Pun Serge *v* Joy Head Investments Ltd
[2010] SGHC 182

Case Number : Suit No 189 of 2009

Decision Date : 29 June 2010

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Jason Lim Chen Thor and Kevin De Souza (De Souza Lim & Goh LLP) for the plaintiff; Andre Yeap SC, Danny Ong Tun Wei and Yam Wern-Jhien (Rajah & Tann LLP) for the defendant.

Parties : Pun Serge — Joy Head Investments Ltd

Contract

29 June 2010 Judgment reserved.

Belinda Ang Saw Ean J:

Introduction

1 Under an agreement dated 15 September 2008 ("the Agreement"), the plaintiff, Serge Pun (henceforth, "the Purchaser"), agreed to purchase the interests of the defendant, Joy Head Investments Limited (henceforth, "the Vendor"), in Winner Sight Investments Limited ("WSIL"), a company incorporated in Hong Kong, for a total consideration of HK$84,974,780 ("the Consideration"). These interests comprised 2,000 sale shares in the issued capital of WSIL and an outstanding shareholder's loan by the Vendor to WSIL (henceforth collectively "the Vendor's interests in WSIL").

2 The Agreement was designed primarily to bring an end to earlier litigation between the Vendor and Purchaser in Suit No 225 of 2008 ("the Initial Action"). The details of the Initial Action are not relevant for present purposes; it suffices to say that that action was commenced against the Purchaser by the Vendor in respect of disputes relating to the purchase of the Vendor's interests in WSIL.

3 It is common ground that the Purchaser acquired the Vendor's interests in WSIL on 15 December 2008, having earlier failed to complete the transaction on 9 December 2008 as agreed ("the Agreed Completion Date"). This present action concerns the Vendor's retention of S$1m which it received after it called on a performance bond furnished by the Purchaser in the form of an on-demand banker's guarantee pursuant to the Agreement ("the Performance Bond") immediately following the Purchaser's breach of the Agreement on 9 December 2008. In brief, the nub of the issue between the parties is whether the Vendor is entitled, as it contends, to keep the full amount paid under the Performance Bond even though it had suffered no loss [note: 1] as a result of the Purchaser's breach of the Agreed Completion Date of 9 December 2008. The events leading to the breach and the post-breach dealings between the parties are narrated below (see [4] to [7]).

The material facts and the parties' contentions

4 The salient facts relevant to the dispute between the parties are relatively straightforward. Originally, under the Agreement, the Completion Date was stipulated to be 19 December 2008.

However, on or about 5 December 2008, the parties agreed, at the Purchaser's suggestion, to bring forward the Completion Date to 9 December 2008, the Agreed Completion Date. This was consistent with the terms of the Agreement, which stated that completion could take place on "such other earlier date as may be agreed in writing between the Vendor and the Purchaser". [note: 2] On 9 December 2008, the Purchaser gave instructions for the Consideration to be remitted to the Vendor's designated account. As it turned out, however, due to certain technicalities with the Purchaser's financier, the money was not received in the designated account that day. Accordingly, completion did not take place on 9 December 2008.

5 On 10 December 2008, the Vendor demanded from the issuing bank ("OCBC Bank") payment of the full amount of S$1m payable under the Performance Bond, and OCBC Bank duly paid the S$1m to the Vendor's solicitors, M/s Rajah & Tann LLP ("R&T"), on or about 16 December 2008.

6 Between 10 December 2008 and 15 December 2008, the Purchaser's representatives provided assurances and copies of documents to the Vendor in an attempt to satisfy the latter that instruction *had* indeed been given for the Consideration to be remitted into its designated account on 9 December 2008. Subsequently, on 15 December 2008, the Vendor confirmed that it had received the Consideration in its designated account. The parties then proceeded to exchange the requisite documents to effect the sale of the Vendor's interests in WSIL to the Purchaser.

7 This "completion", however, proceeded (so the Vendor argues) on the supposed basis (as per R&T's letter of 15 December 2008 [note: 3]) that it would be without prejudice to the Vendor's rights under the Agreement in respect of the Purchaser's tardiness and breach on 9 December 2008, including but not limited to the alleged right to make a demand on the Performance Bond (which it had done on 10 December 2008) and to retain the proceeds thereof. [note: 4] In other words, from the Vendor's point of view, the exchange of documents for the Consideration (the Vendor does not accept that what took place on 15 December 2008 was "Completion" as defined in the Agreement) was on the basis that the Vendor was entitled to demand and retain the sum of S$1m under the Performance Bond *without more*. Arising from these facts, it is the Vendor's case that:

(a) the Purchaser acquired the Vendor's interests in WSIL on the basis that the Vendor was entitled to demand the sum of S$1m under the Performance Bond and would be retaining the same, which the Purchaser had accepted without any protest whatsoever; [note: 5] and that basis constituted a new contract which was separate and distinct from the Agreement and the completion of the sale as contemplated therein; [note: 6] and/or

(b) the S$1m was separate consideration payable by the Purchaser to the Vendor under cl 4.2.6 of the Agreement. [note: 7]

8 On this second point (b), much of the present dispute turns on the interpretation of several clauses in the Agreement relating to the provision (and subsequent discharge) of the Performance Bond by the Purchaser. Clause 4.1.1 of the Agreement provides, very broadly, for the securing of "the obligations of the Purchaser under [the] Agreement" via the Performance Bond, as follows: [note: 8]

> At the time of the execution of this Agreement by the Parties and against delivery by the Vendor of the executed copy of this Agreement to the Purchaser or the Purchaser's Solicitors, the Purchaser shall deliver to the Vendor and *the Vendor shall receive from the Purchaser a performance bond issued by a first class bank in Singapore on terms acceptable to the Vendor whereunder the performance of the obligations of the Purchaser under this Agreement shall be*

irrevocably and unconditionally secured by the above bank up to the maximum sum of S$1,000,000"Performance Bond"). [emphasis added]

9 Based on the terms of the Agreement, it appears that the Performance Bond, which was in effect an on-demand banker's guarantee, was meant as assurance for the Vendor against a multitude of contingencies that might have occurred *pending* the completion of the sale and purchase of the Vendor's interests in WSIL. These contingencies comprised, among other things, a failure by the Purchaser to: [note: 9]

(a) pay any money payable by the Vendor towards any increase in share capital and/or any shareholder's loan ("Additional Capital Injection") which the Vendor was required to pay for pursuant to certain budget and capital proposal approvals ("Approvals") sought by the Purchaser under the Agreement and given by the Vendor at the Purchaser's request; and

(b) ensure that completion took place on the Completion Date as provided for in the Agreement and as agreed between the parties. (On the fact of this case, the Agreed Completion Date.)

In the event of any of the contingencies occurring, the Vendor argues that it was entitled, pursuant to cll 4.2.6(i) and 4.2.6(ii) of the Agreement, to retain the full amount payable under the Performance Bond. For completeness, I should mention that the Vendor in its pleadings also relies on cl 5.5.2(b) as entitling it to retain the S$1m. (The specific clauses of the Agreement referenced here and immediately below shall be addressed in greater detail later on in this judgment.)

10 The Purchaser disagrees with the Vendor's contentions and is now claiming for the return of the S$1m paid out under the Performance Bond. The Purchaser's primary argument is that the Agreement *was not terminated* by the Vendor after the Purchaser's default on 9 December 2008, and, as such, what took place on 15 December 2008 could only have been completion proper, and not a mere "exchange of documents" as alleged by the Vendor. [note: 10] Consequently, the Vendor is obliged to return the S$1m under cl 5.6.2 of the Agreement. (I should mention again that S$1m was paid by OCBC Bank to R&T on or about 16 December 2008, and that R&T wrote to OCBC Bank on 17 December 2008 to acknowledge receipt of the payment. [note: 11]) The Purchaser's point, in short, is that the S$1m was received *after* the Purchaser acquired the Vendor's interests in WSIL, and should, therefore, be returned to the Purchaser under cl 5.6.2 or cl 4.2.6(iii) of the Agreement which provides for the payment of S$1m to be deemed waived in the event of "Completion" as defined in cl 1.1 of the Agreement (see [29] below). [note: 12] On the Vendor's further argument that the exchange of documents on 15 December 2008 constituted a new contract which was separate and distinct from the Agreement as "Completion" under the Agreement was no longer possible, [note: 13] the Purchaser rejects the Vendor's contention of a "new contract" since the Agreement was never terminated by the Vendor following the Purchaser's breach of the Agreement on 9 December 2008. As for the Vendor's alternative argument that the S$1m was a separate consideration prescribed under cl 4.2.6 and, by reason thereof, the Vendor is entitled to retain the full amount payable under the Performance Bond, the Purchaser says that cll 4.2.6(i) and 4.2.6(ii) were not engaged because prior to 15 December 2008, there was *no* call on the Vendor by WSIL to subscribe and pay any increase in its share capital and/or any shareholder's loan. It is the Purchaser's case that, in the circumstance as described, he was under no obligation to pay the separate consideration for the Approvals: he had completed the purchase of the Vendor's interests in WSIL on 15 December 2008, and by virtue of cl 4.2.6(iii), the Vendor is deemed to have waived the payment of the sum of S$1m as separate consideration for the Approvals. [note: 14] The relevant portions of cl 4.2.6 are reproduced in this

judgment at [36] below.

The nature of the Performance Bond

11 At this juncture, a proper consideration of the *nature* of the Performance Bond is in order. The Purchaser argues at para 14 of his Statement of Claim (Amendment No 1) that: [note: 15]

> … there is an implied contractual term in the Agreement that the [Vendor] would account to the [Purchaser] for the proceeds received under the Performance Bond and would only retain the amount of any loss suffered by the [Vendor] in consequence of the [Purchaser's] failure to complete on the Completion Date.

The Purchaser's contention finds support in *Cargill International SA and another v Bangladesh Sugar and Food Industries Corp* [1996] 4 All ER 563 ("*Cargill*"). In *Cargill*, it was established that since a performance bond was not an *estimate of damages* that might flow from a breach of contract but, rather, a *guarantee of due performance* of a contract, it would be *implicit in the nature of such a bond* that unless the contrary was expressly stated, there would at some future stage be an accounting between the contracting parties (hereafter referred to as a "subsequent mutual accounting") in the event that payment was indeed made under the bond. As was noted by Potter LJ in *Comdel Commodities Ltd v Siporex Trade SA* [1997] 1 Lloyd's Rep 424 ("*Comdel*") at 431, which applied the *Cargill* analysis in full:

> If the amount of the bond is not enough to satisfy the seller's claim for damages, the buyer is liable to the seller for damages in excess of the amount of the bond. On the other hand, if the amount of the bond is more than enough to satisfy the seller's claim for damages, the buyer can recover from the seller the amount of the bond which exceeds the seller's damages.

12 As a matter of intellectual consistency and symmetry, this approach can only be sensible. I do not think that the Vendor here would have been content to limit its claim to only S$1m without more if the Purchaser had not gone ahead with the sale as contemplated by the Agreement. This observation is borne out, for instance, by cl 5.5.3 of the Agreement, which obliges the Purchaser to indemnify the Vendor against "any and all losses, damages, costs, expenses… arising from, relating to and /or in connection with this Agreement (including but not limited to any failure or breach on the part of the Purchaser in respect of this Agreement)". [note: 16] On the facts, the Performance Bond functioned as a form of security; and, as with any secured creditor, the Vendor was entitled to the security provided, but was nonetheless subject to the full extent of its claim. Any shortfall between the full amount of the security and the Vendor's loss would have to be additionally made good by the Purchaser subsequently; conversely, any excess of the security after taking into account the amount needed to cover the Vendor's loss would have to be accounted for by the Vendor.

1 3 *Cargill* was subsequently affirmed on appeal (see *Cargill International SA and another v Bangladesh Sugar and Food Industries Corp* [1998] 2 All ER 406 ("*Bangladesh Sugar*")), and the principle espoused therein has since been applied in numerous other cases. Notably, in the recent case of *Tradigrain SA v State Trading Corp of India* [2006] 1 Lloyd's Rep 216, Christopher Clarke J employed at [26] the terminology of an implied contractual term, which terminology was also adopted by the Purchaser in the present case):

> In my judgment [*Cargill*] (and the citations in it) are authority for the proposition that *there is an implied term in the contract of sale that the Buyers will account to the Sellers for any amount that has been paid under the bond to the extent that the amount paid exceeds the true amount of the Buyer's loss*. The amount is due to the Sellers as a debt, whether or not the Sellers have

> indemnified either the paying bank or the indemnifier of the paying bank. In essence this is because, *by calling for too much under the bond, the Buyers have procured payment to themselves from the paying bank (acting, for this purpose, on the Sellers' behalf) of an amount that is not due, and must, obviously, return it to their contractual counterparty from whom they should not have procured it in the first place. Otherwise they will have retained a windfall in the form of money to which they were not entitled since, to the extent of the overpayment, there has been either no breach or no loss entitling them to retain it*. This conclusion appears to me to be correct in principle and has been approved by the Court of Appeal. [emphasis added]

14 It should be noted that in *Cargill*, *Bangladesh Sugar* and *Comdel*, the court referred to the subsequent mutual accounting (as defined at [11] above) as being "*implicit* in the nature of a performance bond" (*Bangladesh Sugar* at 406), and stated that the relevant parties concerned "very probably [would] have known that that [was] a general feature of performance bonds" (*Bangladesh Sugar* at 416). The distinction between the words "*implicit*" and "*inherent*" is slight, but, to my mind, it is preferable to regard the subsequent mutual accounting as something *inherent* in all performance bonds. This straightforward approach would elide the difficulty of determining whether the particular contract at hand requires the implication of an implied term in question.

15 At this juncture, it is important to note that the provisions in the Agreement which relate to the Performance Bond do not take away the possibility – or even appropriateness – of a subsequent mutual accounting. Clause 4.1 of the Agreement expressly states that: [note: 17]

> … the performance of the obligations of the Purchaser under this Agreement shall be irrevocably and unconditionally secured by the above bank up to the maximum sum of S$1,000,000 (the "Performance Bond").

In my view, the use of the word "secured" points unequivocally towards the Performance Bond constituting security for the Purchaser's performance of the contract. In this connection, it should be emphasised that the limit of S$1m operated only as between the *Purchaser* and *OCBC Bank* (*viz*, the issuing bank). The Purchaser would still be liable to the *Vendor* if the latter's claim exceeded the stipulated sum of S$1m.

16 Separately, under cl 4.2.6 of the Agreement, a triumvirate of possibilities are countenanced, each phrased in terminology which is consistent with a subsequent mutual accounting. The opening words of cl 4.2.6 reference a "consideration [of S$1m] for the consent and/approval of the Vendor to any and all the Proposals". [note: 18] I will come to this provision later in the judgment (see [31] - [38] below)). First, however, a consideration of cl 4.2.6(i), which states that:

> … in the event of failure by the Purchaser to make any such payment of the Additional Capital Injection or any part thereof … the payment of S$1,000,000 above shall be deemed to have been made by the Purchaser upon receipt by the Vendor of the full amount payable under the Performance Bond, which amount shall be retained by the Vendor for its sole benefit …

Under this sub-clause, therefore, if the Purchaser failed to provide the required Additional Capital Injection, the secured sum of S$1m would be used to offset (presumably in part since the Additional Capital Injection was contemplated to be more that S$1m) that payment; *ie*, the S$1m would not be paid over *in vacuo*. Similarly, cl 4.2.6(ii), which provides for the S$1m to be retained by the Vendor should the Purchaser fail to effect completion on the Agreed Completion Date, is also consistent with a subsequent mutual accounting to the extent that "the Vendor shall be entitled to retain all Rights and Assets from the Additional Capital Injection by the Purchaser … all of which shall be for the

Vendor's sole benefit". [note: 19]

17 Separately, cl 4.2.6(iii) states that in the event that completion takes place, the Vendor is deemed to have waived the payment of the S$1m, "without prejudice to any rights or remedies which the Vendor may have under this Agreement, and/or any other rights or remedies which the Vendor may have in law and/or equity". [note: 20] This language employed certainly does not preclude the existence of a duty to carry out a subsequent mutual accounting *vis-a-vis* any amount paid out under the Performance Bond; indeed, the reservation to the Vendor of rights and remedies in law and/or equity for prior breaches on the part of the Purchaser in the plain wording of cl 4.2.6(iii) encourages the possibility of subsequent mutual accounting.

18 Finally, it should be noted in passing that according to the proviso (2) to cl 5.5.2(d) of the Agreement: [note: 21]

> … no credit, set-off or deduction whatsoever shall be attributable and/or given to, and *the Purchaser shall have no interest … in respect of … any monies received by the Vendor pursuant to and/or under the Performance Bond*. [emphasis added]

However, it must be noted that the wording of sub-clause (d) of cl 5.5.2 is confined to the situation where the Vendor commences action against the Purchaser and enters final judgment therein against the Purchaser for *non-completion* on the part of the Purchaser of the Purchaser's completion obligations under cl 5.3 of the Agreement. [note: 22] Thus, proviso (2) to cl 5.5.2(d) quoted above applies *only where the Vendor has sued on the Agreement and is subsequently executing on the judgment*. Pursuant to cl 5.5.1 of the Agreement, the Vendor can sue on the Agreement where: (a) it has elected to terminate the Agreement as against the Purchaser; (b) it has decided to effect completion so far as practicable, having regard to the defaults which have occurred; or (c) it is seeking specific performance.

19 Here, the Vendor did not terminate the Agreement and bring an action against the Purchaser when it did not receive the Consideration on 9 December 2008. In the circumstances, I do not see how the provisions of proviso (2) to cl 5.5.2(d) can apply to the countenanced duty of carrying out a subsequent mutual accounting.

Legal effect of non-termination of the Agreement

20 By cl 6.6 of the Agreement, time was stated to be of the essence. [note: 23] Since completion did not take place on the Agreed Completion Date of 9 December 2008, the Purchaser had *prima facie* committed a repudiatory breach. This was readily agreed on and acknowledged by both the Purchaser and the Vendor in their submissions. [note: 24]

21 It should be borne in mind that the Vendor itself saw the various terms and clauses countenanced in the Agreement as "water-tight", [note: 25] and the Agreement itself as conclusive in anticipating and resolving any possible disputes. It is only apposite, therefore, that the four options laid out by cl 5.5.1 of the Agreement be taken into consideration by this court *before* any ad hoc, unilateral improvisations by the Vendor, acting alone, can be seriously contemplated and relied upon.

22 Clause 5.5.1 provides four options to an innocent party in the event of non-completion. [note: 26] These options reflect the standard contractual rights available at common law, and permit the non-defaulting party:

(a) to elect to terminate the Agreement as against the party in default;

(b) to effect [c]ompletion so far as practical, having regard to the defaults which have occurred;

(c) to seek specific performance of the Agreement; or

(d) to fix a new date for [c]ompletion (being not more than 14 days after the Agreed Completion Date), in which case the provisions of cll 5.3 and 5.4 (which spell out the Purchaser's and the Vendor's respective [c]ompletion obligations) shall apply to [c]ompletion as so deferred.

23 In the present case, after the Purchaser's default on 9 December 2008, the Vendor *did not* expressly elect to adopt any of the four options open to it under cl 5.5.1 for non-completion on the part of the Purchaser of its completion obligations under cl 5.3. In particular, it *did not choose to terminate the Agreement*. Therefore, on 15 December 2008, when the sale of the Vendor's interests in WSIL to the Purchaser went ahead, the Agreement remained very much alive.

24 The law in this area is settled, and the authorities, conclusive. *Chitty on Contracts* (HG Beale Gen Ed) (Sweet & Maxwell, 30th Ed, 2008) ("*Chitty*") sets out the position succinctly at para 24-003:

> Where the innocent party, being entitled to choose whether to treat the contract as continuing or to accept the repudiation and treat himself as discharged, elects to treat the contract as continuing, he is usually said to have "affirmed" the contract. … Affirmation may be express or implied. *It will be implied if, with knowledge of the breach and of his right to choose, he does some unequivocal act from which it may be inferred that he intends to go on with the contract regardless of the breach or from which it may be inferred that he will not exercise his right to treat the contract as repudiated*. Affirmation must be total: *the innocent party cannot approbate and reprobate by affirming part of the contract and disaffirming the rest, for that would be to make a new contract*.
>
> … *[I]f the innocent party* unreservedly continues to press for performance or *accepts performance by the other party after becoming aware of the breach and of his right to elect, he will be held to have affirmed the contract*.
>
> [emphasis added]

25 The conduct by the Vendor in going ahead with the exchange of documents on 15 December 2008 to effect the sale of its interests in WSIL to the Purchaser would seem to amount to affirmation of the contract as described in the above passage from *Chitty*. By way of rebuttal, the Vendor might argue (and indeed, has argued) that it had, by R&T's letter dated 15 December 2008 to the Purchaser's solicitors, reserved its rights in respect of the Purchaser's breach, in particular, its right to make a demand on the Performance Bond and to keep the proceeds. To elaborate, the Vendor's argument was that there was no total affirmation of the Agreement despite the Purchaser's repudiatory breach on 9 December 2008. [note: 27] It was further submitted that the Purchaser subsequently acquired the Vendor's interests in WSIL on the basis that the Vendor was entitled to demand the sum of S$1m under the Performance Bond and would be retaining the same, a premise which the Purchaser had accepted without any protest whatsoever. On that basis, as the Vendor's argument develops, a new contract, separate and distinct from the Agreement and the completion of the sale as contemplated therein, would have been constituted.

26 In my view, this argument is neither here nor there. The *un-terminated* existence of the

Agreement between 10 December 2008 and 15 December 2008 and the subsequent affirmation of this Agreement (and I so find, through the sale and purchase of the Vendor's interests in WSIL on 15 December 2008) were not just chronologically prior to the purported "reservation" by the Vendor of its rights – they were also *logically* prior. In my judgment, the Vendor had on 15 December 2008 purported to reserve its right to claim on the Performance Bond when *that right had not yet properly accrued* (see further explanation at [27] below). I make the same point and finding in respect of the other purported oral reservation of rights made in the course of telephone conversations between the respective parties' solicitors on or about 15 December 2008 to the effect that the demand on the Performance Bond stood and that notwithstanding any subsequent performance by the Purchaser of his completion obligations under cl 5.3, the Vendor would keep the S$1m received under the Performance Bond. [note: 28] In this connection, *Chitty* is instructive once again (see para 24-002):

> An innocent party, faced by a repudiatory breach, is therefore given a choice*: he can either treat the contract as continuing ("affirmation" of the contract) or he can bring it to an end ("acceptance of the repudiation")*. He must "elect" or choose between these options. Further, it is sometimes said that there is no other option open to the innocent party; that is to say, there is no "middle way" or "third choice". This is true in the sense that *there is no*:
>
> > "*… third choice, as a sort of via media, to affirm the contract and yet be absolved from tendering further performance* unless and until [the breaching party] gives reasonable notice that he is once again able and willing to perform."
>
> But *the proposition that there is no middle way can be over-stated. There is a sense in which there is a middle way open to the innocent party in that he is given a period of time in which to make up his mind whether he is going to affirm the contract or terminate*.
>
> …
>
> The length of the period given to the innocent party in order to make up his mind will very much depend on the facts of the case. The period may not be a long one because a party who does nothing for too long may be held to have affirmed the contract. The length of time will also depend upon the time at which the innocent party's obligations fall due for performance. *A contract remains in force until it has been terminated for breach so that a contracting party who has not elected to terminate the contract remains bound to perform his obligations unless the effect of the other party's breach is to prevent performance of the innocent party's obligation becoming due*.
>
> [emphasis added]

27 In *Stocznia Gdanska SA v Latvian Shipping Co* [2002] 2 Lloyd's Law Rep 435, Rix LJ at [87] helpfully laid out the following:

> In my judgment, there is of course a middle ground between acceptance of repudiation and affirmation of the contract, and that is the period when the innocent party is making up his mind what to do. If he does nothing for too long, there may come a time when the law will treat him as having affirmed. *If he maintains the contract in being for the moment, while reserving his right to treat it as repudiated if his contract partner persists in his repudiation, then he has not yet elected*. As long as the contract remains alive, the innocent party runs the risk that a merely anticipatory breach, a thing 'writ in water' until acceptance, can be overtaken by another event which prejudices the innocent party's rights under the contract – such as frustration or even his own breach. *He also runs the risk, if that is the right word, that the party in repudiation will*

resume performance of the contract and thus end any continuing right in the innocent party to elect to accept the former repudiation as terminating the contract. [emphasis added]

It should be noted that the Vendor's general reservation of rights in R&T's letter dated 15 December 2008 could have been *effective only if* the Vendor had chosen to exercise the rights *provided for under cl 5.5.1* (as set out at [22] above), which are the only rights prescribed by the parties themselves to address the precise contingency of non-completion. In the present case, the Vendor's act of calling on the Performance Bond was not, in any way, an acceptance of the repudiatory breach and/or act to rescind the Agreement which was very much in force even after the breach on 9 December 2008. If anything, that act, viewed in conjunction with the fact that the Vendor did not elect to terminate the Agreement pursuant to cl 5.5.1(a), evidenced quite the converse.

28 It is worthwhile to note two possible scenarios that could have been at play on 15 December 2008. First, the Vendor's course of action on 15 December 2008 most closely mirrored option (d) under cl 5.5.1 (see [22] above). In the absence of any express election, the Vendor could ostensibly have chosen that particular option by agreeing, in writing, to sell its interests in WSIL to the Purchaser on 15 December 2008. Second, it is also possible that the Vendor's behaviour (*ie*, by calling on the Performance Bond on 10 December 2008 and reserving its rights to the same in subsequent letters on 12 December 2008 and 15 December 2008) after the Purchaser's breach on 9 December 2008 impliedly constituted option (b) – it had, in a sense, chosen to "effect [c]ompletion so far as practicable having regard to the defaults which have occurred" (see cl 5.5.1(b) quoted at [22] above). However, this line of reasoning might raise some potentially thorny issues; presumably, a temporal allowance for the Agreement's satisfactory conclusion would have been entirely provided for by option (d), leaving option (b) open to address the possibility of any waivers of defaults that had occurred *on 9 December 2008* itself. That said, I am mindful that it is not the Vendor's case that it chose either options (b) or (d) on 15 December 2008.

29 Indeed, if what took place on 15 December 2008 was not "Completion" under the Agreement, what else could it have been? The Vendor asserts that it was an "exchange of documents", but this merely labels – without defining – a persisting, unknown quantity. There was no argument that completion *had* to, by definition, take place strictly on 9 December 2008. Indeed, cl 1.1 of the Agreement defines "Completion" to mean only "the sale and purchase of the sale shares and … the assignment of the [s]hareholder's [l]oan". [note: 29] There was also no evidence before me to show any intention or indication of the Vendor's allegation of a new contract being formed between the parties having concluded for the reasons stated in this judgment that the purported reservation of rights was ineffective. If anything, the "exchange of documents" exemplified, at best, only an act of mitigation, on the (unproven) assumption that the Vendor had accepted the Purchaser's breach and terminated the Agreement.

30 The Vendor, therefore, was bound by its obligation of waiving the payment of the sum of S$1m by the Purchaser (as stipulated under clause 4.2.6(iii)) *in so far as the Purchaser subsequently performed its obligations under the Agreement and the Vendor elected not to terminate the Agreement, which remained extant between 10 December 2008 and 15 December 2008*. The Vendor's purported reservation of an ostensible right to demand payment under the Performance Bond in that same intervening period, as well as its subsequent retention of the amount paid out contrary to cl 4.2.6(iii) of the Agreement, was ineffective; it was at best, a misguided attempt at exercising an illusory and unsubstantiated "third choice" (*per Chitty* at para 24-002 which is quoted at [26] above).

Whether the Performance Bond was valid consideration for the Approvals

31 The Vendor's other main plank of argument hinges on its assertion that "[t]he scope and

purpose of the Performance Bond … was to facilitate the [Purchaser's] payment of the sum of [S$1m] which constituted the separate consideration payable by the [Purchaser] to the [Vendor] for certain specific [A]pprovals from the [Vendor] which were sought and required by the [Purchaser] as set out by Clause 4.2.6". [note: 30] In other words, by the Vendor's reckoning, the Performance Bond was no more than the mode by which payment of the sum of S$1m was to be made by the Purchaser to the Vendor. [note: 31] By this logic, therefore, it would appear that the S$1m would have been payable to the Vendor *regardless* of any extrinsic issues relating to completion.

32 Yet, the Vendor argues at para 120 of its closing submissions: [note: 32]

> Instead, it is clear from Clause 4.2.6 that *the sum of S$1 million constitutes a separate consideration for the Approvals*, and Clause 5.5.2(b) (read with Clause 4.2.6(ii) & (iii)) clearly serves: -
>
> (a) as admitted by the [Purchaser], to facilitate the payment of the S$1 million consideration for the Approvals by the [Vendor] should the [Purchaser] fail to effect "*Completion*" on or before 9 December 2008, and consequently, not be entitled to a rebate or waiver in respect thereof;
>
> (b) *to establish an incentive for the [Purchaser] to effect "Completion" on or before 9 December 2008*; and
>
> (c) to alleviate the risk exposure by the [Vendor] to the consequences of implementation of the Proposals (for which the Approvals were provided by the [Vendor]) in the event that the [Purchaser] fails to effect "*Completion*" under the terms of the Settlement Agreement upon having obtained the Approvals and implemented the Proposals.
>
> [emphasis added]

It is difficult to understand the Vendor's arguments here. On the one hand, it insists that the S$1m "constitutes a *separate* consideration for the Approvals" [emphasis added]; yet, on the other hand, it appears to link this *separate* consideration to the event of completion, establishing it as an "incentive" for the Purchaser to effect the same (timely or otherwise).

33 This conflict is problematic for various reasons. Taking the Vendor's case at face value, we have on our hands a situation where the consideration for the Approvals was one that was both *waivable* and *non-specific* – that is to say, the S$1m due under the Performance Bond, liable as it was to be paid out pursuant to a multiplicity of "other bases for demand" (see for example the use of this phrase in cl 4.2.3(a) and cl 5.5.2(b) of the Agreement) [note: 33] was also perfectly relinquishable for reasons *entirely unrelated to the bargain concerning the Approvals themselves*. With respect, this cannot be right. At one level of this conflict is a sum of S$1m that seeks to serve different purposes (some of which were conditional upon the occurrence of specified defaults stipulated in cl 4.2.6(i) and cl 4.2.6(ii) rather than tied to a specific promise). At another higher level is the question whether "consideration" that is indeterminate and comprising one promise to be enforced under two non-mutually exclusive scenarios can amount to good and proper consideration.

34 The orthodox interpretation of consideration is that it is based upon the idea of reciprocity: *viz*, a promisee should not be able to enforce a promise unless he has given or promised to give something in exchange for the promise, or unless the promisor has obtained (or been promised) something in return. Here, however, the Agreement as construed by the Vendor appears to countenance the

legitimacy of a catch-all performance bond (beholden, as it were, to myriad bases of demand and, therefore, quite possibly subject to dissipation pursuant to *other* intervening catalysts) masquerading as a valid reciprocal promise for "*specific* [A]pprovals". Indeed, the requisite sum of S$1m appears to be arguably nothing more than a slightly more difficult variety of illusory consideration, which consideration is unenforceable given the uncertainty and impossibility of its ambit *at the time of the contract*.

35 For all of the above reasons, I do not accept the Vendor's argument that in the light of the opening words of cl 4.2.6, the sum payable under the Performance Bond can effectively amount to a "separate" consideration for the Approvals. The specific trigger for the S$1m falling due on demand pursuant to the Performance Bond simply could not have been both independent of completion (as alleged) and yet, at the same time, contingent on completion taking place as per the Agreement. As has already been discussed at [11]–[19] above, it was clear to me that the sum payable under the Performance Bond was a form of security ensuring the Purchaser's performance, rather than any sort of "consideration" for the Approvals. It would have been somewhat more straightforward for all involved if the Vendor had simply called a spade a spade from the outset.

36 Nonetheless, an alternative gloss on the issue appears to remain. Reading the Agreement strictly, there seems to be room for the argument that the S$1m due under the Performance Bond could have merely been *a fungible sum that would go towards constituting a generic payment of S$1m due under cll 4.2.6(i) and 4.2.6(ii) of the Agreement*. Clause 4.2.6 states:

> The consideration for [the Approvals] shall be:-
>
> (a) in relation to (i), (ii) and (iii) below, the payment by the Purchaser of *the sum of S$1,000,000* …
>
> (b) ….
>
> as follows:-
>
> (i) in the event of failure by the Purchaser to make any such payment of the Additional Capital Injection or any part thereof …. the *payment of S$1,000,000* above shall be deemed to have been made by the Purchaser upon receipt by the Vendor of the full amount payable under the Performance Bond, which amount shall be retained by the Vendor for its sole benefit;
>
> (ii) in the event that Completion does not take place on or by the Completion Date for any reason whatsoever … and/or if the Purchaser fails to perform the obligations under Clause 5.3 or any part thereof, *the payment of S$1,000,000* above shall be deemed to have been made by the Purchaser upon receipt by the Vendor of the full amount payable under the Performance Bond …
>
> (iii) in the event of Completion under Clause 5 below taking place, the Vendor shall forthwith be deemed to have waived the payment of *the sum of S$1,000,000* above by the Purchaser …
>
> [emphasis added]

On this view, the S$1m due under the Performance Bond would *not* have constituted "consideration" for the Approvals *per se*; instead, it would merely have gone towards discharging the *separate* sum of

S$1m due under cl 4.2.6 (as emphasised in italics above). In other words, the Performance Bond would have been simply a *means* of effecting payment of the stipulated sum of S$1m where payment was triggered under cl 4.2.6. On this construction, therefore, there would no longer appear to be any issue with respect to the Performance Bond having to perform a duplicity of consideration roles (as discussed earlier).

37 In my view, however, this interpretation is still unsatisfactory. Whether the amount due under the Performance Bond was meant *directly* as consideration for the Approvals, or whether the amount due was meant to go towards *discharging* a stipulated sum payable under cl 4.2.6, the fact remains that in both cases, the sum of S$1m could have *only been in respect of part-payment* since it is entirely conceivable, for instance, that the requisite Additional Capital Injection under clause 4.2.6(i) would have surpassed S$1m based on the Vendor's evidence [note: 34] – had that been the case, I do not think the Vendor would have been content to limit itself to only the S$1m due under the Performance Bond. This point has already been elaborated on at [12] & [15] above.

38 In view of this, I find that the sum due under the Performance Bond must have necessarily remained in the nature of a *security*, albeit a security that was not exhaustive in terms of quantum or remedy and which served only to guarantee the performance of the Purchaser under the Agreement. It should be noted in passing here that had the Vendor suffered greater losses for which it wished to bring a claim under an action of its own, it was entirely entitled to do so pursuant to cl 6.8 of the Agreement, which expressly left the door open to the Vendor with respect to other remedies "otherwise available at law, in equity, by statute or otherwise". [note: 35]

Whether the provisions in the Agreement relating to the Performance Bond amounted to a penalty clause

39 The contortions of the Vendor's arguments in relation to the terms of the Performance Bond stem, it would seem, largely from its wish *not* to have those self-same provisions struck down as constituting a penalty clause. [note: 36] Indeed the Vendor cites proviso (2) to cl 5.5.2(d) where the Purchaser had, *inter alia*, agreed that the "benefits conferred to the Vendor under Clause 5.5.2 …are fair and reasonable, and do not constitute any penalty". [note: 37] Although I need not rule on this issue as I have already found that the Performance Bond was a form of security aimed at ensuring the Purchaser's performance, the penalty clause arguments canvassed on both sides have been spirited and deserve brief comment.

40 The legal test for assessing whether a clause amounts to a penalty clause is largely settled. In *Dunlop Pneumatic Tyre Co Ltd v Garage and Motor Co Ltd* [1915] AC 79 ("*Dunlop Pneumatic*"), Lord Dunedin put forward the following formulation (at 86–87):

> *The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage* … The question whether a sum stipulated is [a] penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach … [emphasis added]

Lord Dunedin also provided the following gloss "to assist this task of construction" (at 87):

> *There is a presumption (but no more) that it is [a] penalty when "a single lump sum is made payable by way of compensation, on the occurrence of one or more of several events, some of*

which may occasion serious and others but trifling damage" (Lord Watson in *Lord Elphinstone v Monkland Iron and Coal Co* [11App.Cas.332)). [emphasis added]

Lord Parmoor, in agreeing with Lord Dunedin, stated the following (at 101):

> The agreed sum, though described in the contract as liquidated damages, is held to be a penalty if it is extravagant or unconscionable in relation to any possible amount of damages that could have been within the contemplation of the parties at the time when the contract was made. No abstract rule can be laid down without reference to the special facts of the particular case, but when competent parties by free contract are purporting to agree a sum as liquidated damages there is no reason for refusing a wide limit of discretion. *To justify interference there must be an extravagant disproportion between the agreed sum and the amount of any damage capable of pre-estimate*. In the case of *Clydebank Engineering and Shipbuilding Co. v. Don Jose Ramos Yzquierdo y Castaneda*, Lord Halsbury gives an apt illustration of what would probably render a sum agreed by the parties unconscionable, and therefore a penalty:
>
> > "For instance, if you agreed to build a house in a year, and agreed that if you did not build the house for [£50] you were to pay a million of money as a penalty, the extravagance of that would be at once apparent."
>
> [emphasis added]

The analogy here is an easy one to draw; just as the builder of a house fails by one day to deliver possession within a specified period of time for a specific price (but not a *completely* defaulting builder) would be extravagantly punished with a million dollar penalty, so would the purchaser of shares who has rendered late payment (but not *no* payment). I shall elaborate on this point, as it applies to the present facts, in further detail below (see [45]).

41 It should be noted that the test in *Dunlop Pneumatic* has been affirmed and wholeheartedly applied by the Singapore courts on several occasions (see, for example, *Banner Investments Pte Ltd v Hoe Seng Metal Fabrication & Engineers (S) Pte Ltd* [1996] 3 SLR(R) at [14] and *Orchard Twelve Investments Pte Ltd v Golden Bay Realty Pte Ltd* [1985-1986] SLR(R) 723 at [14]–[16]).

42 The Vendor, however, submits an alternative test for determining whether a contractual clause which imposes payment in the event of a default is a penalty clause – *viz*, a test that relies on the relatively untested concept of "commercial justification". It cites the case of *Euro London Appointments Limited v Claessens International* [2006] 2 Lloyd's Law Rep 436 ("*Euro London*") as support for the proposition that a contractual provision, the effect of which was to increase the consideration payable under an executory contract upon default, should *not* be "struck down as a penalty clause if the increase could, in the circumstances, be explained as commercially justifiable, provided always that its dominant purpose was not to deter the other party from breach" (see Chadwick LJ in *Euro London* at [30], citing with approval the opinion of Coleman J in *Lordsvale Finance Plc v Bank of Zambia* [1996] QB 752 at 763H-764A). *Euro London* has not yet been applied in Singapore to date, and, in my view, it should likewise not be applied in the present case for the following reasons.

43 In the first place, it is not at all clear, precedent threshold objections aside, why this alternative test should be preferred in our present situation. Clause 5.5.2 of the Agreement provides the following:

> 5.5.2 If Completion does not take place on or by the [Agreed] Completion Date for any reason,

whatsoever, save by reason of the default of the Vendor, and/or if the Purchaser fails to perform the obligations under Clause 5.3 above, or any part thereof (including making payment to the Vendor of the Consideration for the Sale Transaction or any part thereof), without prejudice to any other of the Vendor's rights under this Agreement or any other rights or remedies available to the vendor in law or equity:-

(a) interest shall accrue on the Consideration for the Sale Transaction or any unpaid portion thereof at the rate of 12% per annum compounded on a daily basis from 1 April 2008 up to and including the day of actual Completion or receipt of payment by the Vendor from the Purchaser, as the case may be;

(b) the Vendor shall, without prejudice to other bases for demand under the Performance Bond, be entitled to forthwith demand for payment of the full amount payable under the Performance Bond without reference to the Purchaser, and retain the same for its sole benefit;

...

44 In its submissions, the Vendor argues that: [note: 38]

Clause 5.5.2(b) provides for the retention of monies already 'paid-over' by a 3rd party issuing bank pursuant to a well-recognised tripartite commercial arrangement ... such monies were primarily intended as consideration for the Approvals and not an 'estimate' of the amount of damages which the [Vendor] would be entitled in the event of the [Purchaser's] breach of the ... Agreement. The classic test as expounded in *Dunlop Pneumatic* of whether the payment of a stipulated sum upon breach is a 'genuine pre-estimate of loss' is therefore inapplicable.

In other words, the Vendor is contending that because the stipulated sum of S$1m under the Performance Bond was *not* a genuine pre-estimate of damages, a separate, novel test should be adopted. Effectively, all the Vendor has done is to concede that it has failed to satisfy the traditional criteria which delineate what type of contractual clauses are not penalty clauses without offering any genuine or compelling reason for the court to prefer the alternative "commercial justification" test.

45 For the avoidance of doubt, even without the Vendor's concession as noted in [44] above, it would appear that the provisions under cl 5.5.2 (addressing the event of a failure of completion) would have *in and of themselves* easily constituted a penalty clause. Clause 5.5.2(a) provides for "interest [to] accrue on the Consideration for the Sale Transaction or any unpaid portion thereof at the rate of 12% per annum compounded on a daily basis from 1 April 2008", while cl 5.5.2(b), the much disputed Performance Bond clause, provides that the Vendor may make a demand under the Performance Bond "without prejudice to other bases for demand". The fact that these two sub-clauses are phrased *conjunctively* and are capable of taking effect *cumulatively* only points to the inherently penal nature of the entire cl 5.5.2. This observation is consistent with cl 6.8 which provides that "…each and every other remedy is cumulative and shall be in addition to every other remedy given hereunder or now or hereafter existing at law, in equity, by statute or otherwise." [note: 39] When we consider how the interest accruing under cl 5.5.2(a) would have entirely outstripped the sum of S$1m due under the Performance Bond, and how the sum of S$1m for a few days' delay is grossly disproportionate in respect of the (unproven) harm or inconvenience ostensibly suffered by the Vendor, we see even more clearly the extravagantly penal ramifications of cl 5.5.2. In this regard, Lord Halsbury's example of a penalty clause (see the quotation at [40] above) is both germane and instructive.

46 Separately, it is also clear that *even on its own "commercial justification" test, the Vendor fails to show why the provisions in the Agreement relating to the Performance Bond are insufficient to constitute a penalty clause*. In *Euro London*, the court considered the standard terms of a contract between an employment agency and its client. That contract provided for a graduated refund of fees in the event of a termination of the contract of employment of an employee whom the employment agency introduced to its client. One of the disputed terms was structured such that the refund was dependent upon the client making payment of the employment agency's fees within 7 days of the employee's employment and serving notice of the termination of that employee's employment within the same 7-day period. Another disputed term of the contract provided that should the terminated employee be re-engaged by the client within six months following termination of his prior engagement *in circumstances where the client would have been entitled to a refund*, the full agency fee would become payable by the client to the employment agency, with no further entitlement to a refund.

47 Clearly, then, the commercial imperative for the disputed terms in *Euro London* was to avoid a situation in which, within a few weeks after employing the employee introduced by the employment agency, the client terminates the employee's contract of employment, claims a refund of the employment agency's fee and *then* re-engages the employee without more, thereby obtaining an unfair benefit at the employment agency's expense. The court in *Euro London*, therefore, was arguably correct in holding that the disputed clauses were "commercially justifiable, provided always that [their] dominant purpose [were] not to deter the other party from breach" (see [42] above).

48 In contrast, it is readily apparent that the provisions in the Agreement relating to the Performance Bond, on a reasonable construction of their "dominant contractual purpose" (see *Euro London* at [32]), were drafted specifically for deterrence, *viz*, "to deter the other party from breach". In so far as the Vendor has conceded that the sum of S$1m was not intended to be a genuine pre-estimate of damages, and inasmuch as the proposition for the S$1m being "separate" consideration for the Approvals has already been rejected (see [31]–[38] above), it is difficult to see how the requirements for penalty clause elision under *Euro London* can be satisfied here by the largely one-dimensional provisions in the Agreement relating to the Performance Bond.

49 However, since I reached the conclusion that the Performance Bond constituted a guarantee for the performance by the Purchaser of its obligations under the Agreement, the fact that the Performance Bond provisions are not a genuine estimate of damages that might flow from a breach of contract is moot; these provisions nonetheless still do *not* constitute a penalty clause in view of the inherent (subsequent) mutual accounting safeguards built into the *nature* of a performance bond (see earlier at [11]–[19] above). Accordingly, I do not find that the Performance Bond provisions amounted to a penalty clause.

The actual document constituting the Performance Bond

50 In my judgment, it was fairly clear that the primary thrust of the provisions in the Agreement relating to the Performance Bond was to ensure not so much that completion took place on time, but that completion actually took place. In this connection, I am guided by the actual banker's guarantee document ("Banker's Guarantee") for the sum of S$1m, payable on demand by the Vendor. The Banker's Guarantee states specifically that it is "in consideration of [the Vendor's] entering into the Agreement dated 15 September 2008 with [the Purchaser] ... pursuant to which the [Purchaser] is obliged to procure and deliver this Banker's Guarantee to [the Vendor] and in your favour". [note: 40] The "form and terms of [the] Performance Bond", set out at schedule 2 of the Agreement and specifically referenced by cl 4.1.2 of the same, [note: 41] outlines the rationale for the Performance Bond, which had undisputedly come to be fulfilled by the Banker's Guarantee:

2. In consideration of the Vendor entering into the Agreement with the Purchaser and/or accepting this Performance Bond under the Agreement, we do hereby agree and undertake unconditionally and irrevocably:-

(a) to pay forthwith upon first demand in writing by the Vendor and without demur, all losses, damages, costs, expenses, fees or otherwise which the Vendor in such demand claims to have sustained and/or incurred by reason or in consequence of the default of the Purchaser in the performance and/or observance of his obligations, undertakings and covenants under the Agreement *and/or the non-completion of the sale and purchase transaction under the Agreement for any reason whatsoever*, provided that our obligation hereunder shall be limited to the maximum aggregate sum of S$1,000,000.00 ...

[emphasis added]

Notably, there is no mention of any Completion Date in the Banker's Guarantee or under schedule 2.

51 I am further guided by the testimony of Mr Jerry Tan Chwee Lee ("Jerry Tan"), the Vendor's director and representative who negotiated the terms of the Performance Bond with the Purchaser. During cross-examination, Jerry Tan insisted that "Mr Pun and [he] had a deal, and the deal was that he would complete the [A]greement at the [Agreed C]ompletion [D]ate, which we had agreed on". [note: 42] Accordingly, Jerry Tan maintained quite rightly that the sum of S$1m due under the Performance Bond was not waivable in the circumstances since the purpose of the Performance Bond was, ostensibly, to ensure completion of the Agreement *on the Agreed Completion Date*.

52 However, this was only a bare assertion. Upon further elaboration during cross-examination, Jerry Tan's (voluntarily given) description of the "stages of negotiations" [note: 43] leading up to the Performance Bond did not appear to have timely completion in mind *a t all*. Instead, from the transcripts, [note: 44] it was clear that to all the parties concerned, particularly the Vendor, the S$1m was to *constitute payment for the Approvals* (although, for the reasons stated at [33]–[38] above, the parties were mistaken in thinking that the S$1m (as worded in the Agreement) could validly and effectively serve this function): [note: 45]

So some of the directors were very unhappy, and said 'Well, we've got to protect ourselves, and we also have to get some payment for these approvals.' I suggested $1 million, but some of the directors felt that we really should ask for more. But based on my negotiations with Mr Pun, I felt that anything above S$1 million probably wouldn't be doable, and both Mr Pun and I [*ie*, Jerry Tan] did want to come to a settlement. So as for that, for the payment, it was for payment of these three proposals that he wanted, that we said we need a banker's guarantee, sorry, we need payment for these approvals.

The above testimony was also confirmed by the Vendor's director and primary witness, Mr Leslie Tan Chwee Lye: [note: 46]

I would explain that the S$1 million came about as a price to pay for the approvals, and it was negotiated by Jerry Tan and Mr Serge Pun.

53 In short, based on the foregoing, the intention of the *Vendor vis-à-vis* the Performance Bond at the time of the contract appeared to be that, first and foremost, it was to constitute consideration for the Approvals (however erroneous the parties were in this regard); it would *then* constitute consideration generally for ensuring completion. The issue of timeliness did not really operate on the

parties' minds with respect to the S$1m; in fact, there was the separate cl 5.5.2(a) which provided for interest in the event of delay. Additionally, as has already been noted, there was no mention made of the Completion Date in the Banker's Guarantee or under schedule 2 (see [50] above).

Conclusion

54 Taking all of this into consideration along with the Vendor's premature reservation of a non-accrued right and its conceptually flawed characterization of the money due under the Performance Bond as "separate" consideration, I would allow judgment for the Purchaser's claim of S$1m together with interest thereon at the rate of 5.33% per annum from 26 February 2009 to the date of this judgment, and costs.

[note: 1] Transcripts of Evidence dated 3 December 2009 at pp 67 & 87

[note: 2] PCB at p 107

[note: 3] PCB p186

[note: 4] DCS at pp 27-29

[note: 5] DCS at [33]

[note: 6] DCS at [60]

[note: 7] DCS at [2], [5] & [120]

[note: 8] PCB at p 111

[note: 9] PCB at p 113-114.

[note: 10] DCS at pp 50-74, in particular [59]- [62]

[note: 11] PCB at p 242

[note: 12] PCB at p 106

[note: 13] DCS at [60] & [62(b)]

[note: 14] PCS at [5] & [6]

[note: 15] BP 110

[note: 16] PCB at p 118

[note: 17] PCB p 111

[note: 18] PCB p 113

[note: 19] PCB at p114

[note: 20] PCB at p114

[note: 21] PCB at p117

[note: 22] PCB at 114

[note: 23] PCB at p 120

[note: 24] PCS at pp 3-4; DCS at p 50

[note: 25] DCS at [194]

[note: 26] PCB at p 115

[note: 27] DCS at pp 55 - 69

[note: 28] Defence (Amendment No 3) at [28]; DCS at [32(f)(iii)]

[note: 29] PCB at p 106

[note: 30] DCS at p 6.

[note: 31] *Ibid*.

[note: 32] DCS at p 114.

[note: 33] PCB at pp 112-113.

[note: 34] Leslie Tan's AEIC at [36]

[note: 35] PCB p120

[note: 36] DCS at pp 87-175.

[note: 37] PCB at p 117

[note: 38] DCS at pp 122-123

[note: 39] PCB at p 120

[note: 40] PCB at p 127

[note: 41] PCB at p125

[note: 42] Transcripts of Evidence dated 3 December 2009 at p96

[note: 43] Transcripts of Evidence dated 3 December 2009 at p88

[note: 44] Transcripts of Evidence dated 3 Dec 2009 at pp 88-92.

[note: 45] *Ibid*. at p 91.

[note: 46] *Ibid*. at p 73.