 1059] NE, 3.5.13, p 100 line 22.

[note: 1060] NE, 3.5.13, p 106 line 16.

[note: 1061] NE, 24.4.13, p 33 line 9.

[note: 1062] NE, 24.4.13, p 33 line 15.

[note: 1063] 2DCS for S 847/2011 at para 452.

[note: 1064] PRS for S 847/2011 at paras 330–336.

[note: 1065] PRS for S 847/2011 at paras 331–332.

[note: 1066] NE, 23.10.13, p 30 line 20; p 104 line 14.

[note: 1067] NE, 23.10.13, p 97 line 2.

[note: 1068] NE, 23.10.13, p 95 line 4–p 98 line 1.

[note: 1069] NE, 16.10.13, p 10 line 9; p 39 line 16.

[note: 1070] 2DCS for S 847/2011 at para 468.

[note: 1071] NE, 3.5.13, p 67 line 10–p 75 line 19.

[note: 1072] NE, 3.5.13, p 75 line 14.

[note: 1073] SOC for S 847/2011 at para 124(f); PCS for S 847/2011 at para 779–781.

[note: 1074] PCS for S 847/2011 at para 588.

[note: 1075] PCS for S 847/2011 at paras 700–711.

[note: 1076] 2DCS for S 847/2011 at paras 213–214.

[note: 1077] PCS for S 847/2011 at paras 591–597.

[note: 1078] PCS for S 847/2011 at paras 598–617.

[note: 1079] PCS for S 847/2011 at paras 618–627.

[note: 1080] PCS for S 847/2011 at paras 628–648.

[note: 1081] PCS for S 847/2011 at paras 654–664.

[note: 1082] PCS for S 847/2011 at paras 672–689.

[note: 1083] NE, 24.4.13, p 64 line 9.

[note: 1084] PCS for S 847/2011 at paras 700–711.

[note: 1085] PRS for S 847/2011 at para 218.

[note: 1086] 2DCS for S 847/2011 at paras 285–286.

[note: 1087] 2DCS for S 847/2011 at paras 287–291.

[note: 1088] 2DCS for S 847/2011 at paras 292–293.

[note: 1089] PRS for S 847/2011 at paras 227–231.

[note: 1090] 2DCS for S 847/2011 at para 287.

[note: 1091] 2DCS for S 847/2011 at para 288.

[note: 1092] 2DCS for S 847/2011 at para 291.

[note: 1093] PCS for S 847/2011 at paras 747–748.

[note: 1094] 2DCS for S 847/2011 at para 300.

[note: 1095] 2DCS for S 847/2011 at para 214(d).

[note: 1096] 2DCS for S 847/2011 at para 305.

[note: 1097] PRS for S 847/2011 at para 235.

[note: 1098] PRS for S 847/2011 at para 238.

[note: 1099] PRS for S 847/2011 at para 239.

[note: 1100] PRS for S 847/2011 at paras 239, 242 and 244. See also PCS for S 847/2011 at para 760.

[note: 1101] NE, 24.4.13, p 32 line 16–p 33 line 3.

[note: 1102] NE, 3.5.13, p 63 line 5–p 64 line 10; p 65 line 2–p 65 line 14.

[note: 1103] NE, 3.5.13, p 75 line 6.

[note: 1104] PRS for S 847/2011 at para 242.

[note: 1105] PCS for S 847/2011 at para 712.

[note: 1106] PCS for S 847/2011 at paras 713–746.

[note: 1107] PCS for S 847/2011 at paras 713–714 and 716.

[note: 1108] PCS for S 847/2011 at paras 723 and 725.

[note: 1109] Chandra's AEIC at para 50.

[note: 1110] PCS for S 847/2011 at para 725.

[note: 1111] Chandra's AEIC at para 29.

[note: 1112] NE, 27.9.13, p 24 line 10–p 27 line 8.

[note: 1113] Chandra's AEIC at CC-7.

[note: 1114] Chandra's AEIC at CC-7 (Baker & McKenzie's fee quote) and Rajaram's AEIC at MR-6 (SLP's fee quote).

[note: 1115] PCS for S 847/2011 at paras 727–746.

[note: 1116] PCS for S 847/2011 at paras 727–744.

[note: 1117] PCS for S 847/2011 at para 746.

[note: 1118] 5 CCB 1355.