eSys Technologies Pte Ltd *v* nTan Corporate Advisory Pte Ltd
[2012] SGHC 136

Case Number : Suit No 690 of 2010

Decision Date : 29 June 2012

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Samuel Chacko and Yeo Teng Yung Christopher for the plaintiff (Legis Point LLC); Edwin Tong, Kristy Tan and Valerie Tay Yie Shan (Allen & Gledhill LLP) for the defendant.

Parties : eSys Technologies Pte Ltd — nTan Corporate Advisory Pte Ltd

Contract – Contractual terms

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 84 of 2012 was allowed by the Court of Appeal on 25 March 2013. See [2013] SGCA 27.]

29 June 2012 Judgment reserved.

Lai Siu Chiu J:

Introduction

1 This is a case where eSys Technologies Pte Ltd ("the plaintiff") should have adhered to the adage "let sleeping dogs lie" instead of suing nTan Corporate Advisory Pte Ltd ("the defendant") for, *inter alia*, the refund of the balance of the deposit of S$2m ("the Deposit") that it paid to the defendant for the latter's consultancy services. Its filing of this suit prompted the defendant to file a counterclaim against the plaintiff for a sum far in excess of the balance of the Deposit.

The parties

2 The plaintiff is a company which was founded and incorporated in 2000 by Vikas Goel ("Vikas"). At the material time in November 2006, the plaintiff was in the business of distributing computer hardware. As of October and November 2006, the plaintiff had several worldwide distribution agreements with Seagate Technology ("Seagate"). Seagate is and was at all material times a multinational corporation based in the United States which designs, manufactures and markets the Seagate and Maxtor brands of hard disk drives. It is not disputed that the distributorship agreements with Seagate were significant to the plaintiff as 40% of the plaintiff's sales comprised of Seagate and Maxtor products and that 40% of the plaintiff's receivables were derived from the same.

3 The defendant is a Singapore company. The defendant is and was at all material times engaged in business and management consultancy services, as well as corporate finance and restructuring services. Its chief executive officer is and was at all material times, Nicky Tan ("Nicky"). Prior to setting up the defendant, Nicky was the Head of Advisory Services at PricewaterhouseCoopers Singapore. In addition, he was also the Chairman of Financial Advisory Services of PricewaterhouseCoopers Asia Pacific, as well as the previous Head of Global Corporate Finance at Arthur Andersen for Singapore and the ASEAN region. Nicky's curriculum vitae was testimony to his expertise in the fields of corporate restructuring and insolvency.

Facts leading to the commencement of the relationship

4 The relationship between the parties arose from events which took place in November 2006. On 6 November 2006, Seagate terminated various distributor agreements which it had with the plaintiff and its subsidiaries. In doing so, Seagate filed an announcement with the United States Securities and Exchange Commission ("SEC Announcement") which stated, *inter alia*:

> Today we took steps to commence the process of terminating our distributor relationships with [the plaintiff] and we have ceased shipments of our products to [the plaintiff]. [The plaintiff] was the largest distributor of Seagate products (including Maxtor products) for the fiscal year ended June 30, 2006 and for the quarter ended September 29, 2006, representing approximately 5% and 6% of our revenues for those respective periods.
>
> In early October 2006, we initiated an audit of [the plaintiff's] point of sale records pursuant to our contractual rights to confirm the accuracy and completeness of [the plaintiff's] claims for program credits under our distributor sales incentive programs. Discussions with [the plaintiff] surrounding the timing, scope of work, and selection of third party auditors continued until last week when [the plaintiff's] officials informed us they would deny our third party auditors access to [the plaintiffs'] records to perform the requested audit notwithstanding our contractual rights to do so. [The plaintiff's] officials also indicated to us that an audit would likely reveal irregularities in [the plaintiff's] compliance with the terms of our incentive programs and other unspecified irregularities. In addition, [the plaintiff] has failed to make full current payments on its obligations to us. Accordingly, today, we notified [the plaintiff] that we are terminating our commercial distributor relationships with [the plaintiff].

5 Then in December 2006, Seagate (and its related companies) commenced Suits No. 844 of 2006 and No 854 of 2006 against the plaintiff and Vikas respectively. (The two suits will be collectively referred to hereinafter as "the 2006 suits".) Suit No 844 of 2006 was Seagate's claim against the plaintiff for the then outstanding sum of more than US$4m due from the plaintiff for the supply of Seagate products. Suit No 854 of 2006 was Seagate's claim against Vikas as the guarantor of the plaintiff's debts under a guarantee dated 8 October 2004. In October 2006, this court dealt with five Registrar's Appeals arising out of the 2006 suits.

The agreement between the parties

6 The events detailed at [4] and [5] above had severe ramifications for the plaintiff. The termination of the distributorship agreements with Seagate, a significant revenue generator of the plaintiff, raised concerns in various parties who had vested interests in the plaintiff. Such concerns resulted in actions which were financially detrimental to the plaintiff. In particular, creditors and suppliers of the plaintiff cancelled credit facilities while bank creditors demanded repayment or furnishing of additional security.

7 In a bid to alleviate its dire situation, the plaintiff sought legal advice from its solicitors, Drew & Napier LLC, whose S Nair ("Nair") recommended that the defendant be engaged as an adviser. Nair then arranged a meeting with Nicky on 11 November 2006 on an urgent basis. On 14 November 2006, the plaintiff and defendant signed a letter of engagement ("the Engagement Letter").

8 As the Engagement Letter is central to the dispute between the parties, its salient terms are reproduced below.

9 The main reason for appointing the defendant was stated in the Engagement letter ("the

Appointment Clause") as follows:

> **APPOINTMENT OF INDEPENDENT ADVISOR**
>
> Allegations of irregularities in a distribution deal between [the plaintiff] and [Seagate] was made by Seagate in a filing on 6 November 2006 with the United States Securities Exchange Commission ("the Allegations") by Seagate. The Allegations may result in litigation ("Potential Litigation").

10 The scope of the defendant's employment was stated in the Engagement Letter ("Scope of Work Clause") as follows:

> **Scope of work**
>
> The board of directors of [the plaintiff] ("Board of Directors") has resolved to and appointed [the defendant] as independent advisor to [the plaintiff] and its subsidiary and associate companies (together, the "Group") to:
>
> (i) review all matters which are the subject of the Allegations and such other related transactions arising from or connected thereto;
>
> (ii) advise and assist the Group in reviewing and developing strategic options with the objective of enhancing value to all stakeholders;
>
> (iii) advise and assist the Group, as appropriate, on suitable options to restructure its operational activities and financial arrangements;
>
> (iv) advise and assist the Group on acquisitions and strategic alliances with the objective of enhancing stakeholder value;
>
> (v) advise and assist the Group in identifying and securing potential investors;
>
> (vi) advise and assist the Group in engaging and instructing relevant professionals, such as accounting, legal and tax who are experts as needed in the circumstances;
>
> (vii) assist lawyers and other professionals who have been and may be appointed by [the plaintiff] in connection with the Allegations and Potential Litigation; and
>
> (viii) review such other matters, transactions and affairs as may be agreed between the Board of Directors and [the defendant].

11 The Engagement Letter provided that two types of fees were liable to be paid by the plaintiff to the defendant. The first type of fees comprised of, *inter alia*, time costs and out-of-pocket expenses. This was stated in the Engagement Letter as follows ("the Fees Clause"):

> [The defendant's] fees for the engagement comprise our time costs fee, out-of pocket expenses (including fees of any experts or professionals) and such other fees as may be provided for in any addendum to this letter. [The defendant] will raise monthly progress billings ("Monthly Progress Billings") based on our time costs and other fees and expenses. [The defendant's] charge out rates and other charges and expenses, are set out in the attached schedule.

12 The schedule ("the Fees Schedule") to the Engagement Letter, referred to in the Fees Clause

(at [11] above) essentially detailed the hourly charge-out rates of personnel of the defendant, which was based upon seniority. The rates ranged from US$100 per hour for an associate, to US$1,000 per hour for Nicky.

13 The second type of fees were value-added fees ("VAF"), which were contingent upon the defendant performing certain types of work which resulted in value being added to the plaintiff. This was stated in the Engagement Letter as follows ("VAF Clause"):

> Upon the successful completion of any of the above foregoing scope of work ("Successful Completion"), a Value-Added Fee ("VAF") computed at 5% of Total Gross Value Added ("TGVA"), shall be payable by [the plaintiff] to [the defendant].
>
> TGVA is the sum total of the following:
>
> a) Value of the Group's liabilities written off, extinguished, avoided or restructured;
>
> b) Fair value of new assets injected and recovered by the Group;
>
> c) Value of new equity and/or debt raised by the Group; and
>
> d) Any other value add agreed with [the plaintiff] and the Group.

14 The Engagement Letter also provided that the plaintiff pay the Deposit upon execution. The plaintiff duly paid the Deposit, and as noted above at [1], brought the present suit to claim the refund of the balance of the Deposit.

15 Clause 8 of Appendix A to the Engagement Letter provided for termination and reads:

> Termination
>
> It is understood that the services to be provided by [the defendant] under this letter may be terminated by either of us at any time by written notice to the other without liability or continuing obligation to either of us except that the provisions relating to fees incurred up to the date of termination and confirmations and further undertakings will continue in force and remain operative.
>
> For the avoidance of doubt, after the termination of this engagement, [the defendant] will continue to be entitled to the fees and out-of-pocket expenses already incurred up to the date of termination in accordance with this letter and any other fees that may be provided for in any addendum to this letter.
>
> For the avoidance of doubt, after the termination of our engagement, [the defendant] will also continue to be entitled to the VAF described herein, if [the plaintiff] and the Group adopt and implement our advice relating to the scope of work contained in this Letter within 36 months from the date of termination.

The termination of the defendant's engagement

16 After the Engagement Letter was executed, the defendant carried out work for the plaintiff. The precise nature of the work done by the defendant, as well as its efficacy, was hotly disputed by the parties and is discussed at length below. The defendant rendered two invoices (collectively "the two invoices") to the plaintiff for time costs and out-of-pocket expenses on 4 and 6 February, 2007

for the sums of S$663,759.64 and S$69,680.15 respectively. The plaintiff terminated the defendant's engagement on the day that the second invoice was rendered.

The pleadings

The claim and defence to counterclaim

17 The plaintiff sought an account of the fees and expenses from the defendant pursuant to the above two invoices ("an Account"). Further, the plaintiff claimed the sum of S$1,266,560.21 which represented the balance of the Deposit after allowing for deduction of the amounts in the two invoices (at [16] above). The plaintiff contended that it was an implied term of the Engagement Letter that the defendant must furnish an Account. As a corollary to this contention, the plaintiff argued that the two invoices and their contents did not suffice as an Account.

18 In respect of the defendant's counterclaim (see [20]), the plaintiff asserted that the defendant was not entitled to any VAF.

The defence and counterclaim

19 In its defence to the claim for an Account, the defendant contended that the plaintiff's claim for an Account was neither genuine nor *bona fide*. The defendant also contended, in the alternative, that there had to be implied a term that any Account sought by the plaintiff had to be obtained within a reasonable time.

20 By way of a counterclaim, the defendant sought a declaration that it was entitled to an additional fee from the plaintiff pursuant to the VAF Clause (at [13] above). The defendant further contended that it was entitled to VAF far in excess of the balance of the Deposit and that pursuant to the terms of the Engagement Letter, it was not liable to refund any portion of the Deposit under the circumstances.

The plaintiff's claim for an Account

The plaintiff's case

21 The plaintiff contended that it was incumbent upon the defendant to furnish the following details in the two invoices

(a) Details of the time spent by the defendant's various employees carrying out the scope of work specified in the Engagement Letter;

(b) Details of the actual work performed by such employees;

(c) The hourly rates of such employees; and

(d) Details of the out-of-pocket expenses incurred by the defendant.

22 The plaintiff contended that because the fees invoiced by the defendant were based upon time costs incurred by the latter, an Account of the matters set out above (at [21]) was essential for the plaintiff to verify whether the fees levied were in accordance with the Engagement Letter.

23 The plaintiff contended that the furnishing of an Account (as detailed at [21]) should be implied

regardless of whether the "officious bystander" test or the "business efficacy" test was applied in the analysis. If such a term was not implied, the plaintiff argued, the defendant would essentially have a *carte blanche* to charge for its services as it deemed fit and in disregard of the terms of the Engagement Letter.

24 There were other submissions made by the plaintiff in relation to the issue of whether or not it was entitled to an Account. As I ultimately found that those submissions were not relevant in the final analysis, I shall only set them out in brief. The plaintiff alleged that an Account was not forthcoming from the defendant despite requests from the plaintiff for the same. In support of this allegation, the plaintiff relied on correspondence exchanged between the parties' solicitors. In addition, the plaintiff alleged that there was evidence adduced that the defendant had overcharged the plaintiff, and that the invoices were not a true reflection of what the defendant was entitled to charge pursuant to the Engagement Letter.

The defendant's case

25 As stated earlier (at [19]), the defendant contended that the plaintiff's claim for an Account was not *bona fide*. In this regard, the defendant relied in the main on the following factors:

(a) That the plaintiff sought an Account only 3½ years after the invoices were rendered;

(b) That the plaintiff never requested the defendant for an Account in the interval since the invoices were rendered, and

(c) That the plaintiff had no interest in receiving an Account whatsoever given that it was no longer a company of any worth.

26 Alternatively, the defendant submitted that it should be an implied term of the Engagement Letter that any request for an Account ought to be made within a reasonable time. As a matter of course, the defendant also argued that such reasonable time must be construed as being less than 3½ years.

The law on implied terms

27 Whether or not the plaintiff is entitled to an Account would depend on whether a relevant term can be implied in the Engagement Letter. The Court of Appeal succinctly summarised the law on implied terms in *Chua Choon Cheng and others v Allgreen Properties Ltd and another appeal* [2009] 3 SLR(R) 724 ("*Chua Choon Cheng*") (at [63]):

> It is settled law that "a court will *not lightly* imply a term into a contract" [emphasis original]: *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2006] 3 SLR(R) 769 at [107]. The rule of thumb is that the more detailed or complex a contract is, the less likely it is that the court will imply a term into that contract. The touchstone for implying a term into a contract is always "necessity and not merely reasonableness": *Hiap Hong & Co Pte Ltd v Hong Huat Development Co (Pte) Ltd* [2001] 1 SLR(R) 458 at [19]. The learned authors of *Chitty on Contracts*, vol 1 (Beale gen ed) (Sweet & Maxwell, 30th Ed, 2008) ("*Chitty on Contracts*") at para 13-004 note that both the officious bystander and business efficacy test "[depended] on the presumed *common intention* of the parties", which has to be objectively ascertained. In *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927 ("*Forefront*") at [36], Andrew Phang Boon Leong J (as he then was), after a detailed analysis of the historical origins of these tests, concluded that the two tests are but different facets of the same coin; "the 'officious

bystander' test is the *practical mode by which* the 'business efficacy' test is implemented" [emphasis in original]. We agree.

28 The threshold consideration of whether or not a term is necessary to be implied, alluded to by the Court of Appeal in *Chua Choon Cheng* was discussed by Chao Hick Tin JA in *Hiap Hong & Co Pte Ltd v Hong Huat Development Co (Pte) Ltd* [2001] 1 SLR(R) 458 ("*Hiap Hong & Co Pte Ltd*") (at [19] – [20]):

> 19 Be that as it may, in considering the question of implied terms, it must be borne in mind that the touchstone is necessity and not merely reasonableness. In the words of Scrutton LJ in *In re Comptoir Commercial Anversois and Power, Son & Co's Arbitration* [1920] 1 KB 868 at 899–900:
>
> > The Court … ought not to imply a term merely because it would be a reasonable term to include if the parties had thought about the matter, or because one party, if he had thought about the matter, would not have made the contract unless the term was included; it must be such a necessary term that both parties must have intended that it should be a term of the contract, and have only not expressed it because its necessity was so obvious that it was taken for granted.
>
> 20 Of course, a term to be implied must always be equitable and reasonable. The court will imply a term if from the language of the contract and the surrounding circumstances an inference should be made that the parties must have intended the stipulation in question.

29 It is well established that two tests may be applied in considering whether or not a term may be implied into a contract. They are commonly known as the "officious bystander" and "business efficacy" tests, and were summarised by Andrew Phang Boon Leong J in *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927 (at [29] – [32]):

> 29 It has always been acknowledged that particular terms might be implied into particular contracts. However, in order not to undermine the concept of freedom of contract itself, terms would be implied only rarely – in exceptional cases where, as one famous case put it, it was *necessary* to give "*business efficacy*" to the contract (see *per* Bowen LJ (as then was) in the English Court of Appeal decision in *The Moorcock* (1889) 14 PD 64). In the words of Bowen LJ himself (at 68):
>
> > Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and there are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances.

30 Indeed, Lord Esher MR adopted a similar approach, although it is Bowen LJ's judgment that is most often cited. This is probably due to the fact that a close perusal of Lord Esher MR's judgment will reveal that the learned Master of the Rolls did not *explicitly* adopt the "business efficacy" test as such. It might be usefully observed at this juncture that the third judge, Fry LJ, agreed with both Bowen LJ and Lord Esher MR (see [29] *supra* at 71).

31 There was another test, which soon became equally famous. It was by MacKinnon LJ in another English Court of Appeal decision. This was the famous "*officious bystander*" test which was propounded in *Shirlaw v Southern Foundries (1926) Limited* [1939] 2 KB 206 at 227 ("*Shirlaw*") (affirmed, [1940] AC 701), as follows:

> If I may quote from an essay which I wrote some years ago, I then said: "Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'"
>
> At least it is true, I think, that, if a term were never implied by a judge unless it could pass that test, he could not be held to be wrong.

Interestingly, the essay referred to above was in fact a public lecture delivered at the London School of Economics in the University of London: see Sir Frank MacKinnon, *Some Aspects of Commercial Law – A Lecture Delivered at the London School of Economics on 3 March 1926* (Oxford University Press, 1926) (and see, especially, p 13).

32 Both these tests are firmly established in the local case law (in addition to the cases cited below, see also, for example, *Lim Eng Hock Peter v Batshita International (Pte) Ltd* [1996] 2 SLR (R) 292 at [13]–[15] (affirmed in *Batshita International (Pte) Ltd v Lim Eng Hock Peter* [1996] 3 SLR (R) 563 and *Chai Chung Ching Chester v Diversey (Far East) Pte Ltd* [1991] 1 SLR (R) 757 at [34] (affirmed in *Diversey (Far East) Pte Ltd v Chai Chung Ching Chester* [1992] 3 SLR (R) 412), with regard to the "business efficacy" and "officious bystander" tests, respectively.

30 With the relevant legal principles in mind, I turn now to analyse the parties' respective cases.

The decision

31 The threshold consideration is whether the term that the defendant be liable to render an Account was of such necessity that both parties intended for its inclusion in the Engagement Letter. In this regard, the plaintiff's position was clear – that it must have intended that the defendant justify its billings and that the only manner in which this could be done was by the furnishing of an Account. As to whether the defendant's intent was consonant with the plaintiff's, it was pertinent that Nicky admitted during cross-examination that, in his view, there was a "minimum obligation" to explain to clients how time costs were calculated:

> Q: Mr Tan, do you therefore take it that if a client does ask – whether it's one year, two years or three years – there is an obligation on your firm to provide that information? Or is it your position that there is no obligation?
>
> A: I think contractually there is no provision in my engagement letter that I should provide the breakdown; but professionally, if any client were to ask me, that is *a minimum obligation I owe my client, to explain to my client how the time costs have been built up, who spent*

what time on the job, and how I billed my client. If my client were to ask, you rest assured I will tell my client very promptly the information.

Q: You said that's the minimum obligation. So that's the very least you would do?

A: It depends what my client ask me. If my client asks me, Mr Tan, "Can you tell me how many hours you have spent on the job?" I'll be very happy to tell him "This is how many hours I have spent." If he asks me, "Can you tell me how many hours Mr Dan has spent on the job" I'll be very happy to do so. It depends on what information my client asks me. No one in Singapore or around the world had ever sued me for not providing a breakdown on the time costs".

[emphasis added]

32 Nicky's description of the furnishing of time-costs to clients as "a minimum obligation" spoke volumes about his state of mind when entering into the Engagement Letter, *ie*, that the furnishing of an Account was essential and taken for granted.

33 Given that both parties were *ad idem* insofar as the necessity of an Account being rendered was concerned, I have little hesitation in holding that it was an implied term of the Engagement Letter that the defendant was obliged to provide an Account to the plaintiff.

34 I turn now to address the defendant's contention that a term had to be equally implied in the Engagement Letter that it was only liable to render an Account "within reasonable time", and that such time had passed. In this regard, s 6(2) of the Limitation Act (Cap 163, 1996 Rev Ed) states that "an action for an account shall not be brought in respect of any matter which arose more than 6 years before the commencement for the action". The plaintiff's right to an Account was not time-barred when it commenced the present action on 9 September 2010, which was well within six years of the date of the second invoice (6 February 2007). However, the plaintiff certainly took its time in filing this suit and I shall return to the possible motives for its action later (at [90]).

Was the defendant entitled to VAF?

The context surrounding the Engagement Letter

35 As noted earlier (at [6]), the SEC Announcement had dire consequences for the plaintiff. It was not disputed that the immediate consequences of the SEC Announcement were the following:

(a) The plaintiff received written demands from bank creditors for repayment or additional security amounting to approximately US$50m;

(b) The plaintiff's bank creditors cancelled approximately US$132m of credit lines; and

(c) The plaintiff's suppliers cancelled approximately US$90.5m of credit lines.

36 The action taken by the plaintiff's bank creditors *viz* IFS Capital Limited ("IFS Capital Ltd"), Hongkong & Shanghai Banking Corporation ("HSBC"), Natexis Banques Populaires, Singapore Branch ("Natexis), UCO Bank ("UCO"), Standard Chartered Bank ("SCB"), Development Bank of Singapore Limited ("DBS"), KBC Bank NV ("KBC") and Bank of India ("BOI") ("the bank creditors") are summarised in the following table:

S/n	Date	Bank	Demand for	Amount
1	8 Nov 2006	IFS Capital Ltd	1. Terminated factoring agreement 2. Demanded outstandings	US$9,404,700.93
2	13 Nov 2006	HSBC	Demanded cash cover for contingent liabilities	US$2,850,000.00
3	14 Nov 2006	Natexis	Demanded repayment of outstanding advances	S$2,362,750.55
4	17 Nov 2006	Natexis	Filed suit against plaintiff for recovery of outstandings	S$2,363,361.73
5	21 Nov 2006	UCO	Demanded payment of overdue amounts	US$1,703,600.00
6	22 Nov 2006	HSBC	1. Recalled banking facilities 2. Demanded payment of outstandings	US$7,812,597.05
7	22 Nov 2006	SCB	1. Terminated import line 2. Demanded payment of outstanding sum under import line	US$1,900,000.00
8	23 Nov 2006	DBS	Demanded payment of sum due under Import Financing Facility	US$1,586,677.50
9	27 Nov 2006	KBC	1. Cancelled merged facility 2. Demanded payment of combined total indebtedness	US$23,229,436.16
10	28 Nov 2006	BOI	Demanded additional cash margin	US$742,000.00

37 At the time the bank creditors made the above demands, the plaintiff was unable to perform its repayment obligations. The plaintiff's inability to meet its repayment obligations was due to the nature of its operations. As a trading company whose primary assets were inventories and receivables, the plaintiff needed to realise its inventories and collect its receivables in order to meet its liabilities. This much was conceded by Vikas in cross-examination:

Q: At that point in time, as of – let's fix a date – end of October 2006, the total amount of outstanding was not something that you had in your bank which you could meet; correct?

A: Yes. In distribution it's always rolling incoming and outgoing

Q: By various dates in early November, up to mid-November, all the banks had demands for the full outstandings as well; correct?

A: Yes

Q: At that time, eSys would have been unable to satisfy all these demands?

A: Yes

….

Q: That's precisely it, Mr Goel. These are not amounts that you would not have been able to pay; you just needed time?

A: Yes

Q: You needed some amount of indulgence so that you would be able to collect receivables, make your trades, collect money from the trades and pay off your various creditors; right?

A: Yes. We were doing that every day.

Q: That's the business you're in. It's a high turnover?

A: Yes.

Q: And high reliance on cash flow; right?

A: Yes

Q: But if all the creditors were to come in the same period and make everything due and payable, you would not be able to meet it?

A: On the same day, no, but we did pay everybody in a span of 8 or 12 weeks...

38 It was against this backdrop of the fear of insolvency on the part of the plaintiff that the defendant was engaged.

The defendant's case

VAF was payable on restructured bank liabilities

39 The defendant's case was that it successfully restructured the plaintiff's liabilities *vis-à-vis* the bank creditors. As such, it was entitled to VAF amounting to 5% of such liabilities. In this regard, the defendant's main contention was that it had successfully secured agreement from the bank creditors to stave off their demands, thereby enabling the plaintiff to eventually repay its debts.

40 Nicky advised the plaintiff that in order to convince the bank creditors that it was in their best interests to accord more time for repayment, the plaintiff had to create a "virtuous", as opposed to a "vicious" cycle. In the former situation, all creditors would be treated equally and no creditor would be preferred over others. As a result, the plaintiff would secure the bank creditors' agreement not to enforce their claims immediately, thereby allowing the plaintiff to fully realise its assets and pay off its liabilities thereafter. In the "vicious" cycle, some creditors would be paid in preference to others thereby creating impetus for other creditors to enforce their claims against the plaintiff immediately to the detriment of the plaintiff. Towards this end, Nicky informed Vikas that a meeting with the bank creditors had to be convened. In addition, Nicky told Vikas that at such a meeting, the plaintiff should do the following:

(a) Present the most up to date operational and financial information pertaining to the plaintiff;

(b) Provide updates on all relevant matters which included the ramifications pertaining to the SEC Announcement;

(c) Assuage the bank creditors' concerns; and

(d) Persuade the bank creditors to agree to a standstill agreement.

41 Vikas agreed to the plan suggested by Nicky and decided that the plaintiff should proceed to arrange a meeting with the bank creditors. The work done by the defendant, in the run up to the bank creditors meeting, was not disputed at the trial. The defendant prepared the presentation which was used during the bank creditors meeting which was eventually held on 24 November 2006 ("the Meeting"). The presentation detailed the most updated financial position of the plaintiff and provided information of the continued viability of the plaintiff. The decision to provide updated financial information pertaining to the plaintiff was a strategic one taken by Nicky. Prior to the Meeting, several of the bank creditors were of the view that the plaintiff had not been transparent in furnishing information pertaining to its financial position. In a bid to reverse the situation, the defendant decided to provide the bank creditors with updated financial figures. Hence, the defendant requested for the plaintiff's management accounts to be updated to 18 November 2006. Nicky explained during cross-examination that by doing so, the defendant sought to demonstrate to the bank creditors that the plaintiff was going to be transparent henceforth:

> Nicky: ... The fact that we produced numbers up to 18 November, to show the banks "Look, forget about the past complaint about lack of transparency; we are now – this is a new regime. We are giving you numbers up to three – five days, seven days before you come to the meeting.
>
> This is the key. You hear – you see all the letters from the bank complaining, "You are not transparent, I can't meet you, I can't get any information from you." One of the key things that I was desperate to show to the bank, within two weeks of our appointment, we got you the latest number. We got you the number as of 18 November. No company produced such things.
>
> The key thing about steadying a ship when you are insolvent or you are unable to pay the bank, what they need is clear, transparent information. They don't mind dealing with bad news; they don't like to deal with uncertainties. So you have to give clear, transparent information, so they know what the situation is.

42 Before the Meeting was convened, Nicky also convinced the plaintiff that it should offer to appoint PricewaterhouseCoopers as the bank creditors' financial adviser. In Nicky's view, such a move would boost the bank creditors' confidence in the plaintiff.

43 Nicky chaired the Meeting which was attended by three of his associates and three lawyers from Drew & Napier. The Meeting was a crucial event as it represented the first opportunity, after the bank creditors had issued their demands on the plaintiff (at [36] above), for the plaintiff to convince the bank creditors to withhold their demands and agree to giving more time for the plaintiff to repay its liabilities. The minutes of the Meeting recorded that Nicky did the following:

(a) Distributed presentation slides and took the bankers through the financial information of the plaintiff contained therein;

(b) Informed the bank creditors that there were potential investors in the plaintiff;

(c) Explained to the bank creditors the nature of the plaintiff's business in the light of which it would be in the bank creditors' best interest to hold off their demands against the plaintiff;

(d) Informed the bank creditors that the plaintiff was formulating a repayment plan;

(e) Informed the bank creditors that no creditor was going to be paid in preference to others; and

(f) Stated that the plaintiff was prepared to file an application under s 210(10) of the Companies Act (Cap 50, 2006 Rev Ed) if necessary.

44 The Meeting concluded with representatives of the attending bank creditors agreeing to meet amongst themselves the following week. In addition, there was agreement that none of the bank creditors would commence legal proceedings against the plaintiff in the interim. Indeed, none of the bank creditors took action against the plaintiff after the Meeting and the plaintiff was able to repay all its debts by March 2007.

VAF payable on the Teledata deal

45 It was the defendant's case that it performed work in relation to an investment by Teledata Informatics Ltd ("Teledata"), of approximately US$100m in the plaintiff ("the Teledata deal"). As such, the defendant claimed that it was entitled to VAF amounting to 5% of the value of the said investment.

46 Vikas told Nicky about a proposal by Teledata for a potential investment in the plaintiff at the first meeting between them on 11 November 2006. The investment contemplated the injection of US$100m by Teledata into the plaintiff. In return, Teledata would obtain shares in the plaintiff. On the same day, Nicky was given the draft Letter of Intent ("draft LOI") in respect of the said investment. Pursuant to the draft LOI, Teledata would purchase 51% of the shares in the plaintiff in consideration of US$60m. In addition, Teledata would provide a loan of US$40m to the plaintiff as working capital.

47 Nicky's evidence was that he advised Vikas not to rush into a deal envisioned by the draft LOI, as the investment structure was far from ideal. This was because the plaintiff would, as a result of the LOI, have a pool of unencumbered cash would could rouse the bank creditors' interest in immediate repayment. In addition, the injection of fresh funds directly into the plaintiff would give the bank creditors impetus to put the plaintiff into liquidation or judicial management. Either scenario would be detrimental to the plaintiff.

48 Instead of the investment structure envisioned by the draft LOI, Nicky advised on four types of structures to facilitate the objective of obtaining new monies to restructure the terms of repayment to the bank creditors as well as to provide working capital for the plaintiff. Nicky's advice was eventually incorporated into five agreements which were entered into by the plaintiff with a company called Rainforest Trading Limited ("Rainforest"). The five agreements are discussed in detail at [49] – [55] below.

(a) The Holding Company Structure;

(b) The US$5m VG (Vikas) Payment Structure;

(c) The Revaluation Excess VG (Vikas) Payment Structure; and

(d) The eSys India Transfer Structure.

It was the defendant's case that the abovementioned four investment structures were incorporated into agreements between the plaintiff and Teledata. The agreements are discussed in turn.

49 On 29 November 2006, a Share Subscription Agreement ("SSA") was executed by the plaintiff, Vikas and Teledata. The key feature of the SSA was its investment structure ("the Holding Company Structure") whereby:

(a) A special purpose vehicle ("SPV") would be incorporated for the purpose of the investment (the SPV that was eventually incorporated was Rainforest);

(b) Vikas would transfer all his shares in the plaintiff to the SPV in consideration of approximately 49% of the shares in the SPV; and

(c) The SPV would provide a secured loan of US$60m to the plaintiff.

In addition, the SSA provided that Teledata would also provide a loan of US$40m to either the plaintiff or the SPV.

50 On 29 November 2006, the plaintiff, Vikas and Teledata executed a supplemental agreement to the SSA ("First Supplemental") which provided for the following:

(a) The plaintiff would transfer 48.6% of its shareholding in eSys India (a subsidiary of the plaintiff) to Vikas at a nominal consideration of US$1. Such a transfer resulted in Vikas – or his nominees – owning 49.9% of the shareholding in eSys India, and the plaintiff owning the remaining 50.1% of eSys India; and

(b) eSys India would enter into a Business Transfer Agreement with a new entity ("Newco"), which would provide for the transfer by eSys India of its existing business. eSys India retained its existing tangibles and fixed assets (including the land which it owned in India). Newco would then be owned by an entity known as Holdco, where Holdco would be 50.001% owned by Teledata and/or its nominees, and 49.999% owned by Vikas and/or his nominees.

51 The effect of the above structure meant that Teledata would own 50.001% interest in the business of eSys India *via* Teledata's shareholding in Holdco. In addition, the First Supplemental provided for Holdco to pay the sum of US$5m to Vikas and/or his nominees. The First Supplemental also provided that parties would perform a revaluation of the plaintiff's assets, and that should such revaluation of the plaintiff result in any surplus over the sum of US$60m, the surplus less the sum of US$5m would be paid to Vikas and/or his nominees (this was effectively the Revaluation Excess VG Payment Structure referred to in [48(c)]).

52 The effect of the First Supplemental was such that Teledata would own approximately 50% interest in the business of eSys India via Teledata's shareholding in Holdco.

53 On 29 November 2006, the plaintiff, Vikas and Teledata entered into a Second Supplemental Agreement to the SSA ("Second Supplemental"). The salient amendment to the SSA, vide the Second Supplemental, was that Vikas was to be issued 60,000,000 shares in the SPV whilst Teledata was to be issued 60,000,001 shares in the same.

54 On 9 February 2007 (after the defendant's engagement was terminated), the plaintiff, Vikas and Teledata entered into the third supplemental agreement to the SSA ("Third Supplemental"). The Third Supplemental provided for a company Baytech Inc to be appointed as Teledata's nominee.

55 On 14 February 2007, the plaintiff, Vikas and Teledata executed the fourth supplemental agreement to the SSA ("Fourth Supplemental") which provided:

(a) Upon the completion of the subscription for shares in Rainforest by Vikas and Teledata, Vikas would sell 5,000,000 shares in Rainforest to Teledata in consideration of US$5m;

(b) Vikas would sell an additional 1,200,001 of his shares in Rainforest to Teledata for a sum of not less than US$1,200,001 or at a fair market value to be determined by the parties; and

(c) The Fourth Supplemental Agreement retained the Holding Company Structure.

56 As a result of the injection of funds into the plaintiff via the deal with Teledata, the defendant claimed that it was entitled to VAF computed at 5% of the value of such injection.

VAF was payable on restructured supply creditor liabilities

57 The crux of the defendant's claim was that the standstill it achieved with the bank creditors enabled the plaintiff to continue trading with its suppliers and further led to such suppliers not demanding immediate repayment of amounts owing to them. The defendant therefore claimed that it was entitled to VAF calculated on the basis of 5% of the supplier/trade creditor liabilities as "restructured".

The plaintiff's case

Was VAF payable on restructured bank liabilities?

58 The plaintiff contended that the "informal standstill" (at [44]) did not entitle the defendant to claim 5% of TGVA as VAF under the VAF clause (at [13]) even though the plaintiff did not dispute that the "informal standstill" was instrumental in facilitating the plaintiff's eventual repayment of its liabilities. The plaintiff contended that the omission of any reference to a "standstill agreement" in the Engagement Letter meant that the parties did not intend for any VAF to be payable upon occurrence of such events. In particular, the plaintiff contended that the bank liabilities were not "restructured" because "standstill agreements" merely involve creditors withholding or refraining from enforcing their existing rights, and do not result in the alteration of the creditors' rights as a result of which the plaintiff enjoyed a benefit.

Was VAF payable on the Teledata deal?

59 The plaintiff's defence to this aspect of the counterclaim was twofold. First, that the defendant did not perform substantial work in relation to the deal involving Teledata. Second, that Teledata did not invest in the plaintiff but in Rainforest.

60 Vikas averred that the defendant was not involved at all in the investment involving Teledata. The relevant portions of his affidavit of evidence–in-chief ("AEIC") read:

(a) the defendant did not render any advice and/or assistance to the plaintiff in relation to the transaction with Teledata;

(b) the structure of the intended transaction with Teledata was based on and formulated from discussions between representatives of Teledata and Vikas. The defendant did not render any advice orally or otherwise to Vikas or to the plaintiff in relation to such structure.

61 Vikas further averred that while the defendant was kept informed of the negotiations between the plaintiff and Teledata, this was only because it was part of the defendant's scope of work to procure new investors, and also because the plaintiff was hopeful that the defendant could have procured a better offer than that proposed by Teledata.

The law on contractual interpretation

62 The Court of Appeal in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*") endorsed the contextual approach to contractual interpretation (*Zurich Insurance* at [121]). Such an approach permits reference to extrinsic evidence even if the term involved is not ambiguous (*Zurich Insurance* at [114] – [120] and [132(c)]). There are two conditions precedent to the use of such extrinsic evidence: first, that the evidence must be "relevant [and] reasonably available to all the contracting parties"; second, that it must "relate to a clear or obvious context" (*Zurich Insurance* at [132(d)], see also [125] and [128] – [129]).

The decision

63 The defendant's entitlement to VAF hinged upon whether or not it had performed work which satisfied the conditions precedent to such entitlement pursuant to the Engagement Letter (at [11] above). I turn now to address each of the defendant's claims in this respect.

VAF on restructured bank liabilities

64 The critical issue for determination is, did the informal standstill by the banks *restructure* liabilities pursuant to the VAF clause? It was not disputed that the defendant was instrumental in getting the bank creditors to agree to an informal standstill. What was disputed, however, was whether the informal standstill "restructured" the liabilities of the plaintiff in a manner which would entitle the defendant to a VAF. According to the defendant's case, it had completed item (iii) of the Scope of Work Clause (see [10] above) by advising and assisting the plaintiff in restructuring the plaintiff's financial arrangements, which led to the plaintiff's liabilities being restructured or avoided pursuant to (a) of the VAF Clause (at [13] above).

65 In my view, given the context in which the Engagement Letter was entered into, the standstill agreement undoubtedly entitled the defendant to claim VAF pursuant to the Engagement Letter. Consequently, VAF is payable to the defendant calculated at 5% of the total bank liabilities which were the subject of the standstill agreement. The reasons are set out below.

66 The context in which the Engagement Letter was entered into is critical in determining exactly what the plaintiff sought to achieve in restructuring its liabilities. Vikas had stated the following in cross-examination:

Q: The context in which this scope of work [under the Engagement Letter] was sought was the banks were seeking payments against you on an urgent basis; correct?

A: Yes

Q: And you needed breathing space?

A: Yes

Q: And you needed nTan to assist you [to] restructure the obligations; correct?

A: I wouldn't say "restructure", but talk to the banks to adopt a path which made sense, that we would be able to pay off – just breathing space, as you would put it, yes.

Q: "Breathing space" means they would hold back on their demands against you; correct?

A: They would give us some time

Q: And not enforce the demands against you; right?

A: Will not go in for litigation or judicial management.

Q: Which is to enforce the demands against you; yes?

A: I mean, if you put it that way, yes.

67 At a later stage, Vikas had (in cross-examination) conceded that the main reason why the plaintiff hired the defendant was so that the latter could help the former obtain a standstill and a breathing space from the bank creditors:

Q: Your banks didn't want to back off, right? They were making demand after demand, and we saw that.

A: Yes

Q: What you needed was an ability to stave off the demands until such time when you were able to pay them; right?

A: Yes.

Q: That's why you went to consult with Drew & Napier and accepted their advice to consult with Mr Nicky Tan?

A: Yes.

68 Consequently, it cannot be disputed that the work done by the defendant was crucial in ensuring that the bank creditors agreed not to enforce their claims against the plaintiff immediately. In this regard, Louis Han of HSBC, who was present at the Meeting testified as follows:

Q: ...First, in order for the bank to agree to an informal standstill, would you agree that the bank must first be given comfort that the bank has a chance of being better off if you allow the company to trade as a going concern than if you move in and put in insolvency professionals immediately?

A: That would be correct, yes

Q: And in order for you to get that comfort, you must be able to see from the financials

presented at this meeting that the company indeed, based on its own financials, is able to continue to trade as a going concern, with a better – with the prospect of a better realisation at the end.

A: That is the ultimate objective, yes, to maximise recovery, yes.

Q: Yes. And you should also expect to see, as you had asked, a realistic repayment plan coming up from the company; correct?

A: Yeah, a repayment plan, restructuring plan, whatever – yeah. Yeah, sure.

Q: If you were given that amount of comfort, then you would be prepared to agree to a standstill?

A: Yes, of course, because to do a standstill, we want to make sure that certain controls are in place, to make sure that someone is there to ensure there is no preferential treatment.

...

Q: In the end, an informal standstill was given to the company, was it not?

A: It was, yeah. No banks took actions, so it was a – there was an informal standstill, yeah because – I think I will clarify: "standstill" means formal or informal. We have a formal standstill, it means everybody sign up on a piece of paper.

69 It is also not in dispute that the informal standstill allowed the plaintiff to repay the bank creditors eventually by March 2007. Vikas admitted that after the Meeting, none of the bank creditors filed writs or attempted to wind up the plaintiff. As a result, the plaintiff was able to realise its receivables and inventories in an orderly fashion and which enabled it to repay the bank creditors.

70 I further noted that Vikas conceded at one stage during cross-examination that he actually considered the informal standstill to constitute restructuring of the plaintiff's existing liabilities:

Q: I wanted to understand from you what you understood "restructuring financial arrangements" to mean. And I'm suggesting to you that it means to help with the banks in a way which would allow you breathing space.

A: Yes.

Q: Would you agree with that?

A: Agree.

Q: That means, because the context in which this agreement was entered into was all the demands that the banks had been making against you, that means giving the banks sufficient comfort and to assuage their concerns so that they will not enforce their demands against you; correct?

A: Yes.

71 Vikas' concession during cross-examination is unsurprising, given that the survival of the plaintiff hinged upon whether or not it received more time to repay its debts. However, Vikas shifted

his position during re-examination and proffered a new general definition of "restructuring":

> Restructuring, especially in context of banks, and you read it in the newspapers every day, with every day some company undergoing this or that. Basically means either the banks take a haircut; they say, "Instead of $100 I take $50" – or $25, whatever; or they say, "Okay, we waive you of interest" or give you – I mean, a loan in a different format. And then sometimes in terms of time period also, it is – short-term borrowings are converted into long term loans which could be three years or – like, minimum, one to two years but three years, five years, with soft interest rates and payment plans where the business could be revised and the money could be paid.

72 Vikas further attempted to proffer his definition of "restructured" in the context of the Engagement Letter:

> Well, the clear-cut understanding for me, and also during the discussions, was if I owe someone $100, it becomes $50; out of the 50, he keeps 5 per cent, I keep 95 percent. Not if I have to pay the same amount of money and still on top of that I pay another 5 percent, because there was no way I would be able to pay that 5 percent or it would have made any sense.

73 In my view, Vikas' suggestion as to what he viewed as "restructuring" in the context of the Engagement Letter was an afterthought. It was clear that at the material time, the plaintiff was satisfied to have its debts "restructured" in any manner which would ensure its continued viability – and that such a result could only be achieved if its existing obligations for immediate repayment to the bank creditors were deferred. Vikas' purported definition of the term "restructure" was also completely untenable as it would limit the definition of the said term to a deal which accorded the plaintiff with a reduction in its total liabilities.

74 Given the context in which the Engagement Letter was entered into, this clearly was not the case. The plaintiff was eager to "restructure" its liabilities in a manner which accorded it valuable time to repay its obligations. In this regard, there were many ways in which this could have been achieved. For instance if, instead of the informal standstill, the defendant had obtained the agreement of all the bank creditors to accept bonds issued by the plaintiff at 5% interest over the course of 5 years, the plaintiff's total monetary liability would still have been increased. Yet, in such a situation, the plaintiff would be hard pressed to argue that its liabilities had not been restructured even though all that the bond issue achieved would have been additional time for the plaintiff to repay its debts, albeit at a higher total cost.

75 I am therefore of the view that the informal standstill constituted restructuring of the plaintiff's liabilities *vis-à-vis* the bank creditors because the character of such liabilities had morphed dramatically. Prior to the informal standstill being granted, the plaintiff's liabilities were due and payable. This was a situation which could potentially cripple the plaintiff. After the informal standstill was granted, the plaintiff's bank liabilities were no longer due and payable forthwith. The plaintiff was therefore given the crucial breathing space it needed to repay its debts within an unspecified period of time. In the result, I find that the plaintiff's liabilities in relation to the bank creditors were restructured pursuant to the VAF clause as there was a significant shift in the temporal nature of such liabilities.

Was VAF payable on the Teledata deal?

76 The defendant's claim in respect of VAF payable on the Teledata deal, was: first, pursuant to (v) of the Scope of Work Clause (at [10] above) whereby the defendant had assisted the plaintiff in

securing an investor, *ie*, Teledata. Second, the defendant's work it was submitted, had resulted in the injection of new equity raised by the plaintiff pursuant to (c) of the VAF Clause (at [13] above).

77 The plaintiff denied that the defendant had performed work in relation to the deal involving Teledata. As a secondary argument, the plaintiff contended that the injection of funds by Teledata did not benefit the plaintiff. As a result, it was submitted, the defendant was not entitled to VAF pursuant to the Engagement Letter. I turn now to consider the two issues in turn.

Whether Nicky had performed work in relation to the Teledata deal

78 In the course of the trial, it was patently clear that the plaintiff's position that the defendant was not involved in the Teledata deal was untenable. Prior to the defendant being informed of the proposed investment by Teledata, the plaintiff was contemplating the execution of a deal with Teledata which was completely different from that which was eventually executed. This is clear from the draft LOI which envisioned a direct injection of cash by Teledata into the plaintiff in exchange for 60% shares in the plaintiff. Based upon the draft LOI and the complete absence of any evidence that the plaintiff was aware of the Holding Company Structure before the involvement of the defendant, it was evident that the only investment structure which was contemplated by the plaintiff and Vikas – prior to the involvement of the defendant – was a direct injection of funds by Teledata in consideration for shares. The question which immediately arose is: why were the agreements (at [49] – [55]) markedly different from the draft LOI?

79 Nicky's evidence as to why he had advised Vikas to adopt the investment structures was not only logical and cogent, it was also not contradicted at trial. Nicky testified that he met Vikas on 25 November 2006, and on this occasion explained the Holding Company Structure to Vikas diagrammatically; (the drawing was admitted into evidence). Vikas alleged, during the course of the trial, that it was he who had taught Nicky about the Holding Company Structure at the meeting on 25 November 2006. This allegation was, in my view, completely spurious. Nicky's expertise at the material time, in the realm of corporate finance was encapsulated in his *curriculam vitae*. In addition, if Vikas had personal knowledge of the sophisticated investment structures – without assistance from Nicky – which were eventually incorporated into the agreements, then Vikas would not have consulted Nicky at all in the first place.

80 Consequently, I have no hesitation in finding that the Holding Company Structure was incorporated in the agreements between Teledata and the plaintiff, because of the defendant's advice to the plaintiff.

81 Nicky had contended that he initiated the idea of US$5m VG Payment Structure and the Revaluation Excess VG Payment Structure which were eventually incorporated in the agreements between Teledata and the plaintiff. In support of his contention, the defendant tendered a Bundle of Teledata Diagrams ("Diagrams") which provided contemporaneous notes supporting Nicky's assertion. Neither Nicky's evidence in this regard nor the contents of the Diagrams were challenged by the plaintiff. As such, I find that the defendant had advised the plaintiff on the aforementioned two structures which were incorporated in the agreements between Teledata and the plaintiff.

The findings

Whether the Teledata deal involved injection of equity into the plaintiff

82 I find that the plaintiff's argument that the defendant was precluded from claiming VAF in respect of the Teledata deal, because the injection of funds accrued to Rainforest, was totally

unmeritorious. This is because the Teledata deal was structured in a manner which benefitted the plaintiff whilst Rainforest was a mere shell. This was readily apparent from the agreements between Teledata and the plaintiff. In short, Rainforest was merely a conduit to achieve the end of raising funds for the plaintiff.

Was VAF payable on the trade and supplier liabilities?

83 The defendant had also claimed VAF (see para 24(4) and (5) of the defence) for its advice to the plaintiff's management in collecting receivables, on how to manage suppliers who were concerned about Seagate's termination as well as the plaintiff's creditors. At Vikas' behest, the defendant dealt directly with Western Digital Corporation, one of the plaintiff's largest suppliers, on payment and return of inventory.

84 The plaintiff's former chief financial officer, Chay Suet Meng ("Emily"), and Nicky were cross-examined on this aspect of the defendant's claim. Emily had confirmed that the defendant assisted the plaintiff to answer questions raised by vendors and had advised her not to make undue preference payments to the plaintiff's creditors and suppliers. She further agreed that the defendant had to analyse the plaintiff's prospects of recoverability of trade receivables from its debtors. Emily did not affirm an AEIC for her testimony. Instead, a draft AEIC was presented to her in court (in exhibit P1) which she confirmed save for certain amendments. The thrust of Emily's testimony was that the defendant hardly did any meaningful work (except for work done for the Meeting) so as to earn the invoiced sums. I find this to be an unfair glossing over of the work carried out by the defendant. In my view, Emily's testimony may well have been coloured by the fact that she is currently employed by a company (Ezy Global Infotech FZE) which is largely owned by Vikas' family.

85 Nicky had testified that two to three members of his staff (including Dan Yock Hian ("Dan")) were stationed at the plaintiff's office on a daily basis from mid-November 2006 to early January 2007. The defendant implemented a disbursement request payment policy which stipulated that the plaintiff's management must give its approval before payments were disbursed in order to avoid undue preference payments being made by the plaintiff. It was also to ensure that the plaintiff made essential payments such as salaries and CPF contributions and paid parties that enabled the plaintiff to continue trading, such as its suppliers and vendors.

86 It was also Nicky's evidence that the defendant's staff had to manage the plaintiff's operations in the initial period of the defendant's engagement because, at that time, Vikas had apparently fled Singapore for fear of being investigated by the Commercial Affairs Department of the Corrupt Practices Investigation Bureau. Whilst this allegation was denied by Vikas, the undisputed fact remains that he and Emily were constantly on the telephone with Nicky (as evidenced by Nicky's mobile telephone bills in exhibit D5). Vikas had 6 telephone conversations with Nicky, while Emily had 40 telephone conversations with Nicky and 81 telephone conversations with Dan. She had also exchanged 60 short message services with them. I should add that Nicky's evidence that Vikas spoke to him on Christmas Eve of 2006 for 16.3 minutes on the Teledata deal was also evidenced in exhibit D5. Nicky testified that he took the telephone call on his mobile telephone because Vikas was afraid that Nicky's land-line was tapped.

87 I find that the frequency of the telephone conversations between Vikas and Emily with Nicky as well as the defendant's staff does not support the allegation that the defendant did very little work for the plaintiff during the short period of the defendant's engagement.

88 While the evidence conclusively shows that Nicky did substantial work in relation to the plaintiff's trade partners and suppliers, the question remains as to whether such work entitled the

defendant to VAF. In resolving this issue, the parties' intentions – as evinced in the VAF Clause at [13] above – is critical. In this regard, only (a) of the VAF Clause is relevant and Nicky's work, as discussed at [83] – [87] above, must have resulted in the plaintiff's trade/supplier liabilities being "written off, extinguished, avoided or restructured" in order for a claim for VAF to succeed.

89 In my view, the defendant's work in relation to the plaintiff did not entitle the former to VAF. The main difference between the plaintiff's trade/supplier liabilities and its bank creditor liabilities is that there was actually an informal standstill agreed to between the bank creditors. That was the restructuring of a significant temporal nature which took place in relation to the plaintiff's liabilities *vis a vis* its bank creditors. Such a standstill did not take place in relation to the plaintiff's trade/supplier liabilities. On the contrary, the evidence showed that the plaintiff *met* (emphasis added) its liabilities to its trade/supply creditors. Whilst the defendant undoubtedly played a key role in ensuring that the plaintiff met its obligations towards its trade/supply creditors, such work was only compensable pursuant to the Fees Clause as no value add – as defined in the VAF Clause – occurred.

The plaintiff's claim

90 In regard to the plaintiff's claim for an Account, I had earlier held (at [33]) that it was an implied term that the defendant would be liable to render an Account to the plaintiff. However, the plaintiff should have requested for the same within a reasonable period after the defendant's services were terminated which, as noted earlier (at [25]), was not the case. I accept in this regard the defendant's submission that Vikas had deliberately waited until after 3½ years had lapsed and the plaintiff's assets had been "hollowed out of the company" before he requested for an Account. Vikas (who is funding this action) wanted to ensure that the plaintiff was judgment proof before it commenced proceedings against the defendant. Indeed, the plaintiff's latest audited accounts as of 31 March 2009 showed it was/is insolvent as its liabilities exceeded its assets by some US$14m.

91 As the plaintiff's claim for an Account is a claim in equity, I find that there was an inexplicable delay in making the claim bearing in mind that the first time the plaintiff requested for an Account was by its solicitor's letter dated 6 August 2010, well after the defendant's second invoice had been issued on 6 February 2007. Although it was not said in so many words, the defendant's complaint that the claim was not made timeously is really that laches applied and the plaintiff should be denied this relief even though its claim was not time-barred. At the very least, the maxim: delay defeats equities should apply to the plaintiff. Had the plaintiff made its claim while it still had assets (*viz* before 31 March 2009), the defendant would have been able to enforce its judgment if it succeeded in its counterclaim.

92 I accept the defendant's contention that the plaintiff's request and current claim for an Account was neither genuine nor *bona fide* and should not now be entertained. The plaintiff has nothing to lose if its claim for an Account is unsuccessful. Apart from the security for costs it had furnished to the defendant, the plaintiff has no assets against which the defendant can have recourse to for its costs, over and above the $200,000 security. In this regard Vikas' statements under cross-examination are telling:

> Q: I'm suggesting to you that you chose August 2010, or September 2010 deliberately, as the date on which you could safely embark on this litigation without any downside to yourself. Isn't that true?
>
> A: Not true.
>
> Q: Would you be prepared to personally guarantee the payment of any judgment sum that may

be awarded to Mr Tan?

A: And why would I like to do that?

Q: Would you be prepared to do that?

A: No.

Q: Would you be prepared to guarantee the costs that will be paid to Mr Tan beyond the 100,000 should he be entitled to costs?

A: We have already deposited the 100,000 as opposed to ---

Court:Answer the question.

Mr Tong:I said beyond the 100,000, Mr Goel.

A: No.

Q: So you are content to sit here in your litigation knowing that there is no downside on judgment, debt or on costs against you, but with every potential upside, and you hide behind eSys, the company, as a shareholder funding this litigation, and collecting the fruits of the litigation, but at the same time running off to Dubai or to India should there be an adverse award against you. That's in reality the position you're in today, isn't it?

A: I disagree…

93 I found Vikas to be an untruthful witness whose evidence could not be believed. I say this because he had been caught lying in many other instances besides the incidents referred to at [799] and [86] above. As an example, I refer to another portion of his testimony where Vikas alleged that Nicky had told him that Nicky had lied in affidavits filed by the defendant on behalf of Asia Pulp & Paper Company Ltd ("APP") in Originating Petition No 2 of 2002 (see *Deutsche Bank AG & Another v Asia Pulp & Paper Company Ltd* [2002] SGHC 257). I had pointed out to Vikas that I dealt with that matter and had dismissed the bank plaintiffs' application to appoint judicial managers for APP. I did not recall Nicky filing any false affidavits in that case. The only affidavit he filed was to give his opinion that putting APP into judicial management was not in the interests of APP's creditors.

94 In contrast to Vikas' many inconsistencies, Nicky gave his evidence in a clear and forthright manner and without hesitation or contradictions.

Conclusion

95 I find that by virtue of the work done by the defendant, it is entitled to VAF pursuant to the Engagement Letter in respect of: (i) the bank liabilities that were successfully restructured by Nicky, and (ii) the Teledata deal. The defendant is therefore awarded interlocutory judgment with costs on its counterclaim for VAF. An inquiry shall be held by the Registrar to determine the amount of VAF with costs of such inquiry reserved to the Registrar together with interest on the VAF assessed. The VAF amount when assessed shall be paid from the balance of the Deposit. The balance thereafter of the Deposit if any, shall be utilised to pay any outstanding costs due from the plaintiff to the defendant over and above the security for costs of $200,000.

96 It follows that the plaintiff's claim for a refund of the balance of the Deposit is dismissed with

costs. Both sets of costs awarded to the defendant are to be taxed on a standard basis unless otherwise agreed.

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