Neutral Citation Number: [2023] EWHC 1988 (Comm)

Case No: CL-2018-000716

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 31/07/2023

Before :

MR JUSTICE CALVER

- -

Between :

(1) MR NOPPORN SUPPIPAT
(2) SYMPHONY PARTNERS LIMITED
(3) NEXT GLOBAL INVESTMENTS LIMITED
(4) DYNAMIC LINK VENTURES LIMITED

Claimants

- and –

(1) MR NOP NARONGDEJ
(2) MS EMMA LOUISE COLLINS
(3) MR THUN REANSUWAN
(4) MR AMAN LAKHANEY
(5) MS KHADIJA BILLAL SIDDIQUE
(6) COLOME INVESTMENTS LIMITED
(7) KELESTON HOLDINGS LIMITED
(8) ALKBS LLC
(9) GOLDEN MUSIC LIMITED
(10) SIAM COMMERCIAL BANK PUBLIC COMPANY LIMITED
(11) KHUN ARTHID NANTHAWITHAYA
(12) CORNWALLIS LIMITED
(13) KHUN WEERAWONG CHITTMITTRAPAP
(14) DR KASEM NARONGDEJ
(15) MS KHUNYING KORKAEW BOONYACHINDA(16) MR PRADEJ KITTI-ITSARANON
(17) MR NUTTAWUT PHOWBOROM

Defendants

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Justin Fenwick KC, George Spalton KC, Lucy Colter, Marie-Claire O'Kane, Ian McDonald, Carola Binney (instructed by **Willkie Farr & Gallagher (UK) LLP**) for the **Claimants**

Tim Penny KC, Ciaran Keller, Benedict Tompkins, Gretta Schumacher (instructed by **Harcus Parker Limited**) for the **First and Seventeenth Defendants**

Derrick Dale KC, Joseph Farmer (instructed by **Signature Litigation**) for the **Second to Eighth Defendants**

The Ninth, Twelfth, Fourteenth and Fifteenth Defendants were unrepresented

The Sixteenth Defendant was unrepresented and did not appear

Jonathan Davies-Jones KC, David Simpson, Georges Chalfoun, Clarissa Jones (instructed by **RPC**) for the **Tenth Defendant**

Ruth den Besten KC, John Robb (instructed by **Clyde & Co**) for the **Eleventh and Thirteenth Defendants**

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Hearing dates: Monday 17th October 2022 - Thursday 2nd March 2023

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 9:15 on Monday 31st July 2023.

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Mr Justice Calver :

FACTUAL NARRATIVE

BACKGROUND TO THE CLAIM

The parties to the claim

1. The First Claimant (**Mr Suppipat**) is a successful Thai businessman who founded Renewable Energy Corporation Company Limited (**REC**) in 2006 and Wind Energy Holding Company Limited (**WEH**) in 2009. He was co-CEO and a Director of WEH until 15 December 2014. The Sixteenth Defendant (**Khun Pradej**) is a co-founder of WEH.

2. Both REC and WEH are Thai companies. Mr Suppipat held an interest in 97.94% of the shares in REC through the Second Claimant (**Symphony**), the Third Claimant (**NGI**) and the Fourth Claimant (**DLV**) (together, **Mr Suppipat's Companies**). REC owned approximately 59.46% of the shares in WEH (the **Relevant WEH Shares**), a successful company involved in the development of wind farm projects in Thailand.

3. The Second Defendant (**Ms Collins**) was co-CEO and then CEO of WEH between September 2014 and December 2020. The Third Defendant (**Khun Thun**) was the former CFO, former Deputy CEO and a former Director of WEH, and the former Managing Director of REC. The Fourth Defendant (**Mr Lakhaney**) is the former Head of Corporate Finance and a former Director of WEH. Together, the Second to Fourth Defendants will be referred to as the **WEH Managers**. The Fifth Defendant (**Ms Siddique**) is Mr Lakhaney's wife.

4. Ms Collins is the beneficial owner of the Sixth Defendant (**Colome**), a company incorporated in the British Virgin Islands (**BVI**). Khun Thun is the beneficial owner of the Seventh Defendant (**Keleston**), a company incorporated in the BVI. Mr Lakhaney is the beneficial owner of the Eighth Defendant (**ALKBS**), a company incorporated in Delaware.

5. The Tenth Defendant (**SCB**) is the third largest commercial bank in Thailand and WEH's main lender. It was established by royal charter and its largest single shareholder, owning approximately 23% of SCB's shares, is the King of Thailand. The Eleventh Defendant (**Khun Arthid**) was CEO of SCB at the material time, as well as a board member (April 2015-present), Vice-Chairman of the Executive Committee (**ExCom**) (April 2015-July 2016) and President of SCB (July 2016-February 2019). The Thirteenth Defendant (**Khun Weerawong**) is a non-executive director of SCB and an employee (and co-founder) of Thai law firm Weerawong, Chinnavat & Partners (**WCP**).

6. The First Defendant (**Khun Nop**) is the owner of Fullerton Bay Investments Limited (**Fullerton**) and KPN Energy Holding Company Limited (**KPN EH**) (together, **Khun Nop's Companies**). His family owns a group of companies

known as the "**KPN group**". The Seventeenth Defendant (**Khun Nuttawut**) is a business associate of Khun Nop and former CFO of the KPN group.

7. The Fourteenth Defendant (**Dr Kasem**) is the father of Khun Nop. The Fifteenth Defendant (**Madam Boonyachinda**) is Khun Nop's mother-in-law.

8. The Ninth Defendant (**Golden Music**) is a company incorporated in Hong Kong. Madam Boonyachinda claims to be its beneficial owner, but it is alleged by the Claimants that the beneficial owner is instead Khun Nop.

9. The Twelfth Defendant (**Cornwallis**) is a company incorporated in Belize. Madam Boonyachinda claims to be its beneficial owner, but it is alleged by the Claimants that since June 2018 it has been beneficially owned by Khun Nop, and before June 2018 (at least) it was owned by Khun Arthid.

Transfer of REC shares

10. Prior to mid-2015, Mr Suppipat was, as I have stated, the ultimate beneficial owner of a very valuable majority stake (59.46%) in WEH, held through REC. The other main shareholders in WEH were another Thai individual, the sixteenth defendant Khun Pradej Kitti-Itsaranon (**Khun Pradej**), and companies and individuals (all Thai) associated with Khun Pradej, who held a 'blocking' stake of in excess of 25% of WEH. By June 2015 Mr Suppipat's entire shareholding in REC had been transferred to his companies Symphony, NGI and DLV. He gave evidence and I accept that the purpose of these companies was "*to hold [his] REC shares*"[1].

WEH and its wind power projects in Thailand

11. As mentioned, WEH is involved in the development of wind farm projects and it has and had (certainly prior to December 2014) a very valuable wind farm business in Thailand. In Thailand, private wind power projects can only sell electricity to the Electricity Generating Authority of Thailand (**EGAT**), a state-owned company. Prospective companies bid for and, if successful, enter into a power purchase agreement (**PPA**) with EGAT. The PPA sets out the terms under which EGAT agrees to purchase and the project company agrees to sell the electricity generated by the wind farm project. It also defines the payments that will be made for the project's electricity production.

12. PPAs usually provide for or envisage 3 key dates: (i) the Commercial Operation Date (**COD**) on which the project is operational and generating electricity; (ii) the Scheduled Commercial Operation Date (**SCOD**) on which the COD is scheduled to occur (or else, after a grace period, EGAT charges lateness

[1] Suppipat WS 4, [3]

penalties); and (iii) a Long-Stop Commercial Operation Date (**LSCOD**) by which the COD has to occur, or else the PPA is automatically terminated. The WEH Managers argued that, on the basis of Article 5 of an Order of the Energy Regulatory Commission of Thailand (**ERC**) dated 27 March 2012, only one six-month extension to the SCOD is permitted under Thai law. Such an extension would also result in the extension of the LSCOD. In cross-examination, Mr Suppipat maintained that a second extension would be granted if the applicant could show good reason for requesting it.

13. A fundamental assumption for any wind farm project is the amount of wind that can be expected at the project site. Terms such as "P50" and "P75" explain the likelihood of a wind farm producing a given level of electrical energy. "P50" denotes that there is a 50% probability that the electricity generated will be above a specified amount (and that there is a 50% probability it will be below that amount). "P75" denotes that there is a 75% probability that a specified level of generation will be achieved. "P90" denotes a 90% probability.

14. In late 2014, two of WEH's wind farm projects were operational, namely First Korat Wind (**FKW**) and KR Two (**KR2**) (of which WEH's effective ownership was 45%), although it is fair to say that both projects were experiencing a degree of underperformance compared to what had been predicted by modelling - approximately 15-20% below the P50 levels of production which had been predicted prior to construction. Further, there were some issues with the wind turbine foundations. As a result, a curtailment strategy was devised by which the projects would operate at a reduced capacity so as to avoid a total shutdown. The foundation issues ultimately required substantial repairs to 81 of the 90 turbines.[2]

15. WEH also held a minority 34.16% stake in the **Khao Kor** project through a company called Sustainable Energy Corporation Ltd (**SEC**)[3] and a majority 75% stake in the Watabak Wind project (**Watabak**). Both of these projects were under development, but Watabak was the next one intended to be made operational. There is no doubt that Watabak had the potential to be a very valuable project indeed as it geared up for construction towards the end of 2014:

    a. On 16 September 2014, the Watabak project signed a Turbine Supply Agreement (**TSA)** with General Electric (**GE**). The contract price was an aggregate sum of USD 100,723,884 plus THB 596,132,824 (c USD $18.4m) subject to adjustments provided for under the contract. As such, the TSA committed the project to certain payment terms and a significant deposit. Clauses 16.1 and 16.2 respectively of the TSA entitled GE to suspend work or terminate the contract in the event of default by Watabak of its obligations, including in relation to payment, and financing was not yet in place for Watabak to make the payments.

[2] Collins WS 1 [59], [62], [63]; Thun WS 1 [22]; Lakhaney WS 1 [25]

[3] Collins WS 1 [56(d)]

These payments had to take place by mid-March 2015, failing which GE was entitled to terminate the TSA.

b. On 21 November 2014, Watabak entered into a PPA with EGAT. Watabak's SCOD was 1 November 2015 and its LSCOD was 1 November 2016. Mr Suppipat confirmed in cross-examination that the terms were "*extremely generous*" to Watabak by reason of the fact that the Thai government was keen to encourage wind power development. However, under clause 11.3 of the PPA, lateness penalties would be charged at 0.33% per day on the guaranteed amount of electricity once 60 days had elapsed from the SCOD.

c. Towards the end of 2014, the costs budget for Watabak was around THB 5.8bn (c. USD 179m). Those costs were intended to be funded in the proportion of 25% equity and 75% debt. The equity portion was therefore c. USD 45m.

16. Additionally, by the beginning of November 2014 five further WEH projects, namely Krissana Wind Power, K.R. One, K.R.S Three, Theparak Wind and Tropical Wind, were in development (**the Future Projects**). Whilst they had each been granted a PPA by EGAT, they were all at a very early stage of planning. Each project required the creation of development plans and teams; as well as substantial funding and the securing of land rights. Project financing had not yet been secured.[4] Again, however, they clearly had potential to be very valuable projects.

17. Because these projects had the potential to be very profitable, WEH also had the potential for a very successful IPO and SCB was in pole position to finance WEH, with SCB looking at this time to increase its project financing in the renewables sector. On 11 November 2014 SCB's ExCom accordingly approved lending in principle to Khao Kor and the Future Projects, to cover 100% of the debt required by each project. SCB was committed to WEH's projects and WEH's future looked very bright at this time.

WEH IPO preparation: valuations of company in 2014-2015

18. It is a fact that private placements of WEH shares had taken place at THB 380 per share in or around March 2014 and at THB 550 and 570 per share in August 2014, against the background of general buoyancy in the Thai stock market.[5]

19. In 2014, Mr Suppipat and WEH accordingly began working towards what was anticipated to be a lucrative IPO of WEH's shares. The WEH Managers were

[4] Collins WS 1, [67]-[68]; Thun WS 1 [26] ("*the projects required approximately $1.4 billion in financing (in total) which had not been obtained*").

[5] Mr Lakhaney described it as "*a bit of a retail frenzy in Thailand in terms of stock markets and pre-IPO offerings*": Day 24/119:18-22.

central to this process. In this regard, Mr Lakhaney of WEH emailed various individuals at Morgan Stanley on 4 July 2014 following a meeting, stating: "*As discussed we are in a position where we are looking to start streamlining the IPO process and further decide how we want to proceed…*".

20. In July 2014, Bank of America Merrill Lynch (**BAML**) provided a "*preliminary*" pre-money equity valuation for WEH for June 2015 in the very substantial sum of THB 65-93 billion (USD 2.0-2.8 billion). Similarly, in January 2015, Morgan Stanley provided a range of pre-money equity valuations for WEH for August 2015 of THB 46.6 billion, THB 75.5 billion and THB 89 billion and a target post-money valuation of as much as THB 100 billion (being a valuation of USD 2.4 -3.1 billion). At this stage therefore there is no question that WEH was viewed as a very lucrative and successful business.

Mr Suppipat's exile and consequent exit from REC

21. Prior to his involvement with REC and WEH, Mr Suppipat was a director and shareholder of Griffon International Holding Limited (**Griffon**). In or around 2011-12 a dispute arose when a fellow Griffon director and shareholder, Mr Bundit Chotvittayakul (**Khun Bundit –** not to be confused with "Khun Bandit" referred to below), among others, accused him of embezzlement. In Thailand's Court of First Instance, Mr Suppipat was convicted of 13 counts of embezzlement and sentenced to 78 months' imprisonment[6]. The Thai Court of Appeal upheld the convictions but reduced his sentence to 56 months and he was ordered to repay Griffon[7]. The case was appealed further to the Supreme Court of Thailand.

22. Mr Suppipat eventually settled his dispute with 4 shareholders of Griffon, but not Khun Bundit. He exited Griffon in 2012.

23. When WEH began to consider an IPO in 2014, Mr Suppipat decided to attempt to settle with Khun Bundit so as to dispose the charges against him[8]. However, Khun Bundit refused to accept Mr Suppipat's offer of settlement, leading Mr Suppipat to secure the assistance of Commander Parinya, a former military man, as a "*mediator*" to "*try to apply pressure on Khun Bundit*"[9]. It was ultimately this altercation which led to criminal charges being filed against Mr Suppipat.[10]

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[6] Day 6/11-12.

[7] Day 6/12:14.

[8] Day 6/4:23 and T6/15.

[9] Day 6/16-17.

[10] Day 6/20-24.

24. Eventually, Mr Suppipat agreed to pay Khun Bundit THB 120min exchange for the withdrawal of the embezzlement complaints. They were withdrawn on 26 August 2014 and as a result the right to prosecute the offence was extinguished under Thai law.

25. However, on 1 December 2014, Mr Suppipat was charged with *lèse-majesté* (the offence of insulting the King, Queen and Heir to the Throne) under Article 112 of the Thai Criminal Code and other crimes. Mr Suppipat fled Thailand on 30 November 2014 after a tip-off in anticipation of the charges. Mr Suppipat claims he is innocent of the charges but accepted in cross-examination that they are potentially linked to the dispute with Khun Bundit. He is now resident in France, having been granted political asylum there in June 2015.

26. Mr Suppipat's flight from Thailand was reported in the Bangkok Post on 1 December 2014. In view of their role as WEH's funders, it was discussed on the same day at a meeting of SCB's Risk Management Committee.

27. A meeting of the SCB ExCom then took place on 2 December 2014. The resolution of the meeting records that the committee expressed concern that Mr Suppipat's arrest warrant might affect WEH's electricity generating licences since "*the Energy Regulatory Commission regulations state that energy business operators are required to never have been sentenced to prison by a final judgement of imprisonment.*" ExCom was concerned that "[i]*f Mr. Nopporn Suppipat is sentenced to prison, the company's energy generation licence may be revoked*.". It was therefore resolved that consideration of credit facilities for new WEH wind farm projects would be suspended pending "*further clarity in the new executive structure*". A presentation for the meeting was also prepared by SCB's Capital Markets Division (**CMD**) entitled "*Issues related to K. Nopporn Supapipat* [sic]", setting out under the heading "*Corporate Action*" various "*action*[s] *for continuing operation*" including adding to or changing the directors of WEH and REC.

28. By an email dated 2 December 2014, sent to each of Mr Lakhaney, Ms Collins and Khun Srisant Chitvaranund (**Khun Op**) (the latter being a childhood friend and advisor of Mr Suppipat), Khun Thun explained: "*banks… want to put everything on hold due to potential reputational risks issue with their board of directors. This will definitely have implications on Watabak and Khao Kor on different degree … Watabak COD will delay for sure … For Khao Kor, the project might survive*".

29. As Anucha Laokwansatit (**Khun Anucha**) (of SCB) explained, the *lèse-majesté* charges would have been a "*major point of concern*" for any bank in Thailand considering entering into a lending transaction with a company which had an association with Mr Suppipat[11]. Piphob Veraphong (**Khun Piphob**), Mr Suppipat's Thai tax solicitor and Partner of LawAlliance Limited, considered that "*It was public knowledge that the Thai royal family owned shares in SCB, so it would not have been permissible for SCB to deal with anyone charged*

[11] Anucha WS 1 [19]

under Section 112, and that if SCB did not want to lend funds to Mr Suppipat's companies then none of the other Thai banks would be willing to do so either"[12]. The WEH Managers similarly gave evidence regarding the impact of the charges on banks' willingness to finance WEH[13]. SCB's stance was accordingly very important.

30. Mr Suppipat accepted in cross-examination that, immediately after his criminal charges, SCB and "*all other Thai banks*", as well as international banks,[14] became unwilling to provide finance to WEH[15]. He also accepted that, within days of his flight from Thailand, he realised that this stance of the Thai banks posed serious difficulties for WEH and its projects while he remained an indirect shareholder of REC. He understood as a result that either control of WEH had to change by the sale of his shareholding in REC or WEH would have to sell off its projects for them to remain viable, lest WEH "*wither on the vine*".[16] He concluded: "*I had to sell [my shares in REC]*" [17].

31. Indeed, the fallout from the *lèse-majesté* charge was immediate and dramatic. On 3 December 2014, at the first board meeting following Mr Suppipat's flight from Thailand, WEH's Chairman of the Board of Directors, General Lertrat Ratanavanich, resigned. Ms Collins was accordingly appointed as a Director of WEH to replace him. The following day, Khun Pradej's nominated Directors resigned. On 13 December 2014, Khun Op resigned as a Director, informing the WEH Managers that his employer at the time, the Abraaj Group, had asked him to do so immediately.

32. On 8 December 2014, the Thai police froze Mr Suppipat's bank accounts in Thailand, including his accounts and credit cards at SCB. WEH hired a PR consultant to try to mitigate the damage. Although WEH's auditors, KPMG, were persuaded to remain, they only did so on condition that they would not be required to sign off any accounts from 2014 when Mr Suppipat had been associated with WEH.

33. On 15 December 2014, Mr Suppipat resigned his position as co-CEO and Director of WEH. From that point, Ms Collins became sole CEO. Mr Suppipat's involvement in REC and WEH was sufficiently "toxic" (a description used by Mr Suppipat himself in cross-examination) that his name seems to have ceased to be used in day-to day emails and by May 2015 he was being referred to as '*our friend'*, with most communications taking place via

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[12] Piphob WS 1 [4]

[13] Collins WS 1 [73]-[74] and [79], Thun WS 1 [24], [34] and [41], Lakhaney WS 1 [35].

[14] Day 11/64:14.

[15] Save for the existing syndicated lending on the already completed projects KR2 and FKW: Day6/80:8-25.

[16] Day 6/80:8-25 and Day 11/35-36:29. The charges "*put a complete spanner in the works"* in relation to building WEH's projects: Day 11/12:14-15.

[17] Day 11/35:22

Chettaya Pongpitak (known as **Khun Lek**), the former personal assistant to Mr Suppipat and (now former) WEH employee.

34. Mr Lakhaney summarised the state of affairs and issues facing WEH as a result of the charges against Mr Suppipat in an email to Deloitte on 23 December 2014: "*Through the board and then through resignations, we have removed Nick*[18] *from all boards, executive roles, committee memberships, etc…. However, given 'reputational risks' as [REC] owns 60.9% of WEH and Nick owns the majority of REC, no bank will let us draw down any money, and no domestic firm will start a relationship with us. The only solutions are (i) Nick situation gets resolved — not going to happen; or (ii) Nick is no longer a shareholder*."

35. As such, with the assistance of the WEH Managers, Mr Suppipat began to look for an investor to buy his stake in REC. One difficulty was that, under Thai law, WEH had to remain at least 50.1% owned by Thai shareholder(s). Mr Suppipat trusted the WEH Managers to continue to run WEH in his best interests in his absence and continued to remain in close contact with them (Ms Collins in particular).[19]

Impact on WEH's projects of the *lèse-majesté* charge

(1) Khao Kor

36. The Khao Kor project was a casualty of Mr Suppipat's *lèse-majesté* charge. In an email dated 28 December 2014, Khun Thun noted that the project would not obtain financing from "*any bank*" unless WEH diluted its shareholding in SEC (Khao Khor's holding company) from 34.16% (30% if fully capitalised) to under 10%. WEH accordingly complied with this at the beginning of 2015. It had a right to buy back its shareholding by March 2015 if Mr Suppipat was out of the structure.

37. Meanwhile SCB took swift action. On 12 February 2015, SCB's Credit Committee resolved to suspend further consideration of the Khao Kor Facility due to, among other things, the reputational risk associated with Mr Suppipat, and to refer the issue to its ExCom for further consideration.

38. On 17 February 2015, ExCom duly considered the Khao Kor Facility. SCB's CMD prepared a presentation which noted (in light of the dilution of WEH's holding in SEC to less than 10%) "*Legal risk to this Project by having K. Nopporn*[20] *as ultimate shareholder in WEH is considered minimal*". ExCom resolved to approve the Khao Kor Facility *"contingent upon discussions with*

[18] i.e. Mr Suppipat

[19] Suppipat WS 4 [13].

[20] i.e. Mr. Suppipat

the Executive Committee Chairman and approval by the Chairman of the Board, Chairman of the Audit Committee and Chairman of the Nomination, Compensation and Corporate Governance Committee according to the credit approval authority regulations for potential social impact loans".

39. Khun Thun emailed Ms Collins and Mr Lakhaney on 9 March 2015 explaining that there was a "*hard decision to make again re Khao Kor. SCB has issue with WEH as shareholder and wouldn't lend to the project. We have to exit completely (buy back option is acceptable) …*". Linklaters were asked to draw up a Share Purchase Agreement and a buy-back agreement.

40. Consistently with Khun Thun's email, by the end of March 2015 SCB was insisting that WEH sell its remaining interest in Khao Khor. The proposal put to the EGM of WEH on 27 March 2015 was accordingly that WEH sell its remaining shares, but with a right to buy them back in December 2015. The proposal would have allowed WEH (in due course) to retain an interest in Khao Kor and would have allowed financing to have been obtained for the project. However, the shareholders (including Khun Pradej and REC, i.e. Mr Suppipat) refused to adopt the proposal[21].

(2) FKW and KR2

41. Significantly, however, SCB did not suspend its existing lending to WEH's FKW and KR2 (operational) projects. Parnu Chotiprasidhi (**Khun Parnu**) (WEH's relationship manager at SCB) explained this on the basis that: (i) these were funds that had already been drawn down; (ii) SCB had already conducted feasibility studies for the projects; (iii) the projects had achieved COD and were generating power and revenue; (iv) SCB was part of a lending syndicate, which could have presented difficulties in calling default; and (v) the project companies had other shareholders (Ratchaburi and Chubu) who could be trusted to manage the projects if Mr Suppipat ceased to have an interest. However, this nonetheless demonstrates the attractiveness of WEH's wind farm business to SCB.

(3) Watabak

42. By March 2015, WEH was experiencing financial difficulties in relation to the Watabak project which did not have financing in place; construction efforts were on hold and the majority of the team working on it were made redundant. In consequence, on 26 May 2015, WEH applied to EGAT for an extension to the SCOD under the Watabak PPA. A 6-month extension was granted on 13 August 2015, such that the new SCOD date became 1 May 2016 and the LSCOD became 1 May 2017.

[21] Khun Thun's account of what occurred (Thun WS 1 [40]) was not challenged in cross examination : Day23/22:13-26:1.

Attempts to sell Mr Suppipat's shares: valuations of WEH

43. At the end of December 2014, Mr Suppipat set about trying to sell his REC shares. He originally sought a straight sale of the shares to an independent buyer. It is significant that by an email of 20 December 2014, Khun Thun proposed to the other WEH Managers that at that time WEH should have a valuation of US$1.8-1.9 billion (with a 25% discount). Mr Lakhaney agreed with this proposal. As will be seen, these numbers are significantly higher than the subsequent valuations of WEH put forward by the WEH Managers.

44. SCB produced two presentations entitled "*Discussion Material*" with regard to WEH in the course of their retainer for Energy Absolute, a company which was considering making an offer for WEH. It is also significant (as will be seen) that these contemporaneous, high valuations were made immediately *after* the *lèse-majesté* charge had been made:

    a. The SCB presentation dated 25 December 2014 suggests a US$2-2.5 billion valuation for WEH. The equity value range on "*SCB Case*" is stated to be THB 28.6-42.6 billion and on "*Client Case*" THB 44.9-66.7 billion. This presentation was attached to an email sent between two SCB employees stating, "*Draft version of presentation to discuss with Khun Arthid*".

    b. The presentation dated 13 January 2015 sets out that the equity value range on "*SCB Case*" is THB 21.5-33.5 billion and on "*Client Case*" THB 34.8-53.4 billion.

45. On 19 January 2015, Khun Thun set out his thoughts on a possible management buyout: envisaging an IPO within a year and suggesting that Mr Suppipat would receive USD 503 million immediately following the sale and a further USD 407 million following the IPO, "*comparing to USD 836mil in a straight deal*". It is clear that he considered that WEH remained a very valuable business.

46. It should be mentioned, however, that on 20 January 2015, REC sold 1.41% of its WEH shares to Thai Focused Equity Fund Limited for approximately $11 million. This price would have valued REC as a whole at about $450 million, although obviously this was only a small minority stake. In cross-examination, Mr Suppipat also explained this on the basis that this was REC in its "*darkest days*" and it involved an 100% upfront payment.

47. On 12 February 2015, there was an internal exchange of emails at SCB in respect of the value and acquisition of WEH, in which Khun Chuwinya Chittikuladilok asked "*IB team*" "*to prepare information and slides*" regarding "1) *Valuation justification – for the acquisition value 100% at [50,000-60,000]MB* [c USD $1.5-1.7b] ... " (the next section of the email is redacted) ahead of a "*special CC/special EXCOM next week"*. The attached SCB document, headed "*Acquisition Financing & Exit Strategies Discussion Material*", is dated 16 February 2015. The vast majority of the presentation is redacted.

48. Following 35 potential bidders signing non-disclosure agreements with REC, 9 Letters of Intention (but no binding offers) were submitted by 15 June 2015, as reflected in a spreadsheet entitled, "*Summary of bidding status June 2015 v2.xlsx*", which was emailed from Mr Lakhaney to Khun Thun.

49. The WEH Managers expressed interest in progressing the offers from Sun Edison Inc (**Sun Edison**), EREN Development (**EREN**) and Equis Fund Group (**Equis**):

    a. Sun Edison offered "*up to*" USD 850 million total consideration, with USD 90 million up front. However, the majority was deferred and contingent, to be determined by a "*return*" criterion (which included that Sun Edison should achieve at least 12.5% equity return on its investment). Mr Suppipat explained in his Witness Statement that it was not taken forward:

        "*because it was an earn out structure, the company was too speculative on their investment and … not exactly well managed. [It] went bankrupt not long after*"[22].

    b. EREN offered USD 440 million total consideration, with USD 165 million upfront and the majority deferred until after COD. In cross-examination, Mr Suppipat said this offer was similarly unviable. EREN dropped out in June 2015.

    c. The Equis offer was based on a valuation of USD 533 million, with up to USD 80 million upfront, plus a share of profits if an IPO took place. But part of the structure of the deal was the incorporation of an onerous commercial loan. In an email of 20 May 2015, Mr Lakhaney described Equis as "*keen and aggressive*". Mr Suppipat said in cross-examination that Equis' offer was the only viable offer.

50. The bidding status spreadsheet also illustrates how two of the interested purchasers had dropped out due to "*reputational*" risk. In particular, B Grimm (which had offered USD 384 million after completion of due diligence) had written a letter terminating their involvement in negotiations on 15 May 2015, "*based on results of [their] feasibility study*" which raised a "*number of complicated factors and technical restrictions*" which made it "*impossible*" for them to "*organise the transaction in the way which [they] would have generally been capable to proceed*". This included the fact they had not been able to trace the funds which Mr Suppipat had used to buy shares in REC and reference was made to the Khun Bundit embezzlement charges. In cross-examination however, Mr Suppipat insisted that he had never received inquiries from B Grimm about the funds he used to acquire the REC shares.

[22] Suppipat WS 5, [28]

51. Further, Gulf, a company which had submitted a letter of interest in December 2014 and later sent through a number of due diligence questions, is said in the spreadsheet to have made "*[n]o formal pricing offer after [due diligence] but verbal[ly] indicated [it] is under THB 300 per WEH share*".

MISREPRESENTATION CLAIMS

Initial negotiations

Mr Suppipat decides to sell to a nominee

52. In March/April 2015, Mr Suppipat started to consider using a nominee structure whereby a third party would acquire his REC shares and work towards an IPO (**Part A**) with Mr Suppipat retaining the right to repurchase his REC shares at a later stage through the exercise of a call option agreement (**COA**) (**Part B**) (Part A and Part B, combined shall hereafter be referred to as **the Global Transaction**). Mr Suppipat explained in his Witness Statement that he pursued a nominee structure because the straight sale offers received "*were either low in value, or complex, or involved little money upfront. They did not reflect the true value of WEH because I was seen as an enemy of the state*" and he "*did not urgently require the proceeds from a sale of the shares*"[23]. In other words, the offers (which were lower than the various contemporaneous valuations) sought to take advantage of Mr Suppipat's pariah status. I accept that evidence.

53. As such, on 25 April 2015, Mr Lakhaney informed the WEH Managers that he had, "*Just spoke[n] to [Mr Suppipat] – seems to be focused on this nominee sale*". This is clear contemporary documentary evidence that, by the time negotiations began with Khun Nop (see below), Mr Suppipat was seeking to sell to a nominee rather than a genuinely independent buyer.

54. However, issues were experienced in finding an appropriate nominee. Verwaltungs- und Privat-Bank (**VP Bank**), a bank based in Liechtenstein, was considered as a potential nominee. In an email of 27 April 2015 to Clare Lam of VP Bank, Khun Piphob explained that:

> "*Basically, NS would like VPB (or affiliate) to hold shares in REC (i.e. by purchasing NS shares with a promissory note) for a while and then we will do the entire business transfer at the WEH level. …*
>
> *If we cannot find a new potential buyer, we will either list REC or WEH by ourselves. In the latter case, if you cannot help NS to continue to hold shares during the listing process, a US hedge fund could replace your funds/affiliates before a listing application will be filed …*
>
> *The reason why we need to talk about the listing scenario is because the potential Thai Buyer has tried to discount the value of WEH substantially*

[23] Suppipat WS 4, [17] and [18]

– knowing that NS wants to exit. Hence, if we want to list REC or WEH by ourselves, we need to take NS out from REC first, so that WEH can complete its project finance for the new windfarm under the pipelines….".

55. The possibility of a nominee structure was also canvassed with the ACO Investment Group LLC (**ACO**). However, in an email of 27 April 2015, Mr Lakhaney explained to Mr Suppipat and Mr Baker (one of Mr Suppipat's lawyers) that ACO "*don't seem to be open to a 'nominee' fixed return type of arrangement*". At the time of his email, a meeting with VP Bank was scheduled and Mr Lakhaney commented that, "*pending*" their answer about acting as nominee, "*I think the only option then is to get Chris [Baker] for example as a nominee. As per Op, the new board will come in so long as NS is not there, we will stay in control and buy some time and have board protection from EA, Pradej etc*." His final comment in the email was that, "*At this stage, I do not see us getting a "quality" nominee that would allow for construction finance, etc. given the timeframe.*" This demonstrates a clear awareness on Mr Lakhaney's part that Mr Suppipat was focused on using a nominee despite the difficulties being experienced.

56. Negotiations with VP Bank ultimately failed. Khun Piphob explained in his Witness Statement that he "*believe[s] this proposal did not go ahead because senior management at VP Bank believed that, upon an IPO, the bank would need to disclose to the SEC the identity of Mr Suppipat as the beneficiary of the nominee arrangement*"[24].

57. On 30 April 2015, Ms Collins texted Mr Lakhaney saying, "*Op is not really helping is he?*" and "*He is v keen on Equis !!!*". Mr Lakhaney replied saying, "*Same story…nominee so NS can come back in…*". Ms Collins then responded, "*OMG!!! … I am ignoring the last sentence*". Ms Collins' evidence was that she was talking about the problem of finding a quality nominee, not the issue of Mr Suppipat coming back[25]. Either way, this exchange clearly shows that Mr Suppipat was pursuing a nominee structure and that this was known to the WEH Managers.

Negotiations with Khun Nop begin: the Global Transaction Structure

58. I accept Mr Suppipat's evidence that, having decided to pursue a nominee sale, he and the WEH Managers commenced negotiations with Khun Nop to that end in "*April or early May 2015*"[26]. Khun Nop's involvement had been proposed by Khun Op, who was in fact a mutual friend of both Mr Suppipat and Khun Nop. Khun Op was also a business partner of Khun Nop through the Abraaj Group. Mr Suppipat explains in his Witness Statement that he thought

[24] Piphob WS 2 [4]

[25] Day 21/118:2-19

[26] Suppipat WS 4, [22]

that Khun Nop would be a good option "*due to him being well known in Thailand, him telling me that he was very close [to] the Crown Prince (who later became King of Thailand), and because he was introduced to me by Op*"[27].

59. Mr Suppipat insisted in cross-examination that "*Nop ha[d] never been brought in as a bona fide buyer. He is a nominee*". I accept this evidence which is consistent with the documentary evidence, which shows Mr Suppipat's clear pursuit of a nominee structure. Khun Nop was to receive a fee by way of payment in exchange for participating as a nominee in the transaction, and for enabling an IPO at a later date when Mr Suppipat would re-acquire the shares under a call option.

60. The Claimants also say that, during the course of negotiations, Khun Nop and Khun Nuttawut represented to Mr Suppipat their intention to give effect to the Global Transaction, in particular to Part B as well as Part A (the **Global Transaction Representations**). In reliance on these representations, Mr Suppipat's Companies sold their REC shares to Khun Nop's Companies. As will be explained in detail, I accept the Claimants' case.

61. Khun Nop's case, in contrast, is that he never agreed to be a nominee and instead it was, in his words, a negotiation of "*two deals*" [28]. He says that the sale and potential buy-back deal were on two separate tracks[29] (i) with separate advisors (Linklaters working on the REC SPAs, and Stéphane Héliot (**Mr Héliot**) on the draft call options, with no cross-over at all), (ii) following separate timeframes (the REC SPAs were signed before the first draft call option was even produced), and (iii) with separate documentation (the REC SPAs not referring to, or expressed as in any way dependent or conditional upon, the proposed call option)[30].

62. Khun Nop asserted in cross-examination that a nominee deal was only considered for "*maybe one meeting*"[31], before an outright sale was envisaged. In cross-examination he said:

> "*I think what I recall is that on the nominee deal, the first Skype meeting with Mr Suppipat, and he suggest that he offered the deal of nominee deal, and I remember that he mentioned I have to pay him $175 million, and if we can IPO the company, he offer me $200 million. I asked him that I not understand, so is that 200 minus 175. He say yes, and I asked him whether*

[27] Suppipat WS 4, [21]

[28] Day16/16:14–17 ("*I think in the negotiation all along, it is always two deals. … [I]t's not going together between a straight sale and call option. It's always separate one*").

[29] D1 and D17 Closing Submissions, [96]

[30] *ibid*

[31] Day 16/13:16-17

that is a good deal. He said no, and he just laugh. That is how I recall the first meeting."[32]

I find that to be untruthful evidence.

63. Khun Nop said that he was "*prepared to listen*" to "*some kind of separate discussion of [Mr Suppipat] coming back in certain conditions"*[33] and alleged that his criteria when considering the call option proposals were: **"***First ... if [Mr Suppipat] get clear from all the criminal charges, including the 112; secondly, ... I am not going to do anything illegal; thirdly, it has to be commercially viable to me*".[34] I firmly reject this evidence which I consider to be untruthful. It is clear from the contemporaneous documentary evidence that, as Khun Nop knew very well, Mr Suppipat only negotiated with him on the basis that he would act as nominee.

64. Further, Khun Nop suggested for the first time in cross-examination that he told Khun Op over the telephone, on an unspecified date in May 2015, that he was prepared to proceed only on a straight sale basis[35]. I reject this suggestion. This was another lie of Khun Nop's. Unsurprisingly, the alleged May telephone conversation was not put to Khun Op, who gave evidence before Khun Nop.

65. Ms Collins also maintained in cross-examination that this was not a nominee sale and suggested that the structure looked similar to the Equis and B Grimm deals. I reject this evidence which is contrary to the contemporaneous documentary evidence, including that of Ms Collins herself.

66. On 16 May 2015, Mr Suppipat emailed Khun Op attaching a presentation on the "*Deal Structure*" (**the Deal Structure Presentation**) to be discussed with Khun Nop "*tmr*" [tomorrow] and requesting that Khun Op "*review it and let's go through this before the meeting*". I accept Mr Suppipat's evidence that "*this deal structure was developed after [Khun Nop] accepted to be a nominee*"[36] and it followed a series of discussions during which a proposed call option was described to Khun Nop and Khun Nuttawut, prior to the Deal Structure Presentation and the 17 May Skype Call.[37]

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[32] Day 16/14:4-12

[33] Day 16/15:10–17.

[34] Day 16/14:21 to 15:1. See also, in re-examination, Day 18/158:5–14: "*Q: [D]id you mean your evidence to be that from day one, you had decided not to entertain any call option agreement or buy-back agreement proposal regardless of whether it was commercially viable? A: No. If it fit with the three criteria, I am willing to listen ... no issue with the 112 charge or the criminal charges; I am not going to do anything illegal; and is commercially viable, I am willing to consider then.*"

[35] Day 16/20:3-18

[36] Day 6/121:16-122:13

[37] Suppipat WS 4, [22]–[29]; Srisant WS 1 [13]–[14] and Srisant WS 2, [8] .

67. According to the Deal Structure presentation, the total purchase price to be paid was USD 450 million and an initial cash payment of USD 75 million was to be "*recycled*". In cross-examination, Mr Suppipat said that this "*recycling*" would involve his borrowing from VP Bank, lending the sum to Khun Nop and then Khun Nop using the sum to pay back Mr Suppipat. Khun Nop insisted in his cross-examination that he never anticipated that Mr Suppipat (as the seller) would lend him (as the buyer) money to pay for what was being bought. Once again, I reject Khun Nop's evidence in this respect; I consider that Mr Suppipat is telling the truth about this. The intention at this stage was that Khun Nop would borrow the remaining $100 million of the First Instalment payments.

68. Khun Nop's complete lack of liquidity is consistent with the Claimants' case that he was brought in as a mere nominee. It also demonstrates that Mr Suppipat was already aware of Khun Nop's financial position by this point and, as such, negotiations must have already begun. Therefore, I accept the Claimants' case that Khun Nop had already agreed to be a nominee when the Deal Structure Presentation was prepared on 16 May 2015 and I reject Khun Nop's evidence to the contrary.

69. The Deal Structure Presentation includes a section entitled "*Proceed Sharing and Buy Back*". This refers to Part B of the transaction – the buy-back of the shares by Mr Suppipat under a call option – with Part A being the sale of the shares. As the fee for his services as a nominee, Khun Nop stood to make an enormous USD 216.25 million as he would receive back 20% of the purchase price of USD 450 million (i.e. USD 90 million) immediately following the IPO, with a further payment to follow one year later.

70. Further, the Deal Structure presentation envisaged management being placed in the structure for market presentation purposes, in order to give credibility to the transaction, and to assist with raising finance, which was critical for WEH's projects. I find also that, as will become apparent, Mr Suppipat wanted the WEH Managers in place to protect his interests in the Global Transaction.

The Skype Call of 17 May 2015

71. Discussions took place about the Deal Structure one day later on a Skype call of 17 May 2015 between Mr Suppipat, Khun Op, Khun Nop and Khun Nuttawut (**Skype Call**). There is no contemporaneous record of precisely what was said on the call.

72. However, we know that on the same day, 17 May 2015, Mr Suppipat emailed the Deal Structure Presentation to Mr Lakhaney, saying he had "*discussed it with Nop and Nuttawut via Skype today and they seem to like it*", and separately to Mr Baker, saying that the Presentation "*reflect[s] our teleconference this morn. It's slightly different from yours but with input from Nop's team and ours taking into the account*". Mr Suppipat's evidence is that in the course of these discussions Khun Nop and Khun Nuttawut: "*each indicated to me that they understood the Global Transaction and accepted that the intention behind it was that, in accordance with Part B, I would be able to reacquire my interest*

in REC"[38] and "*They have agreed to the deal. And I presented the structure to them and they liked it*"[39]. I accept this evidence and I find as a fact that, on the Skype Call, Khun Nop and Khun Nuttawut represented to Mr Suppipat that their intention was to give effect to the Global Transaction (in particular to Part B) (viz, the Global Transaction Representation) when, as their actions after this date make clear, in fact they held no such intention.

73. In cross-examination, Khun Nop denied that the Deal Structure Presentation was ever discussed on the Skype Call. I find that that was another lie. Indeed, this was never part of Khun Nop's case until he gave his oral evidence, and it contradicted his pleaded case, which is contained in paragraph 53(1) of the Defence of Khun Nop and Khun Nuttawut, where it is pleaded that:

> "*It is admitted that on or around 17 May 2015 NS prepared or caused to be prepared a presentation setting out a proposed deal structure for discussion with NN, that NS, NN and Mr Phowborom discussed a proposed deal structure via Skype, and that NS sent the proposed deal structure to Mr Lakhaney the following day*."

74. Further, when asked about the profit which he would make under a call option deal, Khun Nop alleged that he "*first hear[d] about the call option on the formula is after we sign[ed] the SPA*". That was another lie and it contradicted his witness statement in which he had said: "*I can recall NP mentioning a call option before the signing of the REC SPAs …. I recall that before signing the REC SPAs, NP mentioned to me that there was no call option in the REC SPAs … This was good as* ***the complicated call option that NS had been continually changing*** *had gone away…*" (emphasis added). It also contradicted his earlier evidence in cross-examination that "*I think in the negotiation all along, it is always two deals*". Khun Nuttawut also gave false evidence that he did not remember having seen the Deal Structure Presentation before.

75. Further, it is noteworthy that the Deal Structure Presentation is the first in a range of documents which consider the Global Transaction as a whole. The Defendants' argument that the sale and potential buy-back deals had "*separate documentation*"[40] since the latter is not referred to in the REC SPAs is therefore inconsistent with the documentary evidence as a whole. Similarly, the idea that they followed "*separate timeframes*" on the basis that the REC SPAs were signed before the first draft call option was produced ignores this constant, consistent consideration of the Global Transaction as a whole.

76. I therefore reject the evidence of both Khun Nop and Khun Nuttawut in this regard and find that the Deal Structure Presentation was discussed by them with Mr Suppipat in the Skype call of 17 May 2015 and that, during the call, Khun

[38] Suppipat WS 1, [65].

[39] Day 6/145:2-7 (see generally T6/143:14-145:7).

[40] D1 and D17 closing [96].

Nop and Khun Nuttawut led Mr Suppipat to believe that they intended to implement the proposed structure, which included the buy-back.

Nop is to be Mr Suppipat's nominee; no due diligence carried out

77. On 18 May 2015, Mr Lakhaney circulated to Mr Suppipat, Mr Baker and the other WEH Managers an Excel spreadsheet table on how the transaction with Khun Nop would work (**Deal Structure Spreadsheet**) which, in particular, demonstrated how the Part B repurchase price would be divided between Khun Nop, Ms Collins and Khun Thun. Again, it is notable that WEH was given a substantial USD $2 billion pre-money valuation. 40% of REC would be sold to the WEH Managers and they would eventually sell that stake back to Mr Suppipat for $10m each.

78. In his covering email, Mr Lakhaney states:

> "*…A few issues we will be discussing with Linklaters tomorrow whereby I don't think this looks like it is (i) a commercial deal that if someone external looked at they would think made sense; (ii) missing the cost of the upfront financing; (iii) tax issues in terms of an NS buyback …; (iii) attractiveness to KPN; (iv) Disclosures in an IPO – can we have a side agreement locked away not disclosed, and then NS comes back in at below market value – what happens?; (v) Need financing to repay Partners Group; (vi) How can we not sell shares when we need to pledge shares to banks; (vii) Can a Thai company / individual own Thai assets through a HK company – if they have to fully disclose this in an IPO. …*". (Emphasis added)

79. Ms Collins shared the concerns set out in Mr Lakhaney's email of 18 May 2015.[41] She was also surprised that KPN were a potential purchaser, given that they did not have a previous track record in the energy sector[42]. This factor further supports Mr Suppipat's evidence that Khun Nop was brought in as a nominee because he was not an appropriate candidate for a genuine, straight sale.

80. Mr Lakhaney's email also shows that Linklaters provided advice regarding (amongst other things) the "*NS buyback*". This also shows that the Defendants' case - that the sale and potential buy-back deals were on two separate tracks because Linklaters worked on the REC SPAs and Mr Héliot on the draft call options "*with no-crossover*"[43] - is false.

[41] Collins WS1 [117]; and [109].

[42] Collins WS 1 [114].

[43] D1 and D17 closing [96]

81. Mr Baker responded to Mr Lakhaney's email stating: "*Agree that all of your points need to be addressed*". He then offers comments on some of the points:

> "*[on] the first point, there really is no good answer : you have been trying to pull together a real deal with a real buyer and there appears to be no such deal on the table. I guess that I, at least, have come to the tentative conclusion that a credible commercial deal is not achievable given the position N is in. … Given this unfortunate situation, N he decided to do a deal with management and one sponsor who, together are prepared to put 75 of cash on the table. The entire balance of the price is vendor financing …. I agree that no vendor who could find a buyer would do this; but N cannot find a buyer. So the deal he is doing is quite transparently designed to deliver funding to him over the next several years, and to capture for him a significant part of the future upside through the terms of his vendor financing, and to put him in a preferred position, but with no contractual right, to repurchase all or part of his control position if that becomes politically feasible …. In addition, it would be my intention that the shareholders' agreement in REC, Manco KPN Thai and KPN KH, and pledges would make it impossible for the Purchasers to do anything other than to IPO the company, with a primary issuance of new shares … In my mind there is no buy back deal; I expect any legally binding buy back or call deal would indeed have to be disclosed. But the Purchasers also do not have any kind of liquidity – either at the WEH level, the REC level or even the Purchaser vehicle level without the Seller's consent, and the mutual agreement of the Manco shareholders and KPN. I would make the argument that the absence of liquidity justifies a significant discount on the vehicle shares, as compared to the WEH listed share equivalent value. N's control over their liquidity is one of the reasons he has accepted a very low up front cash payment and all the vendor financing. …*".

82. It is plain from this exchange that Mr Lakhaney and Mr Baker did not consider the proposed transfer to Khun Nop's companies to be a commercial deal; Khun Nop, with his lack of liquidity, was clearly not a genuine, competitive buyer. Further, it is notable that Ms Collins and Khun Thun were copied into the email exchange – as such, they too must have been aware that this was not a commercial deal.

83. On 20 May 2015, Mr Lakhaney emailed Mr Shahzad Lalani, a banker at the Bank of America, explaining that the deal with Khun Nop and KPN "*could move very quickly as they will not do DD"* (i.e. due diligence) and, as Mr Lakhaney stated in cross-examination, "*[t]hey weren't haggling on valuation*". Again, that is obviously because this was a nominee deal. Both Ms Collins and Mr Lakhaney described it as a "*friendly deal*" in cross-examination and Mr Suppipat explained in his Witness Statement that, "*[a]s far as I was aware, when the REC SPAs were entered into, Nop and Nutt had not undertaken any due diligence on the transaction, which was consistent with my expectations because Nop would only own the shares until they were sold back to me and*

that the price was below the true market value"[44]. I accept that evidence which is consistent with Mr Baker's contemporaneous email recited above.

84. Khun Nuttawut alleged that an external lawyer advised Khun Nop verbally about the merits of the sale, but there is no documentary evidence to support this suggestion which, again, I find to be false.

85. On 22 May 2015, Ms Collins sent a 100-page WEH document called a "*Management Due Diligence Memorandum*" to Khun Nop and Khun Nuttawut. Additionally, Ms Collins alleged in cross-examination that Khun Nop had access to a "*data room [that] was full of vendor due diligence packs*" which had already been compiled by the WEH Managers[45] and contained "*all of the due diligence from … legal, project, technical and financial*" [46]. Whether it be true or not that he potentially had this access, neither Khun Nop or Khun Nuttawut mentioned these documents when asked about due diligence in cross-examination. Khun Thun said that he was unaware whether Khun Nop and KPN accessed the data room. I find as a fact that they did not.

86. Khun Nop alleged in a related arbitration that he had relied upon a Deloitte report regarding "*what should be the right number to acquire this company and what's a reasonable price*" and at paragraph 23 of his Second Witness statement in this action he said that he had been briefed by Khun Nuttawut who had himself received draft reports from Deloitte. In cross-examination, both Khun Nop and Khun Thun alleged that, prior to the signing of the SPAs, Khun Nuttawut had said that Deloitte had raised "*no red flags*". Khun Nop admitted, however, that he never saw any such Deloitte report himself; that he was now aware "*that there was no Deloitte report until September"*[47]; and that Khun Nuttawut's belief that there was such a report was a "*misunderstanding*" on his part[48].

87. Khun Nuttawut sought to suggest in his initial evidence in these proceedings that Deloitte "*continued*" their due diligence after the REC SPAs had been signed[49] (implying that they had begun it before signature) but was forced to accept in cross-examination that "*[n]o due diligence*" had been conducted by Deloitte "*before the SPA was signed*". I consider that that is the true position and that any suggestion to the contrary is untruthful. Indeed, he was compelled to concede this in his Fifth Witness Statement, served after the trial had begun,

[44] Suppipat WS 4, [42]

[45] Day 21/29:25

[46] Day 21/30:1–3.

[47] Day 17/10:3-6

[48] Day 17/10:11-14

[49] Nuttawut WS 1, [19]

by reason of the contemporaneous documents. In that statement, confronted by the contemporaneous documents, he was compelled to admit as follows:

> "*2. I make this statement to correct an inaccuracy in my first witness statement. In the final sentence of paragraph I 9, I wrote that "Deloitte continued their due diligence after the REC SPAs were signed. .. " The implication was that Deloitte began its due diligence on the purchase of REC before the REC SPAs were signed.*
>
> *3. My solicitors have now drawn my attention to:*
>
> *1 an email from Thun Reansuwan to Emma Collins and Aman Lakhaney on 23 July 2015 in which Khun Thun indicates that Deloitte have "just started" a financial due diligence report;*
>
> *2 an email exchange between Khun Thun and Deloitte in August 2015; and*
>
> *3 a diary note for a "Kick-off meeting: Financial Due Diligence" (to which I was invited) on 27 August 2015.*
>
> *4. Now that I have read those documents, it is clear to me that I was mistaken in my recollection. I take this opportunity to correct the record*"

88. The contemporaneous documents are as follows:

    a. On 23 July 2015 Khun Thun emailed Ms Collins and Mr Lakhaney saying Deloitte had only "*just started*" their due diligence report and on 10 August 2015 Khun Thun emailed Deloitte setting out the scope of work required from them.

    b. An email exchange between Khun Thun and Deloitte then took place in August 2015 in which they discussed the scope of the work to be undertaken by Deloitte: "*Please find attached a RED FLAG Financial DD Scope for Deloitte krub. Understand that Khun Pathanasak (WEH Fin Controller) has contacted you already on availability of information and entities under scope. Our key requirements here is for Deloitte to help pointing out potential key concerns that might impact financial status of the Company from the latest audited/reviewed financial statements*."

    c. A diary note indicating that a Financial Due Diligence "*Kick-off meeting*" was to take place on 27 August 2015.

89. It was Khun Thun's evidence that these communications were only about a "*final*", "*detailed*" report and that Khun Nuttawut told him he had received a preliminary report from Deloitte before the conclusion of the REC SPAs. I firmly reject that evidence which I consider to be untruthful. There is no documentary evidence of a Deloitte report, whether preliminary/initial or otherwise, having been produced prior to September 2015 and I find that there was not one.

90. I therefore reject any suggestion by Khun Nop or Khun Nuttawut that they carried out any due diligence on the REC SPAs. They were proceeding on the basis that this was a nominee sale, such that the purchase price did not much matter (indeed, as has been noted, part of it came from Mr Suppipat himself).

91. A meeting between the WEH Managers, Khun Nuttawut and Khun Nop took place at KPN's office on 20 May 2015. This is said to be the first time that Ms Collins met Khun Nop. Ms Collins states in her Witness Statement that she asked Khun Nop and Khun Nuttawut if the transaction was a "*real deal*" and was "*assured*" that it was[50]. Additionally, Ms Collins alleges that, *"[a]fter the meeting, Mr Lakhaney received a phone call from [Khun Op] indicating that [Khun Nuttawut] and [Khun Nop] had been offended by the question"*. In cross-examination, Khun Op confirmed that he had made such a call after the meeting; Khun Nop "*had informed [him] that this nominee thing [had] to be a secret among [them], nobody need to know*"[51].

92. On 21 May 2015, Ms Collins emailed Mr Hessmert, Mr Suppipat's butler, with a table setting out the "*pros*" and "*cons*" of the proposed transactions with (i) Equis and (ii) KPN. At this time, Ms Collins was still working on the Equis deal and, as Mr Suppipat agreed in cross-examination, her email provided a "*very clear steer*" that the Equis offer was preferable. Regarding Equis, Ms Collins stated that the pros included that it was a "*[c]ommercial deal*" and involved "*[r]eal skin in the game*". The cons included a "*[l]oss of control until Equis exit*". Regarding KPN, the pros included "[*n]o real skin in the game*". The cons included that there is "*[n]o real commercial deal*" and "*[n]o power experience*". This is an important email. It shows that, contrary to her evidence, Ms Collins knew that the deal with Khun Nop was indeed a nominee deal as he had no real skin in the game. Indeed, she had sufficient information on the Khun Nop deal to send Mr Suppipat a comparative evaluation of it.

93. Consistently with this finding, on 2 July 2015, Mr Suppipat emailed Ms Collins and explained, "*When I met with [Khun Nuttawut] a few days ago he has made it clear that KPN is not an investor but they came in to help*". This again illustrates that Khun Nop was a nominee and that this was not a genuine commercial sale, a fact which I find was known to Ms Collins, despite her evidence to the contrary.

94. Mr Suppipat accepted that the WEH Managers warned him off the deal with Khun Nop[52] and that, despite Ms Collins' advice, he told Ms Collins to "*pull*" the Equis deal. Mr Suppipat sets out in his Witness Statement that:

> "*The reason that I entered into the deal with Nop was because the deal included a call option. If I had not sold the shares to Nop in 2015 with the understanding that the call options would be entered into, I would have*

[50] Collins WS 1, [119]

[51] Day 13/104:4-5

[52] Day 11/82:18-21

> *made a different deal with another person willing to agree to a sale structured with a buy back option. I would only have reluctantly agreed to a straight sale if I had no other option.*"[53]

I accept that evidence.

95. The progress with the Khun Nop deal was discussed in a text message exchange on 27 May 2015 between Ms Collins and Mr Lakhaney. Ms Collins said it is "*Good news [that Khun Nuttawut is] coming into [the] management team*" and, in response to a question from Ms Collins about his meeting, Mr Lakhaney said that they have "*Sorted the structure so productive I think*". This contradicts Mr Lakhaney's suggestion that he was kept on the periphery of the Global Transaction negotiations.

96. The same day, Mr Stephen Nash of Baringa Partners, a London-based management consultancy, sent a further email to Ms Collins, subject: "*forecast tool and models*", setting out a Baringa valuation of 100% of WEH of US$1.3 bn up to US$1.5 bn ("*If we add another ~17% for TV [terminal value]*"). WEH was still considered to be extremely valuable.

97. The following day, 28 May, Mr Lakhaney produced a "*Sale Structure*" presentation, and accompanying spreadsheet; and Khun Nop and Khun Nuttawut were provided with the draft SPA. The Sale Structure presentation sets out a draft structure in which it is stated (among other things) that: (1) Ms Collins and Khun Thun would form a part of the structure; (2) USD 100 million would be borrowed by a foreign bank; (3) prior to the transaction, the REC and WEH shares held by Ms Collins, Khun Thun and Mr Lakhaney would be sold back to Mr Suppipat.

Linklaters advice on disclosure of a call option

98. On 29 May 2015, Khun Piphob emailed Khun Nop, Khun Nuttawut, Khun Op, Khun Luk and Khun Sutthipong of Linklaters and the WEH Managers. Khun Piphob stated that he had just had a telephone discussion with Mr Suppipat, whom he said wanted to change the shareholding ratio in the structure circulated by Mr Lakhaney on 28 May 2015. Further, Khun Piphob specifically referred to how "[*a]fter the IPO, a call option will be exercised to purchase, from KPN SPV 2 BVI, the 49.99% REC shares and X% KPN SPV 1 (Thailand) shares*", and he discussed how to do this in a way "*[t]o avoid pricing disclosure*".

99. Mr Lakhaney replied stating, "*We should discuss but I do not believe a call option can be part of the structure i also don't think the below will get him around price disclosure*". Despite this observation, it was Mr Lakhaney's own evidence that the call option remained part of the overall deal structure until "*sometime in late September [2015]*"[54]. It was Khun Piphob's view that Mr

[53] Suppipat WS 4, [41]

[54] Day 24/128:5-130:22

Lakhaney "*just said that he did not agree with the email on the 49.99%. He did not think that it work, but it doesn't mean that he disagree or extend that conclusion to cover subsequent discussion on the call option*"[55].

100. In a further email to Khun Luk and Khun Sutthipong of Linklaters and Mr Lakhaney, which was sent later the same day (29 May 2015), Khun Piphob stated that Mr Suppipat also asked whether the mere grant of call options to purchase would require any disclosure to the Securities and Exchange Commission and Stock Exchange of Thailand, or if the disclosure requirement is only upon the ""*exercise*" [of the option] *for the tender purpose"*.

101. In response, Linklaters provided the following advice:

> "*Generally, a call option is not regarded as an acquisition of the shares (or voting rights over shares) underlying it, assuming that the option grantee does not have any rights to such shares (whether voting rights, rights to dividends, returns or any other interest). If the call option comes with the right of the option grantee to direct how the option shares are voted, the call option itself could be regarded as an acting in concert behaviour which results in a mandatory tender offer obligations of the parties involved.*"

Khun Piphob forwarded Linklaters' advice to Mr Suppipat.

102. In an email sent the following day (30 May 2015) to Khun Piphob (to which Mr Lakhaney was again copied), Linklaters provided a follow-up clarification to Khun Piphob's question regarding the call option, stating:

> "*To clarify my response, a call option (which does not give the option grantee any rights to the shares before the option is exercised) does not trigger any reporting requirement until it is exercised. However, if the option in place before the IPO, … [it would] need to be disclosed in the IPO documents*".

That advice was not copied or forwarded to Khun Nop or Khun Nuttawut.

103. Khun Piphob did not refer to this email in his Witness Statement. In cross-examination, he said of the email: *"it is not the end of the story. We explore with Linklaters one or two days after that. So we know the solution, even if there is a room of interpretation, but we have chance to implement, right"*[56]. In his written evidence he recalled that, after the date of these emails, he attended between 3 and 5 meetings, as well as phone calls, with Linklaters and Mr Lakhaney to discuss how the Securities and Exchange Commission and Stock

[55] Day 14/11:17-23

[56] Day 14/114:16-116:8

Exchange of Thailand would view the transaction[57] - evidence which was not challenged in cross-examination.

104. When Mr Suppipat was asked whether he knew that the call option would have to be disclosed in the IPO, he said:

> "*I think I did, my Lord…But I also believe that there is a way around this that can still allow me to pursue this option without breaking the law, and that was all along the thesis of the approach.*"[58]

I accept Mr Suppipat's evidence on this.

Increase in purchase price to $713m and the conclusion of the deal

105. On 31 May 2015, Mr Suppipat emailed Khun Op a spreadsheet regarding the "*economics of the deal*" with Khun Nop, which included an increased purchase price of $713 million and also the Part B call option. It is alleged by the Defendants that the price increase (from $450m) was to address the prospect that a call option would not occur. In cross-examination, Mr Suppipat said, however, that this price increase was because: (i) "*it could take [a] long time until [he got] acquitted of all the [criminal] charges…[s]o [he] thought more liquidity would be better*" and (ii) the "*lower risk*" to the buyer from the fact "*most of the payment [was to be] paid after the projects [were] built*" as opposed to entirely upfront[59]. That explanation is consistent with the contemporaneous documentary material above (in particular Mr Baker's email) as well as Mr Suppipat's Fourth Witness Statement, where he stated: "*the balance of the price under the SPAs (the US$525 million 'Remaining Amounts') was only due upon projects reaching commercial operation dates ("COD") and over two years post COD – this meant that the regulatory/construction risk was borne by the seller (i.e. me) in the deal and that Nop was not taking any risk*"[60].

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[57] Piphob WS 1, [17]

[58] Day 7/11:14-22. See also Day 7/28:6-23 ("*At the time, I believed there was – there was some kind of a measure to tackle this very problem, and I have to admit I did not spend time going through all the documents at the time…But I remember that when we pushed through this call option structure and everything, I was assured and affirmed that we would not break any law*"). See also Day 7/26:15-25 ("*the condition to exercise* [of the CoA] *was that I [was] acquitted of all charges. So in that case, I don't see any problem because once that happens, I would be – I would be the legitimate owner of the business, which means that exercise may never be, you know exercised at all*")

[59] Day 7/60:15 The second reason was also referred to in Nop WS 1, [45].

[60] Suppipat WS 4 [35]

106. Mr Suppipat did also fairly acknowledge in his witness statement that the increase was also as "*a form of risk mitigation, so that My Companies would be entitled to US$700 million whatever happened*"[61].

107. I accept Mr Suppipat's evidence on this topic which I consider to be truthful. As Mr Suppipat explained, Khun Nop's failure to push back on this apparently substantial price increase is revealing. No negotiation took place: *"I remember that there was no pushback from Nop or Nutt, but I would not have expected there to be any, because at US$700 million, Nop would get more money because the call option would be more expensive. Increasing the price to US$700 million meant that Nop would receive 20% of US$700 million as the minimum he would be paid*."[62] Consistently with this, as far as the WEH Managers were aware, the purchase price was increased without any consideration or negotiation as to how that would affect the economics of any call option being discussed between Mr Suppipat and Khun Nop[63].

108. Khun Nop's evidence as to the reason for the price increase was wholly unreliable. In cross-examination, he said: "*This negotiation, it's done by Khun Nuttawut, and that is what he informed to me, and the price increase that, you know, he told me from 450 to 700 […]. So I am okay with that, and one of the reasons that he told me that, you know, there should be no call option, which is okay to me. Not – he not using the terminology "call option", but he just give Mr Suppipat more upside.*"[64] However, Khun Nop's evidence in the Arbitrations told a different story entirely, namely that the increase was made in reliance solely upon a supposed report from Deloitte. Khun Nop had to accept in cross-examination that this version of events was false and that he did not have any report from Deloitte at the relevant time.[65]

109. Khun Nuttawut said that he could not recall the reason for this price increase[66]. Had it been in exchange for the dropping of the call option then I consider that he would have remembered that.

110. Khun Op's evidence was that he does not recall Mr Suppipat explaining the reason for the increase to him, but that:

> "*A…to me at that time, it doesn't strike me anything,* ***because as a nominee structure, it doesn't matter, if it is 450 or 700, or 500,*** *Nop will get, you*

[61] Suppipat WS 4 [36]

[62] Suppipat WS 4 [36]

[63] WEH Managers Written Closing [109]

[64] Day 16/119:24-121:7

[65] Day 17/4:22-8:16

[66] Day 19/48:18-25

know, his guaranteed payment, which linked to 0% of whatever, you know, money that is paid." (emphasis added)[67]

111. There is no single contemporaneous document in which the price increase is discussed in terms which suggested that it was given in exchange for Mr Suppipat abandoning the call option. Further, there are numerous references to the call option after the price increase on 6 June 2015 (and no evidence that this was the result of any confusion or uncertainty).

112. In the circumstances, I do not consider that the increase in price leads to the conclusion that the Global Transaction Representations were not (and could not have been) made. On the contrary, I find that they were made.

WEH Managers' continued involvement in the call option

113. Thereafter, the call option remained in play.

114. On 2 June 2015, Mr Lakhaney emailed the WEH Managers, saying that a meeting with Linklaters and Khun Piphob: "*simplified a lot of the insanity but ultimately the story of exit will need to be sorted out between Nop and [Mr Suppipat]. I will send out an updated structure diagram tomorrow*". Asked what this meant in cross-examination[68], Mr Lakhaney said: *"A. Well, if Mr Narongdej is buying the company what is the story around him having agreed a call option and selling his shares back to Mr Suppipat. It's not a normal transaction. It's not a normally heard about transaction."*[69]

115. Ms Collins met Khun Nop and Khun Nuttawut again on 3 June 2015 in order for her to give them an introduction to the business of WEH and to discuss (1) Watabak financing; (2) financing to replace a loan from Partners Group; and (3) financing for the purchase of REC. On Ms Collins' evidence, she hoped that Khun Nop would be able to assist in securing an extension to the Watabak SCOD from EGAT and in obtaining financing for the project.

116. On 4 June 2015, Khun Op emailed Mr Lakhaney attaching an Excel spreadsheet entitled "*WEH buy back calculation Final.xlsx*" which sets out how the consideration payable in respect of the call option was to be calculated. Specifically, it states that Khun Nop's "*Call Option price is 20% of Final Purchase Price*". The total purchase price is set out as $713 million. Mr Lakhaney forwarded this to Ms Collins and Khun Thun. There is no evidence of any indication from anyone that Khun Nop was not still willing to enter into Part B of the Global Transaction.

[67] Day 13/75:21-25

[68] Day 24/135:13-14

[69] Day 24/135:15-19

117. These emails again demonstrate Mr Lakhaney playing an active role in discussions about the deal with Khun Nop and keeping the other WEH Managers up to date with developments through his continued correspondence, which belies Mr Lakhaney's suggestion, which I reject, that he was kept on the periphery of the Global Transaction negotiations.

118. On 5 June 2015, Ms Collins emailed Mr Nash of Baringa asking for modelling that would provide a $700 million valuation. Mr Suppipat had input into this process. On 6 June 2015, Ms Collins emailed Khun Lek, Khun Thun, Mr Lakhaney and Khun Op saying that she thought a $700 million valuation had been "*agreed*" and provided a summary of "*our discussion on valuation*". Her email also notes that "*In the event of an IPO 50% of payments due at COD will be paid within 90 days of the IPO event*".

119. Finally, on 6 June, Mr Suppipat emailed Mr Baker to inform him that:

> "*It's done! We've agreed per below. In short it's 175M at closing + 525M contingent*".

120. On 8 June 2015, Mr Lakhaney emailed Khun Luk and Khun Sutthipong of Linklaters, Mr Baker, Khun Lek and Khun Op with an "*updated acquisition structure and valuation*" which was made *"[p]ost our friend's discussions with Emma this weekend*". He attached a WEH Discussion Document (presumably recording the essence of the discussions between Ms Collins and Mr Suppipat) titled "*Sale Structure – Renewable Energy Corporation Company Limited*" and dated 8 June 2015. This sets out a total purchase price of $700 million with $175 million payment up front and external financing being used for $100 million of that sum.

121. On 11 June 2015 Ms Collins asked Mr Baker as follows (copying in Khun Lek, Khun Thun and Khun Op): "*can you draft the current document relating to the call option and buy back so we can present a draft internally?*". Again and contrary to their evidence, this shows the WEH Managers' active involvement (this time Ms Collins') in the Global Transaction negotiations.

122. There is a further version of the "*Sale Structure – Renewable Energy Corporation Company Limited*", dated 11 June 2015, which sets out, under the "*Transaction Steps*" section, that *"[t]he transaction will be funded with US$ 75 mn of equity and US$ 100 mn of external financing, which shall be shared pro-rata by the purchasers*".

123. Also on 11 June 2015, Khun Lek sent Khun Thun a spreadsheet which calculated the "*Net Cash to BVI*[70] *(final pmt + call option*)". Khun Thun then sent an email to himself saying, "*Shouldn't deduct call option premium out of proceed to BVI*". This is further evidence of the WEH Managers (this time Khun Thun) playing an active role in the deal with Khun Nop and it is clear

[70] This is a reference to Khun Nop's companies

that discussions regarding the call option continued even after the price increase under the SPAs.

REC SPAs

The REC Share Purchase Agreements

124. On 19 June 2015, Mr Suppipat authorised representatives of his Companies to enter into share purchase agreements, which had been drafted by the Bangkok office of Linklaters, for the sale of REC shares between Symphony and Fullerton (**Fullerton SPA**) and NGI/DLV and KPN EH (**KPN EH SPA**) (together, the **REC SPAs**). The total purchase price was USD 700 million, being USD 357 million under the KPN EH SPA and USD 343 million under the Fullerton SPA. Khun Nop claimed in cross-examination that he never read the REC SPAs properly and that he relied on Khun Nuttawut to brief him on the "*headlines*". That is to be expected – as a mere nominee Khun Nop would not have been particularly interested in their detailed terms.

125. Under both the Fullerton SPA and the KPN EH SPA, fixed sums were to be paid (after an initial deposit payment of USD 12,250,000 and 12,750,000 respectively): (i) on the date of the completion of the sale of the shares (USD 12,250,000 and USD 12,750,000 respectively); (ii) 30 days thereafter (USD 12,250,000 and USD 12,750,000 respectively); and (iii) 60 days thereafter (USD 49,000,000 and USD 51,000,000 respectively). These initial three tranches (plus the deposit payments) totalled USD 175 million. A further "*Remaining Amount*" under each SPA (USD 257,250,000 and USD 267,750,000 respectively) of USD 525 million was to be paid according to "*milestone*" dates set out in an attached Schedule, which included 50% of this Remaining Amount within 90 days after the first day's trading of the shares after the anticipated IPO.

126. When asked what steps he took to satisfy himself that he could pay the initial tranche prior to signing the REC SPAs, Khun Nop could not name any specific sources of funds, except for his brothers.[71] Even to that extent, Khun Nop went no further than to say "*we just sitting face-to-face and talk among brothers"*, following which Khun Nop's brother said "*okay, just let me know the plan: and then at the end he didn't give it to me*".[72] He admitted that his brothers had refused him permission to use these funds the day before he signed the SPAs[73]. Khun Nop admitted he did not even have the USD 12.25 million available which was to be paid under the Fullerton SPA on the date of completion. He alleged it was his understanding that Mr Suppipat knew he

[71] Day 16/25:8-27:16. See also Khun Nuttawut's evidence: Day 19/66:10-68:10

[72] Day 16/25:8-26:16. Khun Nop's evidence was that his brothers confirmed that they were not willing to help fund the deal "*I think a day before I signing*" the REC SPAs: Day 16/32:17-21.

[73] Day 16/32:17-21

could not pay the first instalment at the time of signing, but that Khun Op had insisted that the SPA was signed quickly in order that financing could be obtained for the Watabak project.

127. The REC SPAs also contained, in particular, the following terms:

a. Clause 4 of both SPAs sets out various conditions precedent, including "*the Seller and the Purchaser having agreed upon a business plan for the Group and the Projects*".

b. Clause 10.2: "*The Purchaser agrees that it shall procure that the current Senior Management Personnel of the Group be retained at least 5 years after Closing to develop and maintain the Projects*".

c. Clause 10.3.1: "*The Purchaser agrees that it shall not sell any shares without the prior written consent of the Seller prior to full payment of the Purchase Price*".

d. Clause 12.2 is an entire agreement clause, according to which the parties agreed that their only right and remedy in relation to any representation, warranty or undertaking made or given in connection with the Transaction Documents would be for breach of contract and waived all other rights and remedies.

e. Clause 12.2.4 provides: "*Nothing in this Clause 12.2 excludes or limits any liability for fraud*."

128. Thus, whilst there was a prohibition in the REC SPAs under clause 10.3.1 on dealing with the shares in REC until the purchase price was paid in full, there was no specific prohibition on any dealing with WEH shares. Mr Suppipat's explanation for this was that an explicit prohibition was unnecessary because a sale of WEH shares was unlikely for tax reasons[74]. Despite the fact that selling the WEH shares would defeat the purpose of the prohibition in clause 10.3.1, the WEH Managers suggested that they understood that after the REC SPAs were entered into, it would be possible not only to pledge but also to sell the WEH shares in order to fund the purchase of the REC shares.[75] Mr Suppipat also envisaged that Khun Nop might pledge the shares to borrow money to pay Mr Suppipat or refinance borrowings taken out to pay him.[76]

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[74] Day 11/112:2-113:17, see also Day 11/125:25-126:22

[75] Collin WS 1 [147], [241] and Thun WS 1 [124]

[76] Suppipat WS 5 [40] (emphasis added): "*It is correct that the REC SPAs did not prevent Nop from pledging or selling the shares. Emma states at paragraph 147 of her witness statement that this was because Nop needed the ability to "sell, pledge or otherwise encumber REC's WEH shares" in order to raise the money needed to pay me. That is not entirely correct; under the KPN EH SHA and REC SHA, the WEH Managers were empowered to protect my interests as there could only be a sale of the KPN EH or REC shares with Emma and Thun's approval. In practice, the only situation where Nop would pledge the shares would be to borrow money to pay me or refinance borrowings taken out to pay me, and the WEH Managers could police that under the KPN EH SHA and the REC SHA*."

129. The REC SPAs do not specifically refer to the call option. Khun Piphob explained, and I accept, that this was necessary to avoid alerting SCB to the call option arrangement because he and Mr Suppipat understood that SCB would not have been prepared to lend to WEH if it had known that there was an executed call option agreement in Mr Suppipat's favour[77]. Indeed, this was the Defendants' own case as to the effect of the disclosure of the call option arrangement, as put to Mr Héliot in cross-examination[78].

The KPN EH Shareholders Agreement: the WEH Managers' blocking mechanism to protect Mr Suppipat

130. On 19 June 2015, being the same day that the REC SPAs were entered into, Fullerton, KPN EH, Khun Nop, Ms Collins and Khun Thun entered into a Shareholders' Agreement (**KPN EH SHA**) by which Ms Collins and Khun Thun were each to hold 20% of KPN EH. Allotting the WEH managers 40% of the shares in KPN EH reflected a 20% stake in REC at a value of approximately US$140m (based on the agreed purchase price of US$700m). No consideration was provided for those shares. I find, as the Claimants contend, that Ms Collins and Khun Thun held the KPN EH shares as nominees for Mr Suppipat pending his exercise of the call option, at which point it was understood that they would be transferred back to Mr Suppipat[79]. I accept the Claimants' case that these were allotted to them as part of the blocking mechanism under the KPN EH SHA to ensure that Mr Suppipat's interests under the Global Transaction were protected by Ms Collins and Khun Thun:

a. Article 20 of REC's Articles of Association provides: *"[REC] shall not take any action in respect of the following matters unless it has received the resolution of approval by majority votes from the Board meeting. Such approval by majority votes from directors attending and having the right to vote shall at least include the votes of one Group A Director, one Group B director*".

b. Article 20(2) of the Articles then provides that the relevant matters include "*Any acquisition, lease or disposal by [REC]…of any material assets or properties including and disposal by the Company of its shares in the Affiliated Company*".

c. Clause 7 of the KPN EH SHA provides: "*The shareholders shall procure, so far as they lawfully can, that no action is taken or resolution passed by the Company, and the Company shall not take any action, in respect of the Reserved Matters without the approval of at least one A*

[77] On being taken in re-examination to Mr Suppipat's witness statement in the Arbitrations: Day 14/153:24 – 155:6

[78] Day 15/24:4-24

[79] Day 11/164:10-13

Director, one B Director and one C Director or one D Director entitled to vote and present at a quorate Board meeting".

d. The list of "*Reserved Matters*" in Schedule 2 of the KPN EH SHA includes, at [2.3], any decision to be made by REC with respect to "*any sale, transfer, disposal of or creation of encumbrance over any shares held by REC in WEH and the initial public offering or listing of shares of WEH*".

131. I accept the Claimants' case that the KPN EH SHA was the mechanism by which Mr Suppipat's interests were intended to be protected following the signing of the SPAs[80]. Mr Suppipat said he trusted the WEH Managers - "*I trust them, because I hired them as top management…You can't run a business without trusting your top lieutenants*"[81] - and, as he explained in his Witness Statement, "*The purpose of the KPN EH SHA and REC SHA was to empower the WEH Managers to protect my interests and to secure the call option in the transaction, because the agreements had provisions which prevented the sale of the KPN EH or REC shares without the approval of the shareholders (allowing Emma and Thun to block a sale of REC)*"[82]. As Khun Piphob put it, "*the situation is quite complex, so Mr Suppipat did his best effort to check, to check to put all the measure that he could do it, to protect himself"*[83]. Allotting KPN EH shares to Ms Collins and Khun Thun meant that, per the KPN EH SHA, the disposal of REC's WEH shares could not take place without a vote in favour by them.

132. However, the WEH Managers deny this: Ms Collins insisted that their involvement was only "*to help give credibility to the financing and for a potential call option structure … they were the buyback mechanism*" but "*if there was no call option agreement, they were Mr Narongdej's shares*". As such, she insisted that she and Khun Thun were holding these shares as nominees for Khun Nop. I do not accept this evidence. Indeed, it is contradicted by Ms Collins's 7 July 2015 email stating that, "*Nick will not have a pledge on the shares so he is relying on the parties although given this includes management he is satisfied.*".

133. Further, Ms Collins' evidence was that she did not read the KPN EH SHA at the time[84]. Ms Collins is clearly an intelligent and diligent businesswoman and I find this suggestion to be implausible.

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[80] Day 12/45:18-23 and Mr Suppipat's evidence that Ms Collins could have influenced the execution of the call option "*because she is part of the buyers. And she has, through the two shareholders' agreements that I – architect, could to a certain extent exert a negative control*".

[81] Day 11/20:7-14

[82] Suppipat WS [38]-[39]. See also Day 11/164:4-167:18

[83] Day 14/139:6-24

[84] Day 22/27:25-28:3

134. Mr Lakhaney accepted that he was "*involved*" with the KPN EH SHA, and that Ms Collins and Khun Thun held their interest in KPN EH SHA partially on his behalf.[240] Whilst he said "*I don't recall any conversation with anybody around Ms Collins or Khun Thun or myself or anyone policing or blocking Mr Narongdej. This was in place for the call option*"[85], he accepted that these provisions gave Ms Collins and Khun Thun the ability to block any sale of the REC or WEH Shares until Mr Suppipat was paid the $175m[86].

135. Khun Thun accepted that the agreement gave him the right to block the sale of WEH shares - and to either permit or prevent the Kasem Transfer[87] (see below) - but maintained that (consistent with the Claimants' case) the KPN EH SHA was "*to do with the call options*" and that "*it wasn't my share at all. From the start, it's either – it's either Mr Narongdej, or if there is a call option, then the right to the call option is belonging to Mr Suppipat*."[88] Khun Thun, like Ms Collins, was unable clearly to explain the basis of a supposed belief that the beneficial rights to the shares would revert to Khun Nop in the event that no call option was agreed[89]. Khun Thun also alleged in cross-examination that he did not read the KPN EH SHA at the time. Again, I do not believe that evidence which is simply not credible. Indeed, Khun Thun later admitted in his evidence that he "*probably*" did read it in 2015, specifically after the REC SPAs were amended and restated in June 2015.

136. I accordingly accept Mr Suppipat's evidence on this point and reject the evidence of Ms Collins, Khun Thun and Mr Lakhaney. I consider that Ms Collins and Khun Thun were indeed placed into the structure (by receiving the KPN EH shares coupled with the KPN EH SHA, executed on the day the REC SPAs were signed) to ensure, in particular, that any sale of the WEH shares by the nominee, Khun Nop, could be blocked by them on behalf of Mr Suppipat. As a mere nominee, it was important that Khun Nop could be controlled in this way. It was only envisaged that the call option would be entered into after Part A of the Global Transaction, so Mr Suppipat wanted protection of his companies' interests in WEH in the meantime.

137. With this protection in place, on 22 June 2015, Mr Suppipat transferred 2,970,064 of his REC shares to DLV.

138. On 23 June 2015, Khun Thun emailed Khun Nop setting out points to discuss with SCB, including: "*Support on Project Financing for Watabak Project…We need to close Watabak by Mid-August 2015 latest*".

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[85] Day 25/14:12-17

[86] Day 25/14:18-23

[87] Day 23/80:4-24

[88] Day 23/81:5-12

[89] Day 23/81:13 – 82:4

The Advisory Services Agreement

139. An Advisory Services Agreement (**ASA**), dated 25 June 2015, but not executed until 3 August 2015, was entered into between NGI, Ms Collins, Khun Thun and Ms Siddique (Mr Lakhaney's wife), whom Mr Lakhaney said was included for tax reasons.

140. In an email sent on 22 July 2015 to Khun Lek (and copied to Khun Thun and Mr Lakhaney), Ms Collins states that "*I believe we have agreed a USD 10m fee – but deferred payments – which is why the sellers remain as NGI. Our friend will confirm to Lek and we can organise signature with NGI immediately*". In response, on the same day, in an email addressed to Ms Collins, Mr Suppipat confirmed that he was happy with the draft ASA, gave Khun Thun the "*green light*" to transfer Ms Collins' REC shares to Khun Nuttawut (this will be discussed below) and instructed that the transfer document should be backdated to 16 July 2015 (in order to make it appear that REC was not a foreign company). On 27 July 2015, Ms Collins provided Lek with a signed transfer document dated 16 July 2015. The ASA was finally executed on 3 August 2015.

141. Under clause 2.1 of the ASA, Ms Collins, Khun Thun and Ms Siddique (**ASA Ds**), agreed to provide or procure the provision of "*Services*" as specified in Schedule 1 from 6 April 2015 until completion of the "*Transaction*" defined as "*the direct, or indirect transfer of, the shares and other equity interests, directly or indirectly, in [REC] pursuant to the Share Purchase Agreements, together with the execution by the purchasers of their obligations thereunder including, without limitation, the payment to the sellers of the "Purchase Price" as defined payable pursuant to the [REC SPAs]*." (emphasis added).

142. These relevant Services included:

a. "*evaluating proposals from prospective purchasers on behalf of [NGI] and providing guidance with respect to the structure of the transaction*";

b. "*Co-ordinating, reviewing and negotiating all legal and related documentation*"; and

c. "*working with [NGI] to ensure that all the conditions precedent covenants and undertakings contained in in [sic] the [REC SPAs] are met and executed*".

143. The ASA Ds were also required, under cl. 2.2.3, to "*promptly notify [NGI] of any developments which may have had a material adverse impact on the Service Providers' ability to provide the Services or meet any other obligations under this agreement*".

144. In exchange, the ASA Ds were to receive a phased payment of USD 10 million each:

a. Under clause 3.1.1, they would each be paid USD 10 million for providing the Services to NGI;

b. Under clause 3.1.2, USD 6 million would be paid to Ms Collins, Khun Thun and Ms Siddique within 5 days after payment by the purchasers to the sellers under the REC SPAs of the initial USD 175,000,000 aggregate consideration payable under the REC SPAs; and

c. Under clause 3.1.3 USD 4 million would be paid after payment by the purchasers to the sellers in full of the first payment of the "*Remaining Amount*", as defined under the REC SPAs.

145. On the Claimants' case, the ASA imposed an obligation on the ASA Ds to take steps to ensure that Mr Suppipat's Companies were paid under the REC SPAs[90]. Further, they submit that the REC SPAs, KPN EH SHA and ASA must be considered together as they are core contractual documents which are revealing as to the parties' understanding of the nature of the transaction. These were, they say, all part of Mr Suppipat's blocking mechanism to ensure his interests under the Global Transaction were protected.

146. By contrast, the WEH Managers deny that the ASA imposed any prospective obligation on them to protect Mr Suppipat's interests in the Global Transaction. Instead, they say that the USD 10 million was a reward for two things. Firstly, to reflect services they had already rendered, including their efforts to assist Mr Suppipat in finding a purchaser for his REC shares. Secondly, as consideration for the transfer of their REC shares to Khun Nop's Companies and Khun Nuttawut. Under Part A of the Global Transaction, it was envisaged that Ms Collins, Khun Thun and Ms Siddique would transfer their shares in REC (1.06% and 0.5% respectively) to Khun Nuttawut and KPN EH to allow Khun Nop to acquire 100% of REC. The Managers say that the USD 10m payable under the ASA was in fact consideration for the transfer of their REC shares. They say that whilst a straightforward sale and purchase agreement was originally envisaged, they decided in June 2015 that, for tax reasons, it was preferable to receive the USD 10 million pursuant to an instrument unrelated to the transfer of the shares. Mr Suppipat conceded that the ASA was partly "backward looking" as a reward for their services and the shares, but the ASA Ds go further to say that it was completely "backward looking".

147. Ms Collins said the ASA "*was a simple, straightforward agreement, which was for the transfer, for the sale of our shares at the REC sale, and it was not related to -- it was not -- you know, there was no expectation that we could force the payment [by Khun Nop] of these shares".* When it was pointed out to her that she and Khun Thun had, by this point, very wide-ranging powers under the KPN EH SHA to block the onward sale of WEH shares she said only: "*I'm*

[90] Claimants' Written Closing [162]

sorry, that was never discussed with Nick or Mr Suppipat, that was never discussed"[91].

148. Khun Thun's evidence was that, pursuant to the ASA, Ms Collins and Ms Siddique were obliged to ensure that Mr Suppipat transferred his shares to Khun Nop, but not that Khun Nop ever paid for them[92]. I do not accept this evidence.

149. Ms Siddique said that she had never read the ASA and did not understand, when she signed it, that it imposed obligations on her[93].

150. I will explore this issue on whether the ASA was 'forward' or 'backward' looking in greater detail below when discussing the ASA-related claims. As will be seen, I find that Mr Suppipat is correct in saying that the ASA placed prospective obligations on the WEH Managers to protect his interests in the Global Transaction by (amongst other things) working to ensure that he received payment under the REC SPAs. The consideration payable under the ASA had not already been earned by the WEH Managers. Consistently with this finding, under clause 3.1 of the ASA, the payment of $10m was to be a staged payment, with each payment triggered by receipt from Khun Nop's Companies of the amounts due under the REC SPAs at the relevant stages.

151. However, the ASA Ds did not comply with the ASA obligations. Khun Thun accepted during cross-examination that, after January 2016, he did not so much as enquire into Khun Nop's intention to pay the outstanding sums due and that at no stage did he ever press Khun Nop to pay[94]. There is also no documentary evidence of any of the other WEH Managers enquiring as to the payment of the purchase price. Indeed, as will be seen, to suit their own financial benefit, the WEH Managers switched sides to assist Khun Nop. They removed Mr Suppipat's blocking mechanisms by terminating the KPN EH SHA and the ASA for their own financial gain.

Negotiations to enter into a Call Option Agreement

The First Paris Meeting

152. On 29 June 2015, Mr Suppipat, Khun Nuttawut, Khun Op, Mr Héliot and, on the Claimants' case, Khun Nop, met in Paris (**the First Paris Meeting**). On the Claimants' case, which I accept, this meeting consisted of 3 parts:

[91] Day 21/65:9-10

[92] Day 23/93:13-18 (Khun Thun)

[93] Day 26/76:6-17

[94] Day 23/94:23-99:17

a. The first involved a "*coaching session*" for Khun Nop on the wind farm business in Mr Suppipat's suite at the Peninsula Hotel. Mr Suppipat explained that this meeting was not just to celebrate entry into the REC SPAs but "*more about -- to explain the economic[s] of the deal further, but more about -- ... how to get to [a] 5,6,7,8 billion valuation. And, on the other hand, to make sure that he's a presentable and convincing nominee, he needs to understand the development process of the business*[95]. This was attended by Mr Suppipat, Khun Op, Khun Nop and Khun Nuttawut. Mr Suppipat's best recollection was that Mr Héliot arrived later[96].

b. A further meeting took place in Mr Suppipat's suite, immediately following the discussion above and following Mr Héliot's arrival, at which Mr Héliot explained the proposed call option mechanism to Khun Nuttawut in order to get his input ahead of circulating a draft agreement[97]. Khun Op and Mr Héliot's evidence was that Khun Nop did not attend this segment of the meeting[98].

c. A dinner later in the evening, which was primarily a social event to commemorate the signing of the REC SPAs[99].

153. The Claimants contend that at the First Paris Meeting on 29 June 2015, Khun Nop and Khun Nuttawut (dishonestly) repeated the Global Transaction Representations by discussing with Mr Suppipat the call option proposal and acknowledging a Global Transaction structure that included Part A and Part B as inseparable elements[100].

154. Mr Suppipat explained in his Witness Statement at [44], and confirmed in cross-examination, that "*Nop and Nutt didn't provide much feedback to me, but they showed no signs that they were not on board with the transaction structure and the call options…Nop and Nutt agreed with me when I said that the next step was to finalise and execute the call options*". I accept this evidence.

155. Khun Op's evidence in contrast was somewhat inconsistent. His evidence in the arbitration was that, during this meeting, *"... the key terms of the Global Transaction were initially agreed and it was my understanding that Part A of the Transaction was inseparable from Part B ...*". However, his evidence about this meeting in his Witness Statement for this trial was that "*... We went through the transaction in detail. Nop and Nutt complained about the amount*

[95] Day 7/97:10-98:1, 100:3 (Mr Suppipat); Day 13/164:10-164:2 (Khun Op)

[96] Day 7/100:8-20 (Mr Suppipat); Day 13/164:10-164:2 (Khun Op)

[97] Day 7/101:6-18 (Mr Suppipat); Day 13/114:13-25 (Khun Op); Day 15/12:23-13:8 (Mr Héliot)

[98] Day 13/80:12-14 (Khun Op); Day 15/12:15-17 (Mr Héliot)

[99] Day 7/98:18-99:1

[100] RAPOC, [46.9] and [48.1]

of funds that Nop's companies had to borrow to make the payments under the sale arrangement and felt that, relative to this level of risk, they weren't getting enough money to act as nominees." Khun Op was asked about this in cross-examination:

> "***Q. … It is a very different summary, isn't it, from your summary in the arbitrations?***
>
> *A. Yes, they can have their opinion, but they have not say no, that they will not do it; they just don't understand the transaction and they just questioning.*
>
> ***Q. They didn't understand the transaction and they asked questions about it?***
>
> *A. Which is normal, right, for them to have questions, and it's normal for Stéphane to explain. That is the whole point of the meeting.*"

156. When it was suggested to Mr Héliot that what actually happened at the meeting was that "*Mr Suppipat proposed a complicated deal involving a call option, and other arrangements, and Khun Nuttawut listened politely to the proposal, which he was willing to take back to Khun Nop but without any commitment*"[101], Mr Héliot explained: "*That is not my recollection. My recollection is that I met with all three gentlemen [Mr Suppipat, Khun Op and Khun Nuttawut], whom I had not met before, and all of them were trying to brainstorm a legal way to achieve an intended economic result which had been agreed between them. So the complication was the legal structure; it was not the business deal*."[102]

157. Consistently with this evidence which I accept, Mr Héliot produced a document headed "*Notes from meeting – 29 June*". The note reflects the existence of the "*Call Option*" and "*REC Call Option Signing*" and sets out "*REC Call Options Terms*". Mr Héliot explained in cross-examination that the note was to set out "*the factual elements arising from the meeting which were necessary for [him] to draft the agreements that [he] was meant to draft*", including: the payments to be made for the REC shares, the steps to be taken with regard to signing and exercising the call option, and the terms of the call option.

158. In cross-examination, Mr Héliot insisted that this document was produced on the day of the meeting. Further, he claimed that the notes are "*not a reflection of direction given to me by Nick. They are a reflection of each and every person who was attending the meeting in Paris' instructions to me as to*

[101] Day 15/13:24-14:4

[102] Day 15/14:5-11. See also Mr Héliot's evidence at Day 15/18:5-18 : "*the notes are not a reflection of directions given be me by Nick. They are a reflection of each and every person who was attending the meeting in Paris' instruction to me as to what I should be drafting*".

what I should be drafting". Again, I accept his evidence in this respect: Mr Héliot was a thoughtful and transparently honest witness.

159. The notes concluded with a comment that Mr Héliot would "*send emails to NP who will review/liaise with counsel*". Mr Héliot accepted that he was aware at the time when he prepared the notes that everything was subject to review and advice from counsel on Khun Nop's side.[103]

160. By contrast, although Khun Nuttawut accepted that Mr Suppipat raised the call option with him at a short meeting before the dinner, he said that he merely "*listened to the suggestion*"[104] and, whilst he and Khun Nop were prepared to consider a call option if it made commercial sense, they would have needed to think about whatever terms were proposed. He said he did not agree to anything on Khun Nop's behalf and Mr Suppipat knew that he was not empowered to do so. However, when taken in cross-examination to Mr Héliot's note which records – in detail – the steps to be taken up to signing and exercise of the call option, Khun Nuttawut was unable to identify any specific inaccuracies in Mr Héliot's account of what had been discussed[105]. I therefore reject Khun Nuttawut's evidence on this.

First draft Call Option Agreement

161. Again, consistently with his evidence, the day after the meeting Mr Héliot emailed Khun Nuttawut "*a draft of the call option as discussed yesterday*" (**first draft COA**). In cross-examination, Mr Suppipat said he was "*responsible for drafting [the call option] with Mr Héliot*".

162. This first draft COA provided for a guaranteed return of 20% of whatever sum was paid to buy the shares as a profit plus 20% of whatever increase there was in the value of the shares over and above the amount that had been paid. The first draft COA also contained the following material terms:

    a. By clause 2.1.1, Fullerton granted Symphony an irrevocable option at any time during the Call Option Exercise Period to acquire its 49% shareholding in REC, in consideration for the Purchase Price, on the terms and conditions set out in the Agreement. The Call Option Exercise Period is defined on page 3, as the period commencing on the third anniversary of the Signing Date and ending on the date that is six years after that. The draft COA did <u>not</u> provide that the call option could only be exercised if the charges against Mr Suppipat were dropped.

[103] Day 15/18:23 and 19:1.

[104] Nuttawut WS 1, [35]

[105] Day 19/83:2-24 . Asked "*What in here was not discussed? Firstly, take this page and tell us what was not discussed on this page*?", Khun Nuttawut said: "*This, I don't know, this is not the note taken by me*".

b. By clause 2.2, Symphony was to pay to Fullerton within 10 business days of the Signing Date, the "*Call Option Consideration*", defined as comprising two elements:

    i. First, a Call Option Floor of $75 million. That effectively cancelled out the $75 million loan which Mr Héliot's notes of the First Paris Meeting contemplated would be made by Symphony to Khun Nop's companies as part of a vendor financing scheme.

    ii. Second, 9.23% of the amount of any payments made under the SPAs in excess of $375m, being a maximum, assuming all of the $700m potentially due under the SPAs had been paid, of c. $30 million.

c. Clause 2.3 provided that if the call option was actually exercised at some point in the future, which might or might not take place at any point up to 6 years after the post-IPO Signing Date, a Purchase Price would be payable. The Purchase Price formula, when unpacked, is:

    i. *the Relevant Percentage* — defined at (i) as 65% of the value of Fullerton's 49% shareholding in REC;

    ii. *of the Company Valuation* — defined at (ii) as (A) the percentage of shares held by REC in WEH, at this stage 59.46% (although it was contemplated that would be diluted post-IPO to 51%, which would reduce the Purchase Price); (B) multiplied by the weighted average price of WEH's shares in the 60 trading days before the exercise of the option; (C) minus REC's net debt (which it was contemplated would be small);

    iii. (simplified, (a) and (b) above can be expressed as 65% of 49% of 59.46% of the value of WEH's shares, which equates to just under 19% of WEH's value);

    iv. *less the Price Adjustment*, defined at (iii) as the total Call Option Consideration, which is to be deducted from any Purchase Price payable.

163. Khun Nuttawut did not respond to the email providing the first draft COA. His evidence was that he may have missed the email while on a flight to Thailand and/or was "*too busy with other thing[s]*" to read the draft in detail[106]. According to his iPhone diary, he was flying overnight from Paris to Bangkok. However, no explanation has been provided for his failure to correct what would have been, on his case, a significant misunderstanding on Mr Héliot's part that the call option had been agreed in principle. Khun Nop alleged in cross-examination that he did not recall seeing the first draft COA and that, at

[106] Day 19/90:3-91:6; Nuttawut WS 1 [37]

the time, he "*was not in the loop*". Further, he said he would never accept such an offer as "*we expect[ed] more return*". I reject this evidence which I consider to be inherently unlikely in view of Khun Nop's nominee status.

164. The first draft COA states in its preamble that, "*In light of developments since that sale, including the initial public offering of [WEH], the Beneficiary has expressed an interest in repurchasing the Shares from the Grantor*". This reflects the parties' intention to only sign the call option agreement after the IPO had taken place. Hence Mr Suppipat admitted in cross-examination that the COA was to be "*undated*" so that the parties could "*keep it between [themselves]*" and not disclose it on an IPO. It is the Claimants' case that, following the clarificatory response from Linklaters on 30 May 2015, the plan was to place a partially signed COA (signed by Khun Nop) in escrow[107] (see further below).

165. On 2 July 2015, Mr Suppipat emailed Ms Collins. He stated as follows (the WEH Managers referred to this in submissions as their **Second Incentive Scheme**):

a. Khun Thun had "*informed [me] that you guys are still expecting the 10M so I told him that I think I can still afford to pay 30M*" – this was despite the fact that at closing with "*KPN*" he was "*getting roughly half of what [he] would've got if the [B Grimm] deal goes through*".

b. However, this USD 10m would be paid in two tranches: USD 6m as soon as Mr Suppipat had received USD 100m from Khun Nop's companies under the REC SPAs and USD 4m after the IPO when he had received the further payment (and preferably when the call option had been signed). This again shows that the WEH Managers' consideration under the ASA was linked to payment by Khun Nop's companies.

c. He had structured and negotiated with Khun Nop a separate package, which entailed:

i. a payment of USD 11.67m to each of the WEH Managers (USD 35m in total) "*after IPO [of WEH] when the call option is signed*"; and

ii. a final payment when he "*exercised the call option in 2020*".

d. Furthermore, Mr Suppipat observed in this email, "*It is very important that all our interests, including KPN's, are aligned. In this case they're only aligned when we achieved the long term goal above – not when we close the deal*."

166. Mr Suppipat's email also again emphasised the fact that Khun Nop was a nominee: "*When I met with Nattawut [sic] a few days ago he has made it clear that KPN is not an investor but they came in to help. He explained that the first*

[107] Claimants' Written Closing [100]

25M payment is actually more like a loan to help me pay all kind of expense", i.e. a nominee arrangement with a COA.

Second draft Call Option Agreement

167. Khun Nuttawut likewise failed, again without adequate explanation[108], to respond to a further draft COA sent by Mr Héliot on 10 July 2015 (**second draft COA**). The Defendants highlight that, according to his iPhone calendar, Khun Nuttawut flew to London on 10 July 2015, returning on 13 July 2015. But again, this is no reason to not respond to what would have been a significant misunderstanding, especially since the COA had clearly been developed by Mr Héliot in the intervening period.

Consideration by SCB of Khao Kor

168. SCB's Credit Committee considered Khao Kor again on 9 July 2015. The presentation by the CMD shows that SCB had by now become aware of two important developments. First, a further change in the shareholding structure of Khao Kor whereby the intermediate holding company SEC had been entirely removed and the shares of Khao Kor were held by three shareholders not including WEH. Second, the impending sale of Mr Suppipat's interest in REC to KPN. The Credit Committee expressed concerns about the shareholder restructuring of Khao Kor but referred the matter to the ExCom for further consideration.

169. The Credit Committee resolved, on 9 July 2015, not to finance the Khao Kor project until REC had sold its WEH shares to KPN EH.

170. SCB's ExCom considered the matter later the same day. It passed a Resolution on 9 July 2015 (signed by Khun Yol Phokasup on 5 August 2015). This stated: "*the meeting attendees are unable to consider the spending of the credit facilities until the following issues are addressed or rectified: 1. KPN purchases all the Wind Energy Holding Company Limited (WEH) shares currently held by [REC], the price of the aforementioned shares is paid in full and the transfer of the aforementioned shares is legally valid, whereby KPN would become WEH's new majority shareholder. 2. Ensure that Wind Energy Holding Company Limited (WEH) shall resume the shareholding of approximately 9% in [Khao Kor] as before the shareholders restructuring*." (emphasis added)

171. Regarding condition (1), it was Khun Anucha's evidence that he did not believe it was "*ever altered as a requirement*". Payment of the shares had to be made in full before credit facilities would be made available. A particular concern with regard to condition (2), which the ExCom noted in its resolution,

[108] Nuttawut WS 1 [27]; Day 19/90:20-91:6

was "*whether WEH or other stakeholders hold any right to bring a lawsuit in order to revoke SEC's sale of [Khao Kor]'s shares as they were of the opinion that the sale of [Khao Kor]'s shares was at capital price*". Khun Anucha accepted that capital price meant "*book value*"[109] and that the members of the ExCom were "*expressing concern that a sale at book value raised doubts about whether it was a fair value in good faith*."[110]

172. Khun Anucha's evidence was that ultimately no sale (at book value or at all) took place and so the problem resolved itself[111], because following the conclusion of the REC SPAs, Khao Kor entered into a lending facility with a different bank. But Khun Anucha agreed that the bank's requirement would otherwise have been that the sale of Mr Suppipat's interest in WEH to KPN should be completed and paid for before funding for Khao Kor was approved[112].

SCB's failure to enquire into (i) the deferred payment structure under the REC SPAs and (ii) the "Gentlemen's agreement"

173. The 9 July 2015 email exchange also includes the following email from Khun Anucha: "*Please make sure we understand the terms of WEH sale to KPN. I understand that the settlement of the shares includes some deferred payments to K.Nopporn. Is there any risk that the shares will revert to K.Nopporn if KPN defaults on the deferred payments*?" Khun Pimolpa responds that: "*We will definitely check this as condition. Understand from KPN that the 100% share transfer will be completed since Day1. The structure is not "Deferred payment" of 100% value but only additional value is only upside from IPO with* ***gentleman agreement outside*** *but we will definitely review this with legal team*." (emphasis added)

174. Khun Anucha stated that he understood the structure to consist of "*100% payment for the shares in one time, and there would be additional payment only if the company become publicly listed through the IPO*."[113] This is wrong as a matter of fact (given that the USD 175 million was not payable "*in one time*" and instead there was a deferred payment structure which Khun Anucha was not told about – "*I was surprised [to discover] that there was a deferred payment structure in there because as Khun Pimolpa told me that in July there*

[109] Day 26/127:8-21

[110] Day 26/128:19-23

[111] Day 26/130:18-25 and Day 26/131:1-5

[112] Day 26/129:20-25 and Day 26/130:1-17 and Day 26/131/3-5 (that the first item was never altered as a requirement)

[113] Day 26/135:13-16.

was no such deferred payment"[114]), but it also does not account for the "*gentleman agreement outside*" and what that might have meant.

175. Khun Anucha's evidence appeared to be that he had then done little, if anything, in 2015 to better understand the position including the question of whether there was a risk of rescission of the share sale and that he did not believe it to be his role or responsibility to do any more. Further, he initially said that: "*I believe I got the answer*" to the question of whether default would lead to reversal of the share sale and that "*In my understanding it was dealt with*". But in cross examination he admitted as follows:

> "***Q: So is it fair to say that because it was the role of others to check this and they didn't raise it with you, you assumed it was complied with?***
>
> *A: Yes.*"[115]

176. Khun Anucha said he understood the *"gentleman agreement outside*" to be "*Outside the sales and purchase agreement*" but again he admitted in cross examination:

> "***Q: Did you ask any more questions about the gentlemen's agreement or were you told anything more about it at this stage?***
>
> *A: No*."

177. He had assumed that the legal team would find out more about it, but:

> "**Q*: Did you know anything more about the gentleman's agreement or is it just what is written here?***
>
> *A: Just what is written here.*
>
> ***Q: No conversation, no nothing***."[116]

178. Similarly, Wallaya Kaewrungraung (Khun Wallaya) (SCB's Chief Legal and Control Officer) said that she "*didn't enquire any further*" having received this email because: "*if there had been any reviews or any work done, it would be with the relevant teams, so it's not for me to go and ask or investigate whether they have done their work*"[117]. She also suggested that the bank would not be interested in a "*gentlemen's agreement outside*" and stated: "*If it is not documented, and the bank is not one of the parties, we don't pay attention to*

[114] Day 26/145:2-14

[115] Day 26/137:14-25 and Day 26/138:1-17

[116] Day 26:138:21-25 and Day 26/139:1-25 and Day 26/140:1

[117] Day 28/43:8-16

it".[118] In response to the Court's question, she added: "*I confirm that we pay attention to the final target that the shares have been legally transferred and what the gentlemen's agree amongst themselves, we are not part of it, we are not one of the parties."*[119]

179. Khun Wallaya's only explanation as to why she did not ask Khun Pimolpa what she understood the gentlemen's agreement to be was that "*the email, it said Khun Pimolpa will review this with the legal team […] if there had been any issues, it would have been raised to me.*"[120] However, Khun Wallaya had to concede that she was "*not sure*" whether any such investigation work was done.[121]

180. I do not consider that there is sufficient evidence to support the Claimants' suggestion that this was deliberate and dishonest conduct on the part of SCB showing that it was a party to the dishonest asset-stripping conduct of Khun Nop (described below). However, it is fair to say that SCB's conduct in this respect fell well short of the conduct to be expected of a diligent and reputable bank.

The Bangkok Meeting – the draft Steps plan and MOU

181. On 16 July 2015 Mr Héliot emailed Khun Piphob and Mr Baker, copying Mr Suppipat, attaching a draft "*steps plan/MoU*", which he said "*purport[ed]*" to summarise the various transaction steps, and asked for their comments and questions. Mr Héliot accepted that his 16 July 2015 draft "*steps plan/MoU*" was a work in progress, for internal use on Mr Suppipat's side.[122] It did not represent an agreed set of arrangements. That is why the email and draft "*steps plan/MoU*" was not sent to Khun Nuttawut; a draft Steps Plan was only sent to him a month later on 14 August 2015, and a draft MoU later still, on 24 August (see below).

182. Also on 16 July 2015, Khun Piphob and Khun Op met with Khun Nuttawut at KPN's offices in Bangkok (**the Bangkok Meeting**). Khun Nuttawut accepts that the call option *was* discussed at this meeting. It is the Claimants' case that the Global Transaction Representations were continuing, and indeed that they were made again (dishonestly) by Khun Nuttawut at the Bangkok meeting.[123]

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[118] Day 28/44:20-23

[119] Day 28/44:24-25 – 45:1-8

[120] Day 28/47:1-24

[121] Day 28/47:25-48:1-2

[122] Day 15/34:6-9 and Day 15/40:16 to 41:2

[123] RAPOC [48.2], [46.11], [49.3]

183. Khun Op gave evidence that:

> "*A. On that particular meeting if I would recall, still it was silent from Nuttawut, from the KPN team, I would say it was silence. They said okay; they said okay, okay, yes, let me take a look at this. He always said: let me take a look at this and get back to you; all the time.*
>
> ***Q. But what was your view, what was your opinion, give me your opinion?***
>
> *A. My opinion, okay, you ask me, my opinion, I said okay, they are still in this, the deal is progressing, they need time to look into the details, that was –*
>
> ***Q. That was your view?***
>
> *A. That's my view.*
>
> ***Q. That was your view, and you conveyed that to Mr Suppipat?***
>
> *A. I think so*."[124]

184. Khun Piphob gave evidence that, "*The meeting is quite creative. We talk a lot on the call option concept. Even if Mr Nuttawut did not really get into the detail, like clause by clause or something like that, but he list quite a number of questions, and he asked us to improve the call option*."[125]

185. The same day as the Bangkok Meeting, 16 July 2015, Khun Piphob reported back to Mr Suppipat, Mr Baker and Mr Héliot via an email regarding the "*Prelim Comments from KPN*" on the draft COAs. In the email he explained that, "*Nutt and Srisant Chitvaranund … have not yet read the draft call option agreement and there has been no comment on the contents so far. Nonetheless, we have gone through the payment mechanism as outlined in the draft COA together*". Khun Piphob also set out what he described as the "*key*" comments from Khun Nuttawut that required Mr Suppipat's attention.

186. With regard to Khun Nop's position at this stage, Khun Piphob gave evidence that, prior to the meeting, Khun Nop "*did not really review the agreement in detail. He just touch on the concept*". When it was put to him that he could not, therefore, have considered that the COA was agreed, Khun Piphob explained: "*[Khun Nop] agree on the formula. Provided that he would not take loss upon the exercise of the call option. If it is true as he believe, as we explained to him, then he has no objection at all on the concept*"[126].

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[124] Day 13/118:5-19

[125] Day 14/38:18-23

[126] Day 14/46:3-17

187. I find as a fact that at the Bangkok Meeting, Khun Nuttawut led Khun Piphob and Khun Op to believe that Khun Nop still intended to enter into the COA and that this fact was conveyed to Mr Suppipat.

188. On 18 July 2015, Ms Collins texted Mr Lakhaney saying that she *"[n]eed[ed] to share the discussion of Friday with our friend on the call option – m change but drive by the op nop and nuttawut consortium [sic] – just getting rather bored!!!!*". Ms Collins said in cross-examination that she "[couldn't] *remember when [this meeting] was or what it was about*". This text exchange contradicts the evidence Ms Collins gave that, "*we never had any discussion with Mr Suppipat about the call option*" and were "*kept out of the loop*" regarding the call option, a point which she repeated more than once in cross-examination, and which evidence I reject. Similarly, Mr Lakhaney stated in cross-examination that, "*I was not involved in the negotiation of the call option*" and Khun Thun also said: "*I was kept out, yes from the negotiation about the call option*". I do not consider that the WEH Managers were telling the truth about their involvement in the COA negotiation. Their evidence frequently appeared collusive to me – this being one such example - and I accordingly approach it with caution throughout.

REC SPAs amended and restated

189. On 27 July 2015, the REC SPAs were amended and restated to address altered financing arrangements (**the Amended and Restated REC SPAs**). The document itself is backdated to 3 July 2015[127]. The principal reason for this amendment, as Mr Suppipat confirmed in cross-examination, was the recognition that Khun Nop did not have the (approximately) USD 25 million he was required to pay on the date of closing under the original REC SPAs.

190. Khun Piphob similarly explained that the date of the agreement was changed to assist Khun Nop: "*He already been in default on 4 July, and on 7 July, Mr Suppipat was stupid enough to allow him to enter amendment and restatement agreement by backdating it to 3 July in order to make him clean and transfer the shares to him*"[128]. This was also Khun Thun's understanding of the reason for the restatement. In his First Witness Statement, he said: "*I believe the circumstances of the deferral of payment dates…were linked to funding arrangements involving Mr Narongdej and the KPN Group.*"[129] Asked what he meant in cross-examination, Khun Thun's evidence was unclear: he appeared to suggest that this was a reference to the fact that it had not yet been possible to raise the full USD 100 million required in addition to Mr Suppipat's

[127] This is admitted by the Defendants – see D1 and D17 Closing para 149

[128] Day 14/69:13-70:16 . See to similar effect his evidence at Day 14/120:19-121:3

[129] Thun WS 1 [69]

equity, but then said "*Because it is 175, so it was cannot raise 100, the other part probably another – about $25 million*."[130]

191. Under the Amended and Restated REC SPAs, Khun Nop did not have to make any payment when the shares were transferred, as the First Instalments totalling USD 175 million were payable in two tranches 30 and 60 days after closing.

REC share transfer instruments

192. On the same day that the Amended and Restated REC SPAs were entered into, 27 July 2015, the share transfer instruments for the transfer of the REC shares held by NGI and DLV to KPN EH were executed. It is the Claimants' case, which I accept, that the Amended and Restated REC SPAs were entered into, and DLV and NGI transferred their REC shares to KPN EH, in reliance upon and induced by the (continuing) Global Transaction Representations[131].

193. Redacted versions of the REC SPAs, from which SCB allege that the amount of immediate and deferred consideration payable under the SPAs had been redacted, were inspected in REC's offices by individuals from SCB on 29 July 2015. In cross-examination, Khun Wallaya suggested that the bank was not concerned about the price *"[b]ecause the price of the share purchase agreement is between the two parties, a buyer and purchaser, and the bank is not one of the parties. And the bank didn't take the shares as the security*".

194. This seems surprising in the light of the bank's keen interest in the purchase price (and whether it had been paid) in the case of Khao Kor (above), and it again suggests a lack of due diligence on the part of SCB.

Proposed escrow arrangement

195. Khun Piphob emailed Clare Lam and Christoph Mauchle of VP Bank on 29 July 2015 explaining that, *"[Mr Suppipat] … and KPN … would like to enter into a written commitment as soon as practicable but would bind both parties only upon the IPO of WEH*", and as such they "*would like to appoint VPB as an escrow agent to hold two copies of such written commitment, which will only be released one to each party only upon the IPO event*".

196. In cross-examination, Mr Héliot said that he was not sure who had originally suggested the idea of using an escrow agent, but it "*might*" have been him.

[130] Day 23/60:22-61:24

[131] RAPOC, [60.1], [60.3] and [60.4]

197. There was some discussion as to the legality of this proposed arrangement as a matter of Thai law. Mr Suppipat[132], Khun Op[133] and Khun Piphob[134] all gave evidence that they *believed* this arrangement could be carried out lawfully. I accept their evidence. Mr Héliot said he was not told if the scheme was lawful. But, ultimately, the arrangement was not effected in any event because, for the reasons explained below, Khun Nop refused to enter into a call option.

Watabak financing

198. During 2015, Watabak had difficulty in making payment under the TSA with GE. As such, it repeatedly negotiated with GE for extensions. Under the original TSA, if WEH did not have financing in place by mid-March 2015, GE could terminate the agreement. As it turned out, financing was not in place by that date, when Mr Suppipat still had an interest in REC. The TSA was accordingly re-negotiated by Ms Collins and it was amended in March 2015. The new longstop deadline for financing being in place was set to the end of May 2015. The payment schedule was also adjusted so that payments were to be made from November 2015.

199. However, finance was again not in place by the end of May 2015, and there was accordingly further re-negotiation. A fresh TSA was successfully agreed and dated 30 September 2015. According to this new TSA, the deadline for securing finance was mid-October 2015, with a long stop date of 15 December 2015, and payments were to be made from mid-December 2015**.** As such, signature of the Watabak Facility was targeted for 28 September 2015.

200. In early August 2015, Watabak had not yet secured the required funding. The WEH Managers liaised with various third-party funders (Bank of America, Merill Lynch and Credit Suisse) to try to obtain it. These discussions occurred in the context of the 26 June 2015 Proclamation of the Energy Regulation Commission of Thailand (**ERC**) on the Determination of Position Clearance between Wind Farm Projects and of Electricity Installed Capacity for Wind Farm Operator, which had the effect of reducing the number of compliant wind turbines on the Watabak project and accordingly adversely affected the electrical capacity which the Watabak project could produce (although the Proclamation was later conditionally waived by ERC for Watabak on 4 September 2015).

201. Despite this, on 3 August 2015, Mr Lakhaney texted Ms Collins saying, "*Fyi, Nop met the SCB chairman, he's given a green light to everything which is excellent*". She replied, "*Agree*". There is disagreement regarding whether the relevant "*Chairman*" was Dr Vichit Surapongchai (**Dr Vichit**), or Khun

[132] Day 7/147:16-149:1

[133] Day 13/72:18-73:14

[134] Day 14/34:11-35:16

Anand Panyarachun (**Khun Anand**), but there was a general consensus that it was one of the two. When asked about this during cross-examination:

a. Khun Nop's evidence was that he could not remember meetings with Khun Anand at the time. However, there is a record of a "*Meeting with Dr. Vichit SCB*" in Khun Nop's iPad calendar.

b. Khun Arthid explained that it was normal for Dr Vichit to have met Khun Nop in a situation where Khun Nop and new management had come into REC/WEH and there was a "*requirement that the team on both sides have to work against time*"[135].

c. When Mr Lakhaney was asked in cross examination what he was referring to in his 3 August 2015 email, he said: "*I assume financing. The Equis loan sheet was financing Watabak, which was the priority. So I think this was in relation to that. Q: To the financing of Watabak? A: Yes.*"[136]

d. Mr Lakhaney confirmed: "Q: *And what did you understand by "a green light to everything"? A: That they [SCB] are willing to finance WEH.*"[137]

202. It follows that SCB's Chairman had given a green light to SCB funding Watabak. This will be important: it suggests (and I find) that now that the REC SPAs had been concluded, SCB was willing to finance Watabak and would not have let it fail, regardless of whether any further "ring-fencing" took place or not (see below).

Third Draft Call Option and Steps Plan

203. Meanwhile the COA continued to be negotiated between the parties. On 14 August 2015, Mr Héliot emailed Khun Nuttawut, copying in Mr Suppipat and Khun Piphob, attaching (i) a "*new*" version of the call option (which contained various changes) for Khun Nuttawut's review and comments (**third draft COA**), and (ii) a draft "*Steps Plan*" (**Steps Plan**).

204. As Mr Héliot accepted, this was the first time that a Steps Plan had been sent to Khun Nuttawut[138] because the structure for the proposed transaction was still evolving even on Mr Suppipat's side.[139] It set out "*the agreed steps for the*

[135] Day 30/19:1-2

[136] Day 25/29:23-25 and Day 26/30:1-3

[137] (Day 25/30:20-22)

[138] Day 15/40:9-12.

[139] Day 15/40:20-41.

sale by NS of its interests in WEH, and potential repurchase of the same following the IPO of WEH". It was, as Mr Héliot acknowledged, a long, detailed and dense document, which Khun Nuttawut was going to require some time to digest.[140]

The (lack of) response

205. Khun Nuttawut said in his written evidence that he remembered these documents and that when he "*skimmed through the steps plan and went straight to the substance of the calculations [he] was shocked*." He said that he then called a meeting with the WEH Managers as, since English is not his first language, he though he "*perhaps ... did not understand the proposed terms*". He gave evidence that:

> "*The major problem with the proposed call option agreement was that it required us to sell back the REC shares at 65% of the value of the underlying WEH shares. Once you took into account the cost of the finance of the deal and the opportunity cost of the capital which was deployed, there was a significant risk that Khun Nop would lose money on the transaction.*
>
> *In addition, the transaction was open ended and could be exercised at any time after 1 January 2020.*
>
> *There was a further concern, in that the draft said nothing about Mr Suppipat's criminal charges. In principle, Mr Suppipat could exercise the call option whilst still a fugitive from Thai justice. This would have been completely unacceptable to the banks*."[141]

206. In cross-examination, he said that what troubled him was the estimated valuation of WEH at USD 7.5 billion at the IPO, which he considered too high[142]:

> "***Q: […] What was it in here that you were shocked by?***
>
> *A: First of all, my Lord, this is very complicated, very hard to understand. We did calculate following what Mr — I did calculate it following Mr Héliot's table here.*
>
> *He put it like the company would be valued US$7.5 billion. When we purchased this company, the company price is $1.2 billion, and he come up with a calculation that started with 7.5 billion, and with 7.5 billion we will make a profit.*

[140] Day 15/41:3-13.

[141] Nuttawut WS 1, [41]-[44]

[142] Day 19/92:10-93:12

> *I did some calculation, and first of all, I don't believe the company will be worth 7.5 billion. I don't know if it will be worth that much. We did some calculation based on this table which I don't know whether it is right or wrong, but if with a lower valuation, we are at risk at being zero or even losing money in this case, that is why I feel like I was shocked with this, my Lord."* [143]

207. However, Khun Nuttawut accepted that, at least at an earlier stage, he had understood that the proposal was for Khun Nop to receive a guaranteed profit of 20% of the price payable for the REC shares by the time the COA was exercised and 20% of any uplift in value[144].

208. To the extent that Khun Nuttawut's evidence is that he understood, on finally reading the draft COA on 14 August 2015, that that proposal had radically changed such that the Global Transaction would only be profitable for Khun Nop at an IPO valuation which he considered unrealistic, he could not explain his complete failure to inform any of Mr Héliot, Mr Suppipat and/or Khun Op of these supposed concerns of his. I do not accept this evidence which I find to be an excuse made up by Khun Nop and Khun Nuttawut after the event, in order to justify their deliberately misleading conduct (viz, that Khun Nop intended to enter into the call option).

209. Indeed, Mr Héliot explained that the figure of US $7.5bn was simply a worked example of the formula[145], pursuant to which, Khun Nop would not be exposed to the risk of any loss. Khun Nop stood to make c. USD $140 million as soon as the COA was executed. As Mr Suppipat convincingly explained:

> "*A: [...] we have had agreed that the floor price is [USD] 140 [million], provided they pay the purchase price, and anything beyond that, they have to make the company perform beyond the IPO valuation. [...] Even if you don't look at what has been agreed, my Lord, people who comes in with nothing manage the company, manage to pay me one half of 700 million out of my own asset, and get 140 million. That is attractive in any case. Now, if the company performs well post IPO and assuming the IPO price is 2 billion plus, and the value has been increased because they perform, the incentive, in case of the valuation of, say, 4 or 5 billion, which is not unreasonable, because it would have been four, five years post IPO and if IPO price is close to 3 billion, a 50% uplift to the shareholder, 60% uplift or even 100 or 200, it is more than reasonable expectation.*"[146]

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[143] Day 19/92:10 to 93:3

[144] Day 19/93:4-12 See also Khun Op's evidence, Day 13/85:15-25: "*what I have discussed with Nop…is the concept. And this is what we have agree: that he will walk away with 20% of the transaction. This is what we agree. And he will not incur any loss. That has been clearly instruct to Stephane who drafting this agreement*".

[145] Day 15/45:1-24

[146] Day 8/67:24-68:22. See also Khun Op's evidence, Day 13/166:2-17: "*So the basic structure of the deal was always the same. Nop being the nominee, he will get paid, the first portion when he take the company IPO, he will get a certain amount of money, and then there is going to be following tranche once the company, you know, after*

Memorandum of Understanding

210. On 19 August 2015, Mr Héliot emailed Mr Suppipat, copying in Mr Baker and Khun Piphob, attaching, "*in advance of our meeting tomorrow*", the "*first draft*" of a proposed Memorandum of Understanding (**MoU**). This MoU incorporated (as a schedule) a revised Step Plan.

211. On 24 August 2015 Mr Suppipat forwarded that email and the 18 August 2015 draft MoU to Khun Nuttawut. On the same day, a different draft MoU dated 24 August 2015 was sent separately by Mr Héliot to Khun Nuttawut. Mr Héliot's covering email explained that the MoU is to "*define the framework for the transaction*" and "*the steps plan would be an attachment to that MoU*". Further, he noted that "*minor changes have been made to the steps plan compared to the version I have circulated earlier*" and asked Khun Nuttawut to let him know if he "*would like to see a redline version*".

212. This draft MoU sets out the COA arrangement: Khun Nop would buy REC for USD 700 million, putting in no equity himself but using USD 75 million of vendor financing from Mr Suppipat and USD 100 million of commercial loans raised. As consideration for the *execution* of the COA, he would receive "*Call Option Consideration*" of USD 140 million (i.e. 20% of the purchase price paid under the REC SPAs). When the option was *exercised* (after the IPO), Khun Nop would receive a "*Purchase Price*" (or "*upside*") calculated by applying a discount to the amount by which the discounted market value of the repurchased REC shares exceeded the Call Option Consideration.

213. Notably, in clause 1.9.1, the draft MoU refers to the Advisory Services Agreement, entered into by the WEH Managers on 25 June 2015, affirming that "*upon receipt of the first cash instalment of the Acquisition Price each of [the WEH Managers] will receive 6 million US dollars, pursuant to an advisory services agreement with NGI*". This confirms that the ASA was intended to be (at least in part) "forward-looking" (see below).

214. In re-examination, Mr Héliot explained that this document reflected his discussions with Mr Suppipat regarding the outcome of a 14 July 2015 meeting in Cannes:

> "*Like I said in my witness statement, [Mr Suppipat] from time to time took a call or made a call to counterparties in Thailand, including Khun Nop, based on his – based on what he told me from the persons he was on the phone with, and so – and then gave me back the structural changes that were required in the documents, based on those discussions*."[147]

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the company is listed…what Nick always highlight is the beginning of the meeting, of the structure, is that as a nominee, you cannot lose money".

[147] Day 15/70:2-9

215. The revised Steps Plan was at Schedule 1 to the draft MoU. Among other things, it set out in Step 5 a list of steps to be taken and documents to be agreed prior to the Fullerton SPA Closing, including:

a. an Escrow Agreement;

b. the COA;

c. a written assurance from Khun Nop that Management would receive 25% of Fullerton;

d. signed but undated transfer documents for Khun Nop's 40% and Fullerton's 20% in KPN EH;

e. transfer documents for Management's 40% in KPN EH;

f. an undated signed call option for the transfer of 1.06% of REC from Khun Nuttawut to Symphony;

g. various consents; and

h. an assurance from Khun Nop to Khun Op that he would receive 22.5% of Fullerton after IPO.

None of this had happened, notwithstanding the fact that the Fullerton SPA Closing had already taken place.

216. Mr Héliot's evidence was that he was not aware when he sent the draft MoU to Khun Nuttawut that Symphony had already transferred its shares to Fullerton before any call option had been signed, but that when he was informed about that by Mr Suppipat or Mr Baker he found that concerning:[148] "*[Mr Suppipat] had obviously created a legal risk for himself by transferring the shares without having proceeded to the list of steps that I had set out in my steps plan*".[149]

217. Again, Khun Nuttawut did not respond to Mr Héliot's email. Khun Nuttawut's initial written evidence was that he did not reply because, by 24 August 2015, Khun Nop had already decided he did not intend to enter into a COA[150]. However, by his Fourth Witness Statement (not served until 12 October 2022), Khun Nuttawut changed his evidence on this point: he now says, inconsistently, that no decision was taken until a meeting he attended with Khun Piphob and the WEH Managers on 3 September 2015[151], but that in any

[148] Héliot WS 1, [19] and [20]; Day 15/60:2-5 and 61:3-7

[149] Day 15/68:1-4

[150] Nuttawut WS 1 [46]

[151] Nuttawut WS 4 [5]

event the MoU and COA represented "*a bad deal*" and Khun Nop *"[didn't] like it already"* by late August[152].

218. In cross-examination, Khun Nuttawut was not able to provide any proper explanation as to why, if he and Khun Nop were negotiating in good faith with a genuine intention to enter into a COA, he did not go back to Mr Suppipat's team to seek to improve the terms of the alleged "*bad deal*"[153]. In cross-examination, Khun Nuttawut said he did not read the MoU thoroughly, despite being a party to it,[154] and then suggested that *"this is very complicated*" and that he did not understand it properly because it was in English[155]. I reject this evidence; I consider that his failure to revert to Mr Suppipat was designed to continue to mislead him into believing that Khun Nop would enter into a COA.

219. In cross-examination, Mr Suppipat admitted that Khun Nop and Khun Nuttawut were, at this point, still "*digesting*" the call option[156].

220. When asked in cross-examination why he had "*never insist[ed] in black and white on the call option being signed*", Mr Suppipat responded that "*Because … it is complex at the end of the day we thought to shorten the time … we decided to do [a Memorandum of Understanding]. So that things can be easier to address*"[157]. I accept this evidence.

The Symphony transfer and the Watabak Representations

221. On 24 August 2015 at 11:54am Bangkok time, Khun Lek emailed the WEH Managers with a subject line "2nd closing" explaining that "*[o]nce [Ms Collins] talks to [Mr Suppipat] this afternoon, who will give me a greenlight to expedite the Share Transfer Document … heads up to Symphony and Fullerton already …. I am going to advise K. Lakkanasiri to provide Nune REC Shareholders book and this will be updated right after the signing*".

222. In cross-examination, Mr Suppipat insisted that whilst he "*may have been considering*" the decision to transfer the REC shares from Symphony to Fullerton, there was "*no certainty that [he] will make the decision until [he] spoke to [Ms Collins]*". I do not accept that evidence. In fact, what appears to have been holding up the share transfer was not the COA but reaching

[152] Day 19/97:11-21

[153] Day 19/97:22-100:5

[154] Day 19/94:14-25

[155] Day 19/96:19-23

[156] Day 8/30:11-15

[157] Day 12/29:14-22

agreement on amendments to the KPN EH SHA – and the last outstanding point in that respect was resolved on the morning of 24 August 2015.

223. At 3:20pm on 24 August 2015 Khun Lek emailed Khun Nop, Khun Nuttawut, Khun Thun, Mr Lakhaney, Ms Collins and Khun Luk with the subject line, "*The 2nd closing is happening…*". She said "*I am coordinating with Linklaters now, and will keep you posted on the progress please*". Khun Lek confirmed in cross-examination that she "*believe[d]*" that she "*had the green light for the transfer by no later than 3:20pm ICT*"[158].

224. Shortly after 3:20pm on 24 August 2015, Symphony transferred its REC shares under the Fullerton SPA, as it was contractually obliged to do.

225. The Claimants' case is that, over the course of two phone calls with Mr Suppipat on 23 and 24 August 2015[159], Ms Collins put undue pressure on Mr Suppipat to cause Symphony to transfer its REC shares under the Fullerton SPA, despite the COA not yet having been executed. Ms Collins generated this pressure by representing that WEH urgently needed to close the Watabak financing in order to avoid irreparable harm to the project, but that SCB was not willing to sign the facility agreement until the transfer to Khun Nop had completed (**the Watabak Representations**)[160].

226. As is common ground, there was in reality no such urgency: Ms Collins accepts that the Representations were false if they were made[161].

227. Mr Suppipat alleged in his Witness Statement that during the 24 August 2015 call with Ms Collins he expressed his concern about completing the transfer with the COA not yet in place. In response, Ms Collins told Mr Suppipat to trust her, and that the COA would be executed after completion[162]. Mr Suppipat alleged in cross-examination that "*I think she urged me to transfer the share, and the same reason that Thun has given: oh, if you don't do this we are going to miss the schedule, financial close in September, and if we do Watabak will be in trouble, and you should transfer. I don't remember what kind of word she used, but she urged me to transfer*"[163], but he later discovered that, in reality financial close could wait until June 2016[164]. In his Witness Statement, at paragraph 67 Mr Suppipat referred to an earlier date by which financing could have concluded, specifically "*later in 2015*". As such, his

[158] Day 15/102:16-24

[159] It is common ground that both of these phone calls took place: Collins WS 1 [183]

[160] RAPOC [52]-[53]

[161] Collins WS 1 [190]

[162] Suppipat WS 4 [63]

[163] Day 12/37:20-25.

[164] Day 12/44:16-18; T12/53:20-22

evidence with regard to the Watabak Representations was vague and unspecific.

228. Meanwhile, Khun Op's evidence was that Mr Suppipat told him that that he had transferred the shares because Khun Thun (not Ms Collins) told him that it needed to be done "*or bank will not approve or whatever*"[165] and repeated that the bank not funding "*was the reason that Nick told me that Thun gave to him when he transfer the share*".[166]

229. Ms Collins appeared to accept in cross-examination that she had initiated the 24 August phone call and stated that, "*Thun had been chasing on Friday [21 August 2015] because we couldn't start the debt process. So I was – I agreed that I would make the phone call in the afternoon to see if Mr Suppipat would move the shares*"[167]. However, Ms Collins insists in her Witness Statement at paragraph 188 that she "*did not urge Mr Suppipat to move his shares*". Further, she said in cross-examination that Mr Suppipat was well aware that Watabak was at real risk of harm if the shares were not transferred[168]. It was her evidence that there was no discussion about protecting Mr Suppipat's interests or the call option[169]. I accept Ms Collins' evidence on this issue. I find that Mr Suppipat made his own decision to go ahead without the executed call option being in place.

230. Further, there is a lack of evidence for the Claimants' allegation that, whatever she said during that call, Ms Collins did so "*on behalf of Khun Nop*"[170]. Indeed, this allegation was not put to Khun Nop or Ms Collins[171].

231. In the circumstances, I do not consider that the Claimants have proved that the Watabak Representations were made to them or indeed (assuming they were made) relied upon by them.

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[165] Day 13/122:20 to 123:2

[166] Day 13/123:11-14

[167] Day 22/23:22-24:9

[168] Day 22/26:9-27:4

[169] Ms Collins's account is given in Collins WS 1 [184]-[189] {E1.3/1/1}; Day 22/21:25-27:14

[170] RAPOC, [53]

[171] D1 and D17 Written Closing [180.4]

WEH Managers' awareness of the call option documents

232. On the WEH Managers' case, although Mr Lakhaney had seen the schedules to the MoU[172], neither he nor the other WEH Managers had seen or discussed the MoU, the Steps Plan, or any other call option documentation. In particular, as at the end of August 2015, on the WEH Managers' case, not having heard anything from Mr Suppipat, Ms Collins still had no knowledge of the status of the call option discussions. I do not accept Ms Collins' evidence in light of the documentary evidence; in particular it is clear she had ongoing communication with Mr Suppipat through Khun Lek.

233. On the same day that Mr Héliot emailed the MoU to Khun Nuttawut, namely 24 August 2015, Mr Suppipat emailed the MoU to Khun Lek, annexing the Steps Plan document and asking that it be handed to Ms Collins. The 24 August email from Mr Suppipat to Khun Lek was received by Khun Lek at 4:51pm, after Mr Suppipat had transferred his shares on that date (see below).

234. Two days later, on 26 August 2015, Mr Suppipat asked Khun Lek to print out various documents "*and give them to Emma*". (The version of the MoU that Mr Suppipat asked Khun Lek to print was the first draft version circulated on 19 August 2015 by Mr Héliot – entitled "*DRAFT – 18 August 2015*". That was different to a version of the MoU that was circulated on 24 August 2015 by Mr Héliot to Khun Nuttawut).

235. Importantly, Ms Collins accepts that sometime after 26 August 2015 she received by courier a set of draft documents relating to the call option which were delivered in hard copy to her house in Thailand. She said she had only opened the package some time *after* she received it and did not read the documents but simply scanned them to her lawyers[173]. I do not accept Ms Collins' evidence. She is clearly an experienced businessperson who masters the detail of her brief. I do not believe that she would have left a couriered package of such important contractual documents unopened for some time and then when she finally opened it, not even have read their contents. This incident shows clearly that Mr Suppipat was keeping her in the loop with regard to the call option negotiations, and to such an extent that he would provide her with hard copies of the relevant documents.

Watabak Facility

236. The target for financial close of Watabak was September 2015, as Khun Kanyarat Kanaprach (**Khun Kanyarat**) of WEH set out in an email of 4 August 2015. In cross-examination, Mr Supippat confirmed this date and the fact "*that*

[172] Mr. Lakhaney did not receive or comment on the MoU but he saw one or both of the schedules to it, likely because Khun Nuttawut had shown him them at a meeting - Day25/46:7-47:5; Day25/51:18-53:17

[173] Day22/33:11-35:6, Day33/91:16-93:15

the share[s] need to be transferred before they sign [the] financial document[s]".

237. On 27 August 2015, Khun Kanyarat emailed several banks, including SCB, informing them that "*the change of REC shareholder has been done. Currently REC has [been] renamed to "KPN Energy (Thailand) Co., Ltd.*".

238. On 1 September, SCB lawyers produced a first draft of the facility documents.

239. On 10 September 2015, Khun Jittinun emailed Khun Parnu and another attaching a "*summary of discussion with K. Thun*" and commenting *"I do not copy all team members as I think that the purchase price should be kept confidential ...*". In cross-examination, it was Khun Jittinun's evidence that she was unwilling to disclose the price as she wanted to consult more senior members of SCB first. The summary attached to her email outlines that, of the "*Total purchasing price of approx…700MUSD*", "*175M USD have already been paid"* and "*525M USD remains unpaid*". (emphasis added)

240. The statement that $175m had already been paid was, of course, false. It was Khun Jittinun's evidence that the information she used to make this summary, including this false statement, was provided by Khun Thun. I accept that evidence. It was Khun Wallaya's evidence that "*the legal team were completely unaware of the amounts which had to be paid both overall and by way of initial payment 60 days after closing .. until the arbitration*" as they were not included in "*the emails among the business and corporate teams*". Khun Arthid accepted that the bank "*insisted on seeing the share purchase agreement, understanding the deal and being clear that the initial payment of $175 million had been paid.*"[174]

Meeting in Bangkok

241. On 2 September 2015 Khun Lek, at Mr Suppipat's request,[175] set up a meeting at WEH's offices in Bangkok on 3 September 2015, which it is common ground was attended by Khun Nuttawut, the WEH Managers and Khun Piphob,[176] and the purpose of which was to discuss the call option economics.[177] An agenda was never circulated. Khun Nop did not attend the meeting.

[174] Day 35/1:19-23

[175] Day 12/58:20-24.

[176] Nuttawut WS 1, [41] ; Collins WS 1, [200]; Thun WS 1, [91]; Lakhaney WS 1, [74]; Piphob WS 1 [28]

[177] Nuttawut WS 1, [41]-[42] and Piphob's evidence at Day 14/53:17-19

242. On the WEH Managers' case[178], this meeting involved the only material discussion in which they were involved regarding the call option. In cross-examination all three managers maintained that they were not otherwise involved in the call option negotiations.[179] Whilst Mr Lakhaney and the other WEH Managers may not have advised on whether the call option was commercially viable or otherwise a "*good deal*" for either party[180], their participation in this meeting again contradicts their evidence that they were kept out of the loop in regard to call option discussions.

243. It was Khun Piphob's evidence that the focus of the meeting was the call option premium, which Khun Nuttawut insisted would not cover the alleged "*costs and expense"* of the deal[181]. As Khun Piphob put it, the takeaway point from the meeting was: "*I want more money*"[182]. Regarding the WEH Managers' reaction, Khun Piphob said that they "*did not say anything…and they talk about their management fee…No, they did not help me…They did not say it [the CoA] is bad, they did not say it is good, they just sit there*"[183].

244. With regard to the WEH Managers:

a. Ms Collins's evidence was that Khun Nuttawut asked the WEH Managers to explain the economics and the assumptions underlying the proposed call option.[184] Mr Lakhaney explained on the whiteboard the call option numbers from a spreadsheet created by Khun Op called "WEH Buyback Final", which had been emailed by Khun Op to Mr Lakhaney on 4 June 2015, and forwarded by Mr Lakhaney to Ms Collins and Khun Thun the same day. They explained "*each phase when money was due, the fundraise, and the amount of debt that would need to be borrowed in the formula*".[185] Ms Collins gave evidence that Mr Lakhaney explained that the call option was an expensive deal for Khun Nop, which would only make economic sense if WEH were able to

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[178] WEH Manager Closing Submissions paras 123-124

[179] Ms Collins: Day 21/32:25-33:16, Day 21/140:9-141:6, Day 21/142:21-143:4, Day21/145:18-146:2, Day21:148:8-151:23, Day22/19:1-21:24, Day22/33:11-37:10.

Lakhaney: Day25/17:7-16, Day25/45:25-46:6

Thun: Day23/49:6-16, Day23/55:20-56:5, Day23/62:1-63:6

[180] Collins WS 1 [201] ; Thun WS 1 [91]; Thun WS 2 [11]; Lakhaney WS 1 [74]

[181] Day 14/62:17-24, 63:6-19

[182] Day 14/61:22 -63:21

[183] Day 14/147:21-148:23 . Khun Thun's evidence was: "*As the meeting progressed, it became clear that Mr Phowborom did not want the WEH Managers to get involved in discussions regarding the commercial viability of the call option, but just to explain the economics and underlying assumptions*": Thun WS 1 [91]

[184] Collins WS 1, [201]

[185] Day 22/98:1-6

achieve a value of over $3 billion once it was listed,[186] which Ms Collins did not think it would[187] due to the debt and interest required to pay the purchase price under the REC SPAs.[188] Following that explanation of the economics, Khun Nuttawut commented that "*it doesn't sound like a very good deal*".[189]

b. Khun Thun's evidence was to the same effect.[190] He said that the WEH Managers met Khun Piphob and Khun Nuttawut to explain the economics of the call options and underlying assumptions. Mr Lakhaney explained the spreadsheet circulated by Khun Op; the main problem was that it assumed a $6 billion valuation of WEH, which was 3 times higher than the contemplated IPO valuation prior to the charges against Mr Suppipat. Mr Lakhaney explained that any upside was premised on WEH's valuation reaching or exceeding approximately $3 billion, and if a more reasonable $2 billion to $2.2 billion valuation was used, Khun Nop stood to lose money. Khun Nuttawut then confirmed that the call option as drafted was commercially unfavourable.

c. Mr Lakhaney's evidence was similarly that the WEH Managers went through on the white board the spreadsheet circulated by Khun Op[191] "*to lay out what meant what*".[192] There were two major issues (i) the missing cost of debt, and (ii) the exit value, and its impact on the payments potentially due.[193] The call option would not have been a commercially good deal for Khun Nop. On the contrary, Mr Suppipat was proposing a deal which was substantially in his favour. Khun Nop would only make money from the deal if WEH were later valued at over $3 billion, but a valuation at that level was "*highly unlikely*".[194] Ultimately, it '*was apparent to everyone present at that meeting, with the exception of*

[186] Collins WS 1, [201]

[187] Day 21/138:17-24

[188] Collins WS 1, [201]; Day 21/151:10-14 ("*It hadn't included the cost of debt first of all, and then once it included the cost of debt, the formula would work in such a way that, you know, it would be — there would have to be quite a big increase in value before Mr Narongdej would see any upside*"); and Day 22/100:16-19 ("*if you put the debt in, the formula requires you to have a substantial amount of growth before the there is an upside for — in that formula for Mr Narongdej*")

[189] Collins WS 1, [202]

[190] Thun WS 1, [91] and [92] ; Day 23/109:4 to 110:7

[191] Lakhaney WS 2, [11]

[192] Day 25/542-545

[193] Day 25/44:17 to 45:24

[194] Lakhaney WS 1, [75]

[Khun Piphob], that the call option was not a commercially viable deal'.[195]

245. It was the evidence of the WEH Managers that following their input, Khun Nuttawut indicated that the call option was commercially unfavourable.[196] Khun Nuttawut's evidence was that the WEH Managers explained the operation of the proposed call option, and that once the cost of finance and other matters were taken into account there was a significant risk that Khun Nop would lose money on the transaction.[197] However, it appears to be common ground that no decision was made at the meeting not to enter into the call option.

246. Immediately after the 3 September meeting, Khun Piphob claims he met Khun Lek at a coffee shop[198] and asked her to tell Mr Suppipat what had happened in the meeting[199]. Later, Khun Piphob called Mr Suppipat directly and explained what had been discussed during the meeting, questioning whether Mr Suppipat should still consider the WEH Managers to be working for him[200] in view of their complaints about changes to the structure of the ASA during the meeting[201]. According to Khun Piphob, Mr Suppipat said he would ask Khun Op to discuss the call option further with Khun Nuttawut.[202]

247. A message from Mr Lakhaney to Ms Collins on 4 September records that Khun Nuttawut telephoned Khun Thun and told him that Khun Op had spoken to him after the meeting and said that "*we've all ganged up against him, especially [Mr Lakhaney]*". Similarly, Ms Collins' unchallenged evidence[203] was that following the meeting Khun Op telephoned Mr Lakhaney and accused the WEH Managers of not supporting the USD 6 billion WEH valuation in Khun Op's spreadsheet discussed at the meeting.

248. Mr Suppipat said in text messages to his ex-girlfriend, sent on 4 September, "*They gang up against Op and I*"; "*The management is getting into bed with Kpn now*", "*Might not get my company back*".

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[195] Lakhaney WS 1, [74]

[196] Collins WS 1 [202] ; Thun WS 1 [91]; Lakhaney 1 [74]

[197] Nuttawut WS 1, [41]–[43] ; Day 19/98:12–16 ("…*because I said that I want to check whether my understanding is right or not, the meeting doesn't take place until early September, about four or five days later…"*)

[198] Piphob WS 1 [30]

[199] Day 14/64:2-5

[200] Piphob WS 1, [30]

[201] Day 14/64:11-23

[202] Piphob WS 1, [30]

[203] Collins WS 1 [202]

249. There is obviously a difference of recollection as to what took place at this meeting in Bangkok. In the absence of any documentary record of the same and the unreliable nature of much of the witness evidence in this case particularly on the part of the Defendants, I do not feel able to reach any firm conclusions as to whose recollection is to be believed or accepted as to what took place at the Bangkok meeting; but nor is it necessary for me to do so.

250. I consider, however, that it is no coincidence that Khun Nop and Khun Nuttawut only finally expressed their disinterest in the call option after the REC SPAs had been entered into and the shares transferred to Khun Nop. I find that that is because they never intended to enter into the call option and they dishonestly misled Mr Suppipat on those three occasions above (viz the Skype call, First Paris Meeting and Bangkok Meeting) into believing that they did so intend in order to induce him to transfer the valuable REC (and WEH) shares.

The Cannes Meeting

251. That opportunity to exploit Mr Suppipat's weak negotiating position came to a head when Khun Nop spent 4 and 5 September 2015 with Mr Suppipat at Mr Suppipat's villa in France. Although there is not complete agreement between the relevant witnesses, I find that there were two substantive conversations between Mr Suppipat and Khun Nop over two days, with Ms Collins witnessing the latter:

    a. Both Mr Suppipat and Khun Op refer to a discussion between Mr Suppipat and Khun Nop on the evening of 4 September, in the garden of the villa (during which Khun Op was inside, and so he did not himself directly witness it).[204]

    b. Ms Collins recalls a conversation during which she, Mr Suppipat and Khun Nop were on the terrace on the morning of Khun Nop's departure (which was the next day), and after Khun Op had already left.[205]

252. In both conversations, Mr Suppipat appears to have postulated a call option arrangement involving a 50/50 split of some variety.

253. It is Mr Suppipat's evidence that Khun Nop questioned the financial attractiveness of the call option but only "*as [an] excuse*"[206]. According to Mr Suppipat in his Witness Statement, a "*lengthy negotiation*" regarding "*50% of*

[204] Suppipat WS 4, [70] ; Srisant WS 1, [23]

[205] Collins WS 1, [206]

[206] Day 8/71:2-11

any increase in the value of my shares above the purchase price" took place[207]. In cross-examination, Mr Suppipat alleged:

> *"I remember this moment vividly because it was so disgusting, and I said: okay, maybe 25% is not enough for you, 25% of my future net worth, what do you want, do you want 30? And then he paused for a few second and then he said, he shook his head and said no. Oh, you want 35? No. 40? No. Okay, you know what, how about this, how about this. I give you half. But it needs to be half after the 700 million has been fulfilled. And he said okay. Okay. So that was the new agreement that I can have a bit of a question mark, you know, because I think 30% of my total net worth is likely to be more than 50% after 700, but again, my math was quicker than his, and maybe he doesn't fully understand, but I keep on repeating though that, are you sure, it is 50/50 after 700, though. And he said yes, yes, yes. Okay, then we had a deal, we shook hand, and that is what I mean by we had a new deal."*[208]

254. I accept this evidence, despite the fact that in the arbitrations, Mr Suppipat had mistakenly thought that Khun Op and Ms Collins witnessed his and Khun Nop's handshakes.

255. As such, Mr Suppipat claims that a revised call option scheme was agreed on 4 September. Similarly, it was Khun Op's evidence that Mr Suppipat and Khun Nop spoke privately and, after this, Khun Nop told him, "*I have reached a conclusion with Nick. Now I will split 50/50 with Nick, et cetera*."[209]. According to Mr Suppipat, this agreement was then presented to Ms Collins the following day. I accept this evidence.

256. I therefore reject Khun Nop's evidence that

> *"[Mr Suppipat] again tried to persuade me to agree the call option on the basis that it would be a good deal for everyone and everyone would make a lot of money and that we could split it 50-50*"[210]*… I think I then politely declined the call option, and when I came back to Bangkok I formally said no through SC*" and "*my recollection remains that I clearly declined at the meeting*".[211]

257. This evidence is also contradicted by Mr Baker's written record dated 29 September 2015 sent by Mr Suppipat to Khun Nuttawut and his response, referred to below.

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[207] Suppipat WS 4, [70] . Ms Collins refers to "*a call option in relation to 50% of the shares*": Collins WS 1, [206]

[208] Day 8/79:9-80:1.

[209] Day 13/86:11-23

[210] Nop WS 1, [58]

[211] Nop WS 1, [58] ; Nop WS 2 [21]

First Instalments and financing issues

258. The First Instalment under the KPN EH SPA ($89.25 million) fell due on 25 September 2015 but was not paid.

259. Khun Nop alleged in cross-examination that, at the date of the Second Paris Meeting on 26 September 2015 (see below), "*We already have an idea where to line up the money*". When asked from whence the money was to be obtained, Khun Nop said "*Various sources*" but was evasive when asked to name them. He admitted there was nothing in writing evidencing any source of funds and that he was not in a position to pay "*the full amount*" of $89.25 million on 25 September, but could not remember "*exactly how much*" he was in a position to pay.[212] I find that he knew that he could not source the money at this stage. He simply did not have it and did not have any access to it.

Nop's attempts to source funds to meet the purchase price

260. It appears that the WEH Managers had been working to assist Khun Nop in obtaining financing for USD 100 million of the USD 175 million First Instalments. The WEH Managers claim to have "*continually tried to help Mr Narongdej to raise the financing required to pay the First Instalment*"[213] and "*[t]here was a conscious effort … to help KPN Group and Mr Narongdej to raise the requisite finance*"[214]. Khun Thun's evidence was that he never asked how much Khun Nop had available to contribute to the transaction[215], but "*I was told that we need to help raise $100 million out of 175 million*"[216]. There is contemporaneous evidence of meetings and correspondence with Bank of America Merrill Lynch and Credit Suisse, the Malaysian bank Maybank, and ABN AMRO.

261. On 7 September 2015, Mr Lakhaney emailed Ms Collins and Khun Thun with a financing update, noting that whilst matters with BAML and Credit Suisse were at that point moving forward, they had "*big issues internally getting clearance to pay [Mr. Suppipat]*", which was "*a combination of KYC/AML together with ensuring they won't face issues in Thailand going forward*", and a number of other banks had "*politely said "not this one"*". In a

[212] Day 17/36:2-39:16

[213] Collins WS 1, [210]

[214] Lakhaney WS 1, [100]–[105]

[215] Day 22/155:7-9

[216] Day 22/153:17-18

further update on 10 September 2015, Mr Lakhaney stated that Standard Chartered had "*said no*", partly on the basis that they had an *"NS issue"*.

262. A term sheet was obtained from BAML and Credit Suisse in August 2015 but ultimately satisfactory terms could not be negotiated. Khun Nop and Khun Nuttawut were informed of the likely failure of those negotiations on 20 October 2015, and the banks' proposed terms were declined on behalf of Khun Nop on 27 October. Meanwhile, Khun Nop continued to pursue potential funding, including from ABN AMRO.

263. The WEH Managers were ultimately unsuccessful. The Defendants contend that the reasons for this were (i) the banks' concerns about lending money "*that … would be used to pay a fugitive*" and (ii) whether and if so how KPN would finance the remaining $75 million.[217] I accept this; however, reason (ii) is a notable admission which highlights the undeniable lack of liquidity on the part of Khun Nop.

MBK

264. Khun Nuttawut suggested for the first time in cross-examination that he had obtained signed term sheets from lenders willing to finance the First Instalments prior to 26 September 2015[218]. Taken in cross-examination to his 7 February 2016 witness statement in the Arbitrations, in which he said that he and Khun Nop had "*prepared*" the full USD 175m by the new deadline of 31 January 2016, Khun Nuttawut backtracked, saying "*What I mean is that we can raise 175 million*"[219] and "*I have some term sheet, I have some commitment*"[220].

265. In cross-examination, Khun Thun referred for the first time to an unsigned term sheet from a company whom he referred to as "*MBK Guarantee*" (**MBK**), but could not recall whether he had received a copy of it or any specific details of its terms and admitted this was not a final offer of funding[221]. Further, he confirmed that he remembered this detail only on listening to Khun Nuttawut's evidence, in which Khun Nuttawut had referred to an alleged term sheet provided by MBK and various other lenders[222]: "*Yes, I didn't remember it*

[217] Collins WS 1 [210]

[218] Day 19/104:6-107:11

[219] Day 19/129:17

[220] Day 19/131:6

[221] Day 23/39:12-40:25

[222] Day 19/103:14-107:8

[when preparing his witness statement]. But when Khun Nuttawut mentioned the name I did"[223].

266. An unsigned MBK Guarantee term sheet was then disclosed by Signature Litigation after Khun Nuttawut and Khun Thun had given their oral evidence to the court. The Defendants have not, however, disclosed a signed term sheet in respect of such lending. Khun Thun conceded, during his cross-examination, that MBK's terms were "*never acceptable*" and "*need*[ed] *to be renegotiated*"[224].

267. It follows that any suggestion that funding had been secured through MBK was false.

Payment Representations

268. The Claimants' case is that on two occasions (i) at a second meeting in Paris on 26 September 2015, and (ii) on a telephone call between Khun Nuttawut and Mr Suppipat on 6 November 2015, Khun Nop and Khun Nuttawut made the so-called "**Payment Representations**", and thereby secured Mr Suppipat's forbearance from rescinding the REC SPAs for non-payment (see below).

Second Paris Meeting and First Payment Representations

269. On 26 September 2015, a meeting took place in Paris at the Hotel George V (**the Second Paris Meeting**) between Mr Suppipat, Mr Baker, Khun Nop and Khun Nuttawut. The meeting was conducted in Thai and, as such, it is common ground that Mr Baker (who does not speak Thai) was not an active participant.

270. Mr Suppipat alleges that, at this meeting, Khun Nop reneged on Part B of the COA. I accept that evidence. Mr Suppipat explained in cross-examination:

> "*A. When you know they have no money and they renege on call option, hence there is no equity that I am going to assist them with any longer, you know that you are going to get nothing or you are likely to get nothing. So you think of how to unwind this so you can find the next buyer, you go back to someone like Equis and say: I am so sorry, let's do the deal, even if this is a little bit late; but it is not too late.*"[225]

[223] Day 23/43:20-44:10

[224] Day 24/94:22-24

[225] Day 8/95:20-96:2

271. The Claimants' case is that, after Mr Suppipat posited unwinding the REC SPAs, Khun Nop and Khun Nuttawut represented that:

a. The transaction had been personally approved by the Crown Prince (now King), such that the transaction could not be reversed without incurring his disfavour;[226]

b. Khun Nop's Companies had the means to pay the First Instalment one month later;[227] and

c. Khun Nop's family would fund part of the First Instalment[228] (together, "**First Payment Representations**").

272. On 29 September 2015, Mr Suppipat sent to Khun Nuttawut Mr Baker's written record of the meeting. This is the only contemporaneous record of the meeting and it sets out that an agreement had been reached in Paris on "*Sunday*", according to which:

> "*[Mr Suppipat] and [Khun] Nop* ***agreed to set aside*** *the second leg (which [Mr Suppiapt] and [Khun] Nop referred to as "part B" of the deal), so that the Sellers will not fund the initial USD75 million of equity and the Purchaser will not enter into the call option with the Seller,* ***on condition that****:*
>
> *The first Purchase Price instalments under the SPA's (USD 175 million plus interest) are made in full no later than 26 November 2015 … interest will be calculated at the 15% per annum rate…*
>
> *Nop (i) acquire 3.25% of WEH (directly or through an affiliate) from Pradej and (ii) transfer half of those WEH shares to your designee (for no consideration);*"

273. Khun Nuttawut responded to this email, "*Noted with thanks krub*". This indicates that, contrary to Khun Nop's evidence, Khun Nop had not refused point blank to enter into the call option at the meeting in Cannes. Further, this email exchange supports Mr Suppipat's account that Parts A (share purchase sale) and B (call option) were two halves of one overall deal and in Paris at this second meeting the parties agreed that Part B would be set aside but only conditionally, the main condition being that Khun Nop would make full payment of the first purchase price instalment for the shares of US$175 million by 26 November 2015 and pay interest at a rate of 15%.

274. With regard to the acquisition from Khun Pradej, Mr Suppipat explained in his Fourth Witness Statement at paragraph 77: "*I thought it was fair that Nop*

[226] Suppipat WS 4 [74] ; Day 19/117:9-13 (Khun Nuttawut); Day 8/106:19-22, 109:15 – 110:3 (Mr Suppipat).

[227] Suppipat WS 4 [74(iii)]; Day 8/117:10-119:8 (Mr Suppipat).

[228] Suppipat WS 4 [76]; Day 8/107:3-11 (Mr Suppipat).

and I would split those shares between us 50/50: Nop was in the position to force Pradej's hand by saying he could list REC and not WEH in the same way that I could have done in 2014, which would mean that Pradej would not get the full benefit of his WEH shares, and also would not get the shares held by REC in DD Mart".

275. When asked why, if the funds were already available to Khun Nop, it was necessary on 26 September to rearrange the date for the payment of funds which did not fall due until 23 October, Khun Nuttawut said "*I don't remember now*".[229] I find that the reason was, of course, that the funds were not available.

276. However, Mr Baker's written record does not support the Claimants' case that the First Payment Representations were made. There is no contemporaneous documentary evidence that any of these representations were made. In the circumstances, I find that they were not made.

Second Payment Representations

277. On the Defendants' case, Khun Nuttawut telephoned Mr Suppipat on 3 November 2015, to request further time beyond the previously discussed deadline, proposing that $75 million of the KPN EH First Instalment be paid by 26 November, the balance of the KPN EH First Instalment by 15 December, and the Fullerton First Instalment by 31 January 2016.[230]

278. Mr Suppipat sent the following text message to Khun Nuttawut two days later on 5 November: *"Btw. I think I might be able to waive you the interest on the 175 m for period between the closing dates to nov 26 given that 75m is paid before nov 26 and 14m is paid by dec 15th and the rest by jan 31. Will send you an email on the details to confirm this in a day or two na krub."*

279. Mr Suppipat alleges that, on 6 November 2015, he spoke to Khun Nuttawut over the telephone. During this call, Khun Nuttawut allegedly sought a further payment extension with respect to USD 100 million of the First Instalments, saying that Khun Nop's Companies had secured USD 75 million, which they would pay by 26 November 2015, and could secure the remaining USD 100 million at least in part by Khun Nop's or his family's own equity and in time to pay it by 31 January 2016 ("**Second Payment Representations**").

280. Therefore, on the Claimants' case, Mr Suppipat agreed that he would not seek to unwind the REC SPAs provided Khun Nop paid:[231]

[229] Day 19/116:10-12

[230] Nuttawut WS 1 [55]

[231] Suppipat WS 4 [80]

a. $44,727,784.40 to NGI and $30,272,215.60 to DLV by 26 November 2015, plus interest;

b. $14,250,000 to DLV by 15 December 2015, plus interest; and

c. $85,750,000 to Symphony by 31 January 2016, plus interest.

281. In his witness statement Mr Suppipat fails adequately to support the Claimants' pleaded case as to the alleged representations on a 6 November phone call, admitting that "*I do not now specifically recall that discussion*", simply referring to his 10 November email.[232] Khun Nuttawut's evidence is that he did represent that US$75m had now been obtained and that the remaining US$100m would not be available until January 2016[233], but that he made no representations as to how the payments would be funded[234].

282. In a text message of 8 November 2015 to Ms Collins, Mr Lakhaney explained that, "*Nuttawut told Thun money looking good by end of the month – still not sure where from but seems like borrowing from Nop/Nutt connections*". The following day, he sent Ms Collins a further update: "*So interesting day. Our friend sent Nuttawut an email on payment terms, not a nice email, so I don't think he has a deal with Nuttawut*". When asked whether he ever saw any material which suggested to him that Khun Nop might have the money to pay the First Instalments, Mr Lakhaney said "*No*"[235].

283. On 10 November 2015, Mr Suppipat emailed Khun Nuttawut noting that, during a call that week, he had been asked by Khun Nuttawut to accept a further deferral of $100 million and to waive interest on the late payments. Mr Suppipat said, "*I conditionally accepted to set aside so called Part B of our agreement (or the call option) and to postpone the First Payment …ONLY because you promised that the Purchaser would make the First Payment in full, plus interest…on 26 Nov 2015 AND because you promised to try to find an acceptable solution with Pradej and deliver me half of the proceed*". Further, Mr Suppipat stated: "*You are now telling me that you can come up with only around 75M USD by Nov 26 but the 100M USD won't be ready before New Year 2016.*" That is not consistent with the pleaded misrepresentation that there was an intention to make payment in accordance with the revised schedule proposed by Khun Nuttawut on 3 November, including the balance of the KPN EH First Instalment by 15 December (i.e. earlier) and the Fullerton First Instalment by 31 January 2016 (i.e. later). However, on the basis they were trying their best to secure funding, Mr Suppipat agreed to accept the further deferral of payment, but not to waive interest.

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[232] Suppipat WS 4, [80]

[233] Day 19/125:2-8

[234] Nuttawut WS 1 [57]; Day 19/122:12-123:2

[235] Day 25/55:12-14

284. Mr Suppipat set out the "*conditions on the postponement and the payment schedule*", providing the dates on which 5 separate payments should be made. Payment (5) is "*One half of the gross proceed from the negotiations with Pradej in WEH shares (should be no less than 1.75M shares) handed over before Dec 31 2015*". Khun Nuttawut responded the following day, "*I'll give you a call soon on my opinion about the payment term krub. However, regarding (5) I don't think this is coincide with our earlier discussion. We agree to split half/half and we never agree on time line of this issue.*"

285. In short, there is no reliable documentary evidence to support the suggestion that the Second Payment Representations were made to Mr Suppipat and relied upon by him and I find that they were not.

ASSET STRIPPING CLAIMS

Preparations for asset stripping scheme

Payments made under REC SPAs in late 2015

286. Fullerton failed to pay the First Instalments by 26 November 2015. However, on that day at 7:40pm Bangkok time, Khun Nuttawut sent a text message to Mr Suppipat stating: "*I'd like to inform you that I've transferred the principal amount of $75M to your instructed account today*."

287. In fact, on 30 November 2015, KPN EH only paid $44,727,736.58 to NGI and $15,272,168.00 to DLV under the KPN EH SPA.

288. The Claimants maintain and I accept that these under-payments did not discharge the obligations of Khun Nop's Companies. Moreover, they were (i) not paid on time and (ii) did not include all of the interest to be paid in respect of the principal amounts, as agreed during the Second Paris Meeting.

289. On 9 December 2015 letters entitled "*Notice of Default – Failure to Pay the First Instalment of the Purchase Price and related late payment interests under the Share Purchase Agreement*" were served on KPN EH and Fullerton. These purport to revoke the revised payment dates on the basis that there had been a failure by KPN EH and Fullerton to pay by those revised dates.

290. Fullerton responded on 25 December 2015 objecting to the revocation of the revised payment dates and insisting that the due date remained 31 January 2016. It stated: "*Fullerton remains determined to make the required payment for the shares. To demonstrate its good faith, Fullerton will use its best efforts to pay the requested sum in the amount of US$ 85,750,000, together with interest at the rate prescribed under the SPA, calculated from 9 December 2015 (the date Fullerton was first provided with revised payment dates) by 31 January 2016.*"

291. On 25 December 2015, Khun Arthid attended a dinner with Khun Nop (listed in his calendar as: "*Home Dinner with K. Sorapoj, K. Moo Milcon, K. Nop Narongdej, K. Charn Bulkul*").

292. On 29 December 2015, KPN EH paid a further $452,682.45 to NGI and $30,062,692.55 to DLV under the KPN EH SPA. However, the remaining sums due under the KPN EH SPA were never paid; and nothing at all was paid under the Fullerton SPA.

293. In cross-examination, when asked about the source of the money which KPN paid in 2015, Khun Nop admitted that a significant source was WEH itself, through intercompany loans which were dishonestly and falsely recorded in the accounts of WEH.

Grant Thornton report

294. As to this, payments were made from WEH to KPN EH between 23 November 2015 and 24 January 2016. This was later discovered by the auditors of WEH, Grant Thornton, who were engaged on 12 September 2016.

295. Grant Thornton found that *"[d]eceptive conduct occurred by the retrospective preparation of Bills of Exchange…for the 464m, which were issued in the name of a third party instead of KPN*". The report concluded that "*there is evidence that accounting documents were retroactively put in place for the purpose of deceiving a potential user of financial [sic] and then to deceive the auditors KPMG*" (KPMG were acting as WEH's auditors at the time). Further, Grant Thornton recorded that: "*Khun Thun and Khun Nuttawut advised that the KPN payments did not need Board approval but instead approval of the Executive Committee to which authority had been delegated by the board. They advised that KPN payments were approved by Executive Committee members Khun Thun, Khun Nuttawut and Khun Nop. We understand that this approval was not documented*" (emphasis added).

296. Funds were misappropriated from WEH to allow KPN to pay Mr Suppipat's companies under the REC SPAs. This was, I find, seriously dishonest conduct on the part of Khun Thun, Khun Nuttawut and Khun Nop.

297. In his Witness Statement, Khun Thun agrees with and accepts Grant Thornton's findings[236]. He had little choice but to do so. In cross-examination, Khun Nop admitted that these payments were for his benefit and attempted to justify the concealment on the basis that he feared the information (concerning payments to Mr Suppipat) becoming public. I reject that excuse for his dishonest conduct.

298. In cross-examination, Khun Nop said as follows:

[236] Thun WS 3 [7]

"***Q. So it is clear, it is your evidence to my Lord that without your knowledge or consent, Khun Nuttawut and Khun Thun had the entries in WEH's accounts falsified to conceal the fact that loans were made to enable you to make payments to Mr Suppipat. Is that right?***

A. (Interpreted) Yes, I was aware of that, and I had no intention to cause any damage but my intention -- but our intention is to raise the fund to pay Nopporn, and if there were -- if mistakes occurred, yes, I apologise.

Q. I want to be very clear about your evidence. You say "I was aware"; does that mean that you accept that you were aware at the time of the false entries, or are you still saying that you only discovered it later?

A. (Interpreted) At the time of the -- this was recorded, I wasn't aware. I became aware later on."

299. The following day, Khun Nop said as follows:

"***Q. Yes, let's look at {G6/232/19}. If we look at paragraph 4.2: "As a consequence ..." "4. Conclusions. "The above findings provide evidence which supports the following allegations: "... payments from WEH to KPN and receipts from KPN did occur ..." No supporting documentation; retrospective preparation of bills of exchange; bills of exchange issued to a third party instead of KPN; provision of the bills of exchange to the then WEH auditors KPMG. "As a consequence of the above, there is evidence that accounting documents were retroactively put in place for the purpose of deceiving a potential user of financial and to deceive the then auditors ..." Bills of exchange intentionally used to hide the fact that WEH funds had been loaned to KPN for the purpose of assisting KPN finance the purchase of shares. The draft financial accounts disclose the outstanding loan balance, as other receivables, instead of the required disclosure of shareholder loans. This was done without the consent of the board of WEH, was it not?***

A. I don't remember exactly.

Q: So you knew about it?

A: I knew when this incident happened.

Q: Yes?

A: Yes.

Q: And you knew that monies were being taken from WEH in order to fund your purchase of the REC shares?

A: Yes.

Q: And you knew that false bills of exchange were being put into the books?

A: I know that it's not properly done, and the reason is because we are afraid of the attack on the social media."[237]

300. It follows that Khun Nop eventually accepted that he was aware of this dishonest conduct at the time. I find that he was aware of it and sanctioned it. The reference to social media was a spurious excuse.

301. Khun Nop initially said he could not recall whether the board of WEH had approved these transactions. On being asked, "*You must know presumably whether or not the board of WEH approved this behaviour*", he said: "*I don't remember exactly, my Lord, but I would guess that I spoke to the board member*"[238]. I find that that was a lie: on being taken to paragraph 3.15 of Grant Thornton's report, which records that Khun Thun and Khun Nuttawut "*advised that KPN payments were approved by Executive Committee members Khun Thun, Khun Nuttawut and Khun Nop. We understand that this approval was not documented*", Khun Nop immediately changed his evidence, saying "I *admitted that we approved that, and the reason behind that is at that time we are afraid of the media campaign*"[239]:

"***MR JUSTICE CALVER: So this is the answer to the question that I put to you.***

A: Yes, I accept that, my Lord.

MR JUSTICE CALVER: Had you forgotten this when I asked you my question just now, had you forgotten about this?

A: Spoken about what, board member ––

MR JUSTICE CALVER: When I asked you just now whether or not the board had approved these payments, you said that you didn't remember.

A: Now I remember clearly, my Lord, after I look at the document."[240]

302. I find that Khun Nop's use of the WEH funds in this way was thoroughly dishonest and that he was assisted by Khun Thun and Khun Nuttawut who were also dishonest. The suggestion that this dishonest conduct was carried out because of fears concerning Mr Suppipat's media campaign is spurious.

303. It was Ms Collins' evidence that she was not aware of this use of the bills of exchange until March 2016. I accept that evidence.

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[237] Day 17/55:20-56:5

[238] Day 17/57:10-58:1

[239] Day 17/58:21-23

[240] Day 17/58:25 – 59:10

304. It is alleged by the Claimants that "*on or around 10 November 2017, SCB (with the involvement of the WEH Managers and it is inferred NN) persuaded [WEH's] auditors (Grant Thornton) to suppress their conclusion that the Kasem Transfer was not at fair value. SCB persuaded Grant Thornton to "park" the question of whether the transfer to Kasem was at an undervalue until an SEC filing was required*."[241] However, SCB was unable to find any disclosable documents relevant to this allegation and none of SCB's witnesses had any evidence to give concerning it either. Nor were any allegations in connection with this put to any of SCB's witnesses in cross-examination[242] and I accordingly reject this serious allegation.

2016 Arbitration proceedings; Emergency Measures and the BVI injunction

305. In an email of 8 January 2016 to Khun Nop and Khun Nuttawut among others, Mr Suppipat set out his "*stance*". He described how:

> "*When we met in Paris on 26 September, I made it very clear that I'd like to have my company back because you refused to honour our deal – I now understood that you had tricked me and that you did not want to work together and act as my nominee*".

306. He also highlighted how they have "*failed to meet the payment obligation in full on November 26*".

307. As such, Mr Suppipat said:

> *"…as you are obviously super stretched from struggling to fund the payments due by KPN EH, it is clear that Fullerton has not raised any equity or debt and that is why it cannot pay the First Payment, plus interest, due to Symphony. Fullerton has no money… I see no solution now for the Fullerton / Symphony sale other than to reverse the sale, and for Fullerton to make Symphony whole for the damages suffered…."*

308. Mr Suppipat explained that he had "*instructed [his] lawyers to initiate proceedings to recover [the] amounts owed by KPN EH to NGI and DLV"* and *"seek injunctive relief to protect REC and Symphony's interest in REC*".

309. As for the WEH Managers, he stated that he was "*very deeply disappointed with my former managements [sic]"* for either being involved in the conduct about which he was complaining, or for allowing it to happen at all.

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[241] RAPOC, [129.5A]

[242] SCB Closing at [393]

310. Mr Suppipat's account in this email is, I find, materially accurate and truthful. Of course, at this stage Mr Suppipat was unaware of Khun Thun's involvement in the dishonest use of WEH's funds to meet KPN EH's debts.

311. On 8 January 2016, Symphony issued a Notice of Rescission to Fullerton seeking recovery of the REC shares on the basis that Symphony had not received payment of the First Instalment of US$85,750,000 due by 23 October 2015, which constituted total non-performance of Fullerton's obligations under the Fullerton SPA.

312. On 11 January 2016, SCB circulated internally a draft Financial Advisory Committee "*approval memo*" for the IPO, setting out SCB's ambitions for strengthening its relationship with WEH and the advantages of that relationship. It is clear that SCB at this stage were still intending the IPO to go ahead as planned.

313. Khun Arthid's diary had a calendar entry for a meeting with Khun Nop scheduled for 15 January 2016. Khun Arthid claimed: "*It doesn't guarantee – it doesn't mean that it is a real meeting*."[243] Khun Parnu said "*I don't believe I see something*"[244] in writing from the bank referring to any such meeting and Khun Wallaya denied that she was "*aware of the existence of contact between Khun Arthid and Khun Nop …*"[245]. Khun Arthid's evidence was that he was not told by Khun Nop about Mr Suppipat's threat to rescind the REC SPAs, at least at this stage[246].

314. Further, Khun Nop's calendar suggests that he may have had a meeting with Dr Vichit on 22 January 2016. Khun Arthid's evidence was that he did not know whether this meeting in fact happened, but that he did at some stage discuss Khun Nop's non-payment with Dr Vichit[247].

315. On 26 January 2016, Symphony filed a Request for Arbitration against Fullerton under the Fullerton SPA (**the Symphony Arbitration**). NGI/DLV filed their Request against KPN EH on 25 March 2016 (see below).

316. On the same date, 26 January 2016, Mr Suppipat's Companies applied in the arbitrations for Emergency Measures, including an injunction prohibiting Fullerton from disposing or pledging the REC shares transferred under the Fullerton SPA.

317. That same month, WCP commenced acting for Fullerton as its Thai counsel. According to Khun Weerawong, he met Khun Nop for the first time

[243] Day 30/38:9-10

[244] Day 27/12:18-13:15

[245] Day 28/57:22-25

[246] Day30/38:18 - Day30/39:1

[247] Day30/39:13-16

in or about early 2016 when he was approached by Khun Phisit (the head of WCP's dispute resolution department) to assist in identifying appropriate representation for Khun Nop's companies in respect of the Symphony arbitration.[248] Khun Weerawong alleges that he was subsequently briefed to assist WEH in finding a solution to the funding issues which arose because of the arbitration.

318. On 28 January 2016, a letter headed "*Re: Notice of breach under the advisory services agreement dated June 25, 2015"*" was sent from NGI to Ms Collins, Khun Thun and Ms Siddique. This drew their attention to their obligations under the KPN EH SHA and REC SHA: *"…we would like to draw your attention to the fact that any sale by Fullerton of REC shares is (x) contrary to Clause 10.3 of the SPA and (y) subject to approval of KPN pursuant to the REC Shareholders Agreement and (z) a Reserved Matter subject to your control pursuant to the KPN Shareholders' Agreement. We hereby formally notify you that any such sale of REC shares by Fullerton can therefore only be achieved in breach of your obligations pursuant to the [ASA]…."*

319. On 28 January 2016, Ms Collins texted Mr Lakhaney: "*Guys, meeting w Nop and Nuttawutt this morning at KPN Energy 10.30am. Thanks. Thun (that's all I know)"*. Nothing has been disclosed or otherwise revealed about what happened at that meeting[249]. It is likely that it was to discuss the arbitration and payment issues. It is suspicious that this meeting took place without Mr Suppipat's apparent knowledge.

320. The meeting fell on the same day (28 January 2016) that upon the application by Symphony in Claim No. BVIHC (Com) 2016/0016 in the High Court of the BVI, Mr Justice Farara granted an interim freezing injunction restraining Fullerton from *"selling, pledging, dealing with, charging or otherwise disposing of shares in [REC]"* (**BVI Injunction**).

321. In an email dated 2 February 2016, sent by Mr Lakhaney to Omar at the Abraaj Group (being his former employer), he stated: "*Mentioned arbitration that NS has started…Also stated that NS can't win and is a sore seller, but KPN went out of their way to do the deal and put their reputation on the line….*". He continued: "[Mr Suppipat] *had entered into a transaction with* [Khun Nop]*, had together with* [Khun Op] *tried to push a call option deal that was not commercially reasonable, and then agreed to move forward with the SPAs without the call option, and now was trying to attempt to get his company back because he wasn't happy with the terms at which he sold it*."[250]

322. This was an unfair and inaccurate characterisation of Mr Suppipat's position and illustrates where Mr Lakhaney's loyalties now lay. The true position, as Mr Lakhaney knew, was that Khun Nop had failed to honour his

[248] D11/D13 Opening at [12.2]

[249] Claimants' Written Closing [295]

[250] Day 26/45:4-13

payment obligations. Indeed, Khun Nop was stealing from WEH in order to part-comply with those obligations as (at least) Khun Thun knew.

323. The WEH Managers responded to Mr Suppipat's letter on 15 February 2016, rejecting any suggestion they had breached the ASA. NGI replied on 2 March 2016, reasserting its position. Meanwhile, a letter dated 28 January 2016 had been sent by Symphony to Gunkul Engineering Public Co Ltd regarding their attempted purchase of REC shares and "*put[ting them] on notice that the ownership of the Shares is the subjective of an ongoing ICC arbitration*".

324. I consider that Mr Suppipat's conduct at this time was not unreasonable. It was around this time in early 2016, that Mr Suppipat met Mr Marshall in Paris and devised a media strategy to try to embarrass Khun Nop into complying with the obligations under the REC SPAs.[251]

325. This included Mr Suppipat issuing an anonymous letter to WEH's management, auditors, shareholders and the media, being purportedly sent by concerned employees of WEH to Mr Suppipat, setting out various allegations of wrongdoing within and in connection with WEH (**the Anonymous Letter**).

326. He also issued letters dated 29 April 2016 to WEH's directors and shareholders based upon information given to him by Asama Thanyapan. She was a former account manager at WEH, who resigned from WEH and issued letters to WEH's directors and its shareholders, both dated 29 April 2016, citing misconduct at WEH (**Ms Asama's Letters**). Specifically, she alleged that KPN EH had made substantial withdrawals from WEH's bank account during the period November 2015 to February 2016, which were subsequently labelled as loans, and that there had been an attempt to conceal the loans to KPN EH from WEH's auditor, KPMG, by falsifying documents. That, of course, was shown to be wholly true.

327. Mr Suppipat explained in his oral evidence that he "*encouraged*" Ms Asama to resign (and to send Ms Asama's Letters) and made it easier for her to "*take this plunge*" by first issuing the anonymous letter,[252] but he did not pressure her into doing so.[253] I accept that evidence.

328. Contrary to the submissions of Khun Nop, I do not consider that this media strategy was the root cause of WEH's problems; nor do I consider it to have been a blameworthy strategy to adopt. Rather, at that point in time Mr Suppipat was at his wits' end: Khun Nop and Khun Nuttawut had reneged on Part B of the Global Transaction; large sums to which Mr Suppipat's Companies were entitled under the REC SPAs – totalling US$85 million plus interest – remained unpaid; and it had emerged that Khun Nop was trying to sell the Relevant WEH Shares without Mr Suppipat's Companies' consent. Moreover, Mr Suppipat

[251] Suppipat WS 6 [4]

[252] Day 9/122:18-22

[253] Day 9/122:23-123:7

had discovered, through his contacts at WEH, that Khun Nop was using WEH's funds for his own benefit and abusing company property.[254]

329. Indeed, Khun Nop adopted a similar tactic to Mr Suppipat. On 28 June 2016, Mr Lakhaney emailed Khun Nop and Khun Nuttawut, copying in Khun Thun and Ms Collins, attaching "*anonymous letters – one from an employee and one from a minority shareholder*". He explains that the first of these was "*drafted from the "same employees" that sent the first 2 letters and drafted with the same tone/language used*". The latter was "*primarily about Nick's close relationship with Dr K, money Dr K has been getting, and how Dr K + Nick's family seem to be working against the company*". Mr Lakhaney added that: "*Thun – need you to fill in some numbers here which I don't have*". In cross-examination, Mr Lakhaney admitted that these letters were false and had been drafted by him.

SCB's knowledge of and reaction to the arbitration proceedings

SCB's knowledge

330. It is common ground that "*SCB learned of Symphony's rescission claim in or about January 2016."* In particular, the SCB witnesses each admit that they were aware of the arbitrations in "*early 2016*"[255] and it is clear from Khun Parnu's evidence that SCB was aware that the arbitral dispute had arisen from non-payment of the principal sums due under the SPA:

> "***Q…In early 2016, you discovered, did you not, that the 175 million had not in fact been paid…?***
>
> *A. Yes*."[256]

331. Khun Arthid set out in his First Witness Statement that, "*Soon after SCB had agreed in principle to provide finance to Watabak and the other wind projects, I recall that Khun Nop informed me that a dispute had arisen with Khun Nopporn concerning the purchase of the REC shares. I do not remember exactly when Khun Nop told me about the dispute with Khun Nopporn. As I recollect, at that stage it concerned a disagreement about the calculation and payment of interest under the share purchase agreements*."

332. There is ample documentary evidence of meetings between SCB, Khun Arthid and WEH during this period. On 26 and 27 January 2016, Khun Arthid held discussions in respect of KPN although it is unclear what was discussed.[257]

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[254] Suppipat WS 5 [60]. See also, for instance, Day 8/145:3-21

[255] Supalun WS 1, [19]; Sittiporn WS 1 [18] Parnu WS 1 [23]

[256] Day 27/39:5-10

[257] Day 30/41:11-43:17

Further, on 27 January 2016, SCB was looking to get Khun Thun to agree to a mandate for SCB to act as sole Financial Advisor and Underwriter for the WEH IPO. This later made provision for an all-in success fee for SCB of 2.25%. Also on 27 January, there was a New Year's party at Khun Nop's house which was noted in Khun Arthid's diary as "*New year party with SCB Team*" at "*K Nop. Narongdej's house*". Khun Arthid confirmed that he "*went to Khun Nop's house with a big group of people once*" although he could not confirm that it was on 27 January.[258] If this is right this somewhat undermines Khun Arthid's insistence that he has always had a purely professional relationship with Khun Nop:

"***Q. Did you at some stage develop a friendship with Khun Nop?***

A. It is a customer and banker.

Q. Did you at any stage develop a friendship with him?

A. I didn't.

Q. You didn't?

A. No.

Q. When you met him was it therefore, apart from the meeting with his father, was it on business only?

A. It's on the business only.

Q. So every time there was a meeting with him, you were discussing business, correct?

A. Meeting with Khun Nop.

Q. Khun Nop, yes?

A. Yes."[259]

333. In cross-examination, Khun Arthid continued to insist that he was unable to remember exactly when he spoke to Khun Nop but admitted that: "*I think ... I* ***fully aware of dispute before it went to arbitration****, and I cannot recall and understand or remember why it did not go to the credit committee"* (emphasis added). Since the arbitration claim was made in January 2016, this timeline contradicts Khun Arthid's Re-Re-Re-Amended Defence where he pleads that, "*[i]n or around March or April 2016, Khun Arthid was informed by the SCB team that a dispute had arisen between NS's companies and NN's companies*".

[258] Day 30/41:11-43:17

[259] Day29/110:12 - 111:1

Khun Arthid attempted to explain this inconsistency on the basis, "*I may confuse the time*" in the Defence.

334. Khun Arthid admitted in cross-examination that he inferred that Khun Nop had not paid Mr Suppipat under the REC SPAs because he did not have the money and had not been able to raise it: "*Khun Nop didn't tell me about this; it is just my common sense….our guess is, my guess is that he doesn't have the money or enough money, and also my guess is he cannot be able to raise the money.*"[260] Khun Arthid later reiterated his claim that he understood the dispute was related only to the payment of interest rather than principal: "*the problem is not about didn't pay or pay. It's about the way they calculate or they have the dispute on the interest or the account, which I couldn't recall exactly…*"[261]. However, none of the documentary evidence suggests either that it was a dispute solely about interest or that there was any credible basis upon which Khun Arthid could have drawn that conclusion.[262] When put to Khun Arthid that he was well aware that there was also USD 87.5m of principal which had not been paid, he was evasive "*I couldn't recall on this one*"[263] and *"I didn't make that conclusion*" [264].

335. In all the circumstances I find as a fact that Khun Arthid knew in January 2016 that the dispute had arisen by reason of Khun Nop's non-payment of the principal sums due under the SPA and not merely by reason of a dispute regarding interest.

SCB's reaction

336. SCB's reaction to Mr Suppipat's rescission claims in the 2016 Symphony Arbitration was another subject of controversy. The Defendants' position is that SCB was unwilling to finance WEH and Watabak in light of the possibility of Mr Suppipat's return, such that the value of the WEH shares at the point in time when they were sold on to Dr Kasem was significantly reduced.

337. It is common ground that "*in March 2016, SCB refused to sign or allow WEH to draw down on the Watabak Facility, and refused to discuss financing for the Future Projects.*" This was an informal stance rather than a minuted stance of SCB. However, the question is whether this was SCB's stance throughout, and in particular between January 2016 (when it found out about the arbitration) and March 2016. If it was not, it raises the question as to

[260] Day 29/121:1-12

[261] Day 35/5:8-16

[262] Day 35/5:4-16

[263] Day 35/5:17-20

[264] Day 35/7:15-24

whether SCB's refusal in March 2016 was designed to facilitate the false suggestion that the WEH shares had to be urgently sold to Dr Kasem/Madam Boonyachinda.

338. None of SCB, Khun Nop, Khun Nuttawut, Khun Arthid, Khun Weerawong or the WEH Managers has produced a single document (contemporaneous or otherwise) evidencing SCB's stance in early 2016. Furthermore, the 2-3 month delay from SCB gaining knowledge of the arbitration in January 2016 to SCB making this decision is noteworthy considering SCB's extremely swift response when Mr Suppipat was charged with his *lèse-majesté* offence – as set out above, a copy of Mr Suppipat's arrest warrant was circulated on 1 December 2014 and an ExCom meeting took place the following day in order to consider the withdrawal of credit facilities for new WEH projects.

339. Indeed, on SCB's own case, the dispute over payment of the initial REC SPA instalments was *"hardly a crisis because the bank had known from the outset that [Khun Nop] would need to raise money from third parties to make the "milestone" payments under the REC SPAs*"[265]. Further, Khun Arthid gave evidence, when asked about what he and Dr Vichit decided to do about Khun Nop's failure to pay, that: "*Normally when the problem happened with the customer, we always wait and see how the customer fix the problem. We cannot just go tick, tick, tick and just -- if the customer cannot do this we have to jump and chew the deal right away. I think we wait and see how the customer try to solve the problem*."[266]

340. SCB's witnesses maintained that they communicated to WEH (by way of a telephone conversation between Khun Parnu and Khun Thun) that in light of Mr Suppipat's rescission claim, SCB would not permit drawdown on the Watabak facility. As such the lending process was suspended, although not formally.[267] Khun Thun explained: "*I couldn't recall specific word, but the essence was that the bank got very concerned about the rescission claims, because of the whole basis of, the whole basis of the bank entering into loan agreements for Watabak was that there was no risk of Mr Suppipat coming back into the picture*."[268] Ms Collins recounted: "*So in 2016 the first problem we had was SCB refusing to fund projects because of the rescission claim, and obviously the risk that Nick would come back would mean that we wouldn't be able to raise financing*."[269]

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[265] SCB Written Closing [128]

[266] Day 30 / 39:17-25

[267]Day 31/37:18-25

[268] Day 24/36:8-19

[269] Day 21/10:8-11

341. There is no evidence of Khun Nop's default on payment being escalated to the Credit Committee or ExCom[270] until May 2016, despite it being common ground that SCB was aware of the arbitration in January 2016. There are no records of any meetings whatsoever, at any level, during the 2015 period where the conduct of Khun Nop was discussed or concerns were ventilated including as to the defaults in payment or where there was discussion of (i) the apparent inability to pay and (ii) the false assertion made to the bank that Mr Suppipat had been paid (which would have been relevant to the question of whether Mr Suppipat had cause to pursue Khun Nop and ask for his shares back).[271] SCB argues that it can be "*quite certain*" that there was no discussion of the dispute within its committee structure earlier than May 2016 for three reasons – (i) discussions are minuted and recorded, (ii) the drafting technique SCB uses of each resolution referring to a previous resolution and (iii) the bureaucratic structure around the Credit Committee and the ExCom means that a referral of a matter to these committees generates a significant amount of paperwork[272].

342. SCB's position is that, aside from its informal stance, drawdown on the Watabak facility could not happen in any event because a number of conditions precedent were unfulfilled and events of default had not been waived by SCB[273]. The conditions included the obligation to enter into an Equity Contribution Agreement (**ECA**), the purpose of which was to ensure that WEH, as the shareholder of Watabak, would contribute equity as and when required for the project. Khun Supalun records that the Business Relations Division (**BRD**) decided to hold off executing the ECA until the bank had assessed the risk arising from the dispute in more detail[274]. This evidence was not challenged and I accept it. Khun Parnu adds that the BRD also had significant concerns at this time about Watabak's failure to comply with a share pledge obligation because Khun Somphote and Khun Amorn were refusing to allow their shares to be pledged to SCB, an issue which took up more of his time than the issue created by the Arbitrations[275]. This evidence, which I accept, was also not challenged. As such, SCB submits that the decision to suspend drawdown was not a formal decision which needed to be taken by the Credit Committee or the ExCom, but simply a recognition by the CMD, BRD and RMD that progressing the other issues would not unlock drawdown until the issues created by the Symphony Arbitration had been resolved[276].

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[270] Claimants' Written Closing [285]

[271] Claimants' Written Closing [258]

[272] SCB Written Closing [165]

[273] SCB Written Closing [151.1]

[274] Supalun WS 1 [22]

[275] Parnu WS 1 [24], [26]

[276] SCB Written Closing [151.2]

343. As such, Khun Parnu gave evidence that: "*I recall that others at SCB … were concerned that the arbitration presented a substantial risk that Khun Nopporn would return as shareholder of REC … I also recall that SCB's legal department was investigating this issue. I recall being concerned that the arbitration would delay WEH's attempts to do an IPO to raise new funds and therefore negatively impact the Bank's own current and potential future lending to WEH and its subsidiaries; and that if Khun Nopporn did return this would generate the risk of damaging SCB's reputation. For as long as such a risk was going to persist, I do not think that we (my team, CM and Risk Management) at SCB would have sought the Credit Committee's approval to waive the outstanding conditions precedent to drawdown, and until that happened drawdown could not take place. Drawdown on the Watabak Facility was therefore effectively suspended until these issues could be resolved to SCB's satisfaction*."[277] In cross-examination he stated that "*It's the legal teams responsibility to understand the dispute*"[278] but claimed he had informed his line manager, Khun Pimolpa[279].

344. Khun Wallaya, in the section of her Witness Statement which describes the events following the commencement of arbitration proceedings, sets out that "*drawdown [on the Watabak facility] was suspended*", but she could not "*remember exactly when or how that decision was made or who made it*". Khun Wallaya said, in regard to what she did when she heard that approximately half of the initial US$175m due had not been paid, "*I did not take any specific action because there are some other works that other teams are handling*"[280].

345. Khun Arthid's evidence regarding SCB's response to the arbitration was: "*We know that we have to pause, but we tried to understand what is the reason, what is the issue of the conflict, what ---- why, it cannot be resolved, and we believe that as long as it is in arbitration, we need to wait at least at the beginning when we heard. We don't know what exactly, and so we decide to pause and try to wait and see and try to understand what is the real consequence before we take any other action*"[281] and also "*I think it is our discretion of how we make decision about how we wait, how we take the decision to wait and see… We always flexible, we always work with clients, with customer, to see how the customer to solve the issue that they have…*"[282] and "*…When the customer has a problem, it is a problem, but it doesn't mean that Khun Nop is doing anything illegal or anything that – he has a problem… We work with the customer, with the awareness that the customer has a*

[277] Parnu WS1 [25]

[278] Day 27/40:21-41:21

[279] Day 27/45:24-46:21

[280] Day 28/51:13-52:2

[281] Day29/117:7-15

[282] Day30/35:7-12

problem, and the bank will do our job, or the part we can do to resolve the problem"[283].

346. Khun Arthid also explained: "*once the issue go to arbitration, nothing can happen*"[284] and "*…after we know that it went to the arbitration, so I think it's in good hands that the arbitrator will award whatever to resolve the conflict, so it's not a bank role to do any action to resolve the conflict for the two parties*."[285] As to the question of who it was within SCB that had directed that nothing should be done until the arbitration had concluded, Khun Arthid admitted that no one had given this specific direction[286] but claimed it was "*common sense*" from "*the business point of view*"[287].

347. Further, Khun Arthid said that he personally was involved in the "*close monitoring of the situation caused by the arbitrations between at least the end of January and 25 May 2016*"[288] and additionally "*legal, risk and business, and mostly risks and business are working closely, but in this case legal also are a major part of the team*"[289]. He confirmed this was dealt with by the senior members of the teams, who he accepted would be taking a close interest in the case[290].

348. According to Khun Nop, "*What I can recall mostly in terms of funding for WEH, I am speaking to Khun Arthid and the team*" and confirmed that he "*met him regularly during the entire period from mid to late 2015, onwards to 2018 or 2019*". He also confirmed that "*many of*" the conversations had to do with WEH and the dispute with Mr Suppipat, as well as "*the social function organised by [SCB]*"[291].

Engagement of Khun Weerawong

349. Khun Nop said that his understanding of Khun Parnu's message was: "*that it is a policy of the bank that bank cannot deal with anyone who get lèse-majesté charge…that is bank's policy and there is nothing we can do. So we have to fix*

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[283] Day30/45:7 - Day30/46:3

[284] Day 29/118:12-13

[285] Day 29/118:25- 119:4

[286] Day 29/119:25 -120:3

[287] Day 29/120:4-13

[288] Day 30/57:21-58:1

[289] Day 30/58:11-13; Day 30/61:10-19

[290] Day 30/58:19-9:3

[291] Day 16/8:21-9:17

this issue..."[292]. He confirmed that he "*went to Mr Weerawong for help in solving the problem*"[293].

350. Khun Weerawong claimed that in February 2016 Khun Nop and Khun Thun had informed him that the arbitration had caused SCB to raise fresh concerns about Mr Suppipat returning to WEH[294]. WCP was then retained to act for WEH, alongside its instruction in respect of the Arbitrations, "*in respect to the urgent financing issues that it was facing*"[295]. Khun Weerawong understood (consistently with Khun Parnu's evidence) that SCB was effectively refusing to allow drawdown on the Watabak facility, by declining to grant waivers for certain (unrelated) conditions precedent[296].

351. Khun Weerawong said he spoke to Khun Arthid after he *"[l]earned about the SCB did not support the project*" on the basis "*as the CEO of bank ... he should be able to shed some light on this policy*". When Khun Arthid was asked when he "*first [had] a discussion with Khun Weerawong about the arbitrations*", Khun Arthid responded, "*I never discussed with Khun Weerawong on the arbitration*". However, in his First Witness Statement, Khun Weerawong stated that, "*I am unaware how SCB first learned about the arbitrations but by the time I discussed the matter with Khun Arthid he was already aware of at least one of them*". When shown this, Khun Arthid asked to withdraw his comment and said he should have said that he was unable to recall if he had discussed the arbitration with Khun Weerawong.

352. Khun Weerawong alleged that he informed Khun Arthid "*that I was now engaged by WEH to represent WEH to discuss with the bank about whether or not there is possibility to continue with the financing, and I said I was willing to explain in details about the arbitration and my belief that the termination of the agreement should not be awarded by the arbitrators*"[297]. He alleged that, "*Khun Arthid told me that it's not his decision, I need to talk to the legal team at SCB and come up through the ranking ... in accordance with the approval process of the bank*"[298]. After this, Khun Weerawong said he may have had "*updating*" conversations with Khun Arthid.

353. Khun Weerawong's evidence as to what happened after the initial exchange with Khun Arthid was unclear and confusing. Khun Weerawong claimed he spoke to Khun Parnu afterwards, but Khun Parnu told him to speak to Khun

[292] Day 17/87:3-11

[293] Day 17/88:6-18

[294] Day 31/35:23-36:8

[295] Weerawong WS 1 [32]

[296] Day 31/37:5-23

[297] Day31/40

[298] Day31/40:14-23

Arthid. After this, Khun Weerawong alleged he spoke to Khun Arthid again and Khun Arthid said he was "*not interested*" and told him to "*talk to the legal team*". Khun Weerawong also alleged that Khun Arthid told him, "*Even 1% chance of Khun Nopporn coming back, he think that the bank still have a problem*". Khun Arthid could not recall this statement but confirmed that the bank wanted to ensure it understood the possibility of Mr Suppipat "*com[ing] back"* but insisted he "*never ask[ed]*" Khun Weerawong to do the ring-fencing. This is significant: Khun Arthid did not consider it was necessary to "ring-fence" by a further onward sale of the shares.

354. By contrast, in his First Witness Statement, Khun Weerawong outlined: *I believe that I was initially told by Khun Nop and Khun Thun to speak with WEH's relationship manager at SCB, Khun Parnu. My recollection is that I spoke with Khun Parnu about the arbitrations and told him that they would not affect WEH. Khun Parnu told me that I would have to speak with Khun Arthid as Khun Nopporn was a s.112 person. I believe that I then spoke with Khun Arthid shortly after speaking with Khun Parnu. I asked Khun Arthid what would provide SCB with sufficient comfort that any risk of Khun Nopporn returning had been mitigated. I believe that I offered him a legal opinion on how WCP believed that the arbitrators would not decide in favour of the termination of the SPAs as requested by Khun Nopporn's companies, but was told that this would not be enough. It was then that I realised that we would have to come up with a structure to address SCB's concerns."* (underlining added)

355. Overall, on the Defendants' case, the suspension of financing put Watabak and WEH "*in the face of an intense crisis which would have been terminal if the risk of rescission remained*"[299]. In his Witness Statement, Khun Nop explains that the decision to suspend drawdown on the Watabak Facility came at a point when Watabak had already paid a deposit of around $10m to GE under the TSA and, if financing could not be achieved, GE would demand the balance of the payment and not return the deposit[300]. Further, at that point the only funding of Watabak came in the form of equity financing by WEH which would run out "*within a few months*", with Khun Thun warning Khun Nop that it would only be possible to pay staff salaries for another two months[301].

356. Khun Arthid admitted that Khun Nop asked him for help to find a buyer or someone who could provide funding: "*I should say that he asked me to help or to find the person who has interest to buy the share or to give – provide him the funding, could be lending him the money. Yes, he asked me to do that*."[302]

[299] SCB Written Closing [152]

[300] Nop WS 1 [93]

[301] Nop WS 1 [94]

[302] Day 35/7:10-24

This is nothing to do with "ring-fencing" the shares; it is all to do with funding Khun Nop such that he could pay Mr Suppipat for the REC shares.

357. In early 2016, Khun Arthid introduced Khun Nop to Gunkul Engineering PCL (**Gunkul**)[303] specifically to "*help [NN] obtain the kind of equity financing he required to pay for the REC shares*"[304]… "*I recall that I introduced him to the owner of Gunkul Engineering, Khun Gunkul Dhumrongpiyawut ("Khun Gunkul"), who was a customer of the bank and a friend of mine. Khun Gunkul had previously expressed an interest in WEH's wind project companies and Gunkul Engineering was already involved in the energy market in Thailand…*"[305].

358. It appears therefore that Khun Arthid was willing for SCB to finance Watabak if Khun Nop could obtain the funds to pay Mr Suppipat.

359. However, on 28 January 2016, Symphony wrote to Gunkul to "*put [them] on notice that the ownership of the Shares is the subject of an ongoing ICC arbitration between Fullerton … and Symphony … We contend that Symphony is the legal owner of the Shares …*". When Mr Suppipat was asked in cross-examination why he did not want the deal to proceed when it might provide financing to Khun Nop which he could use to pay Mr Suppipat, Mr Suppipat explained that, "*I thought that even if Nop sold 10% to Gunkul and kick the can down the road and pay me 85, what about the rest, the rest is potential timebomb. There will be no idea. I will be unlikely to get 525 because the bank is unlikely to sponsor this behaviour*". I accept that evidence.

360. In the light of all of this evidence about SCB's involvement, I find that SCB had informally determined after the Symphony arbitration commenced that Watabak could not drawdown on its facility, although no formal decision not to fund had yet taken place. The situation was fluid and remained under consideration, including by the taking of legal advice from Khun Weerawong. I find that Khun Arthid was regularly consulted about the situation and he was seeking to assist Khun Nop to meet his payment obligations under the REC SPAs.

Emergency Arbitrator grants emergency measures

361. On 17 February 2016, the Emergency Arbitrator granted Symphony's application for emergency measures (**the EA Order**), ordering amongst other matters that:

[303] Day 30/25

[304] Arthid WS 1, [39]

[305] Arthid WS 1, [39]

> *"Fullerton Bay Investment Limited is prohibited from disposing of the shares, representing 49% of the share capital, it holds in Renewable Energy Corporation Co., Ltd. (now known as KPN Energy (Thailand) Co., Ltd.) (including through sale) and/or transferring such shares and/or creating any charge…and any other action having an economic effect similar to the disposal and/or transfer and/or encumbrance of the shares, pending the resolution of the present dispute between the Parties by way of the final award in the arbitration between the Parties*" (emphasis added)

362. On the same day, a meeting took place between members of both SCB (Khun Supalun and Khun Junya Wangdumrongwet) and WCP (two partners, Khun Phisit Dejchaiyasak and Khun Warathorn Wongsawangsiri, and an associate, Khun Natarin Vititviriyakul). It was not attended by Khun Weerawong. A record of the meeting, produced by Khun Supalun, notes:

    a. WCP's opinion was that if Khun Nop's Companies were found by the arbitrator to be in breach of the Fullerton SPA, Khun Nop's Companies would not be required to return the REC shares to Mr Suppipat's Companies; instead any remedy would be in damages alone. Restitution would be impossible due to KPN's further investment in the business, and, in any event, REC and WEH were not counterparties to the REC SPAs.

    b. That the "*KPN Group's Solution*" to the Symphony arbitration was *"to sell 60% of [REC's] stake in WEH, in which REC holds 60% of WEH's total shares, to new shareholder to sever the link between Fullerton KPN EH and WEH and the resulting litigation issues*".

    c. That "*the outcome of the [arbitration] verdict should not affect REC and WEH, which are not counterparties to the share purchase agreement*".

363. None of these details were challenged in cross-examination of Khun Supalun[306]. Importantly, they demonstrate that the idea of ring-fencing generally did not come from SCB but was something presented to it as the KPN Group's "*solution*" (at the behest of its legal adviser, Khun Weerawong – see below). Moreover, if, as WCP suggest, the shares would not need to be returned to Mr Suppipat, this "solution" was not in fact required at all. Rather, it is likely that it was decided upon by KPN/Khun Weerawong as a necessary step to take to ensure that Khun Nop could extract value from the WEH shares before the (legal) net closed in on his dealing with those shares.

364. In cross-examination, Khun Weerawong confirmed that this is advice that he formulated, being repeated by Khun Phisit[307]. The notes do not record how the proposed solution was compatible with the EA Order and its prohibition of steps which had an economic effect "*similar to the disposal and/or transfer*

[306] Day 29/102:3 – Day 29/104:22

[307] Day 31/65:24-66:1

and/or encumbrance of the shares". As an experienced lawyer, one would expect Khun Weerawong to have (at least) questioned this, if acting honestly.

365. Khun Wallaya explains in her Witness Statement that she "*recall[ed] being briefed about [this] meeting*" and that her "*view at that time was that whether or not the terms of the REC SPAs included rights to terminate as a matter of contract, it could still have been possible for Khun Nopporn to rely upon a right to terminate the REC SPAs as a matter of general civil law*"[308], and obtain the return of the shares. In cross-examination, she confirmed this was her "*personal understanding*". She considered that there was also a risk that any sale of the WEH shares could be challenged if it was not done in good faith.[309] That makes obvious sense and affords another reason why this was not "ring-fencing" the WEH shares at all.

366. In the lead up to the 17 February 2016 meeting, Khun Nuttawut's iPhone calendar records:

a. A meeting with Khun Sasiprin of Ploenchit Capital Limited (**Ploenchit**) on 29 January 2016; and

b. On 2 February, back-to-back meetings: first, with Khun Weerawong and Khun Phisit of WCP, followed immediately by a meeting with Khun Sasipirin of Ploenchit.

367. Between 18-26 February 2016, WCP sent to Khun Supalun of SCB multiple documents relating to the Symphony Arbitration, including:

a. A WCP case summary of the dispute;

b. The Fullerton SPA;

c. Correspondence between Mr Suppipat's Companies and Nop's Companies in relation to the dispute;

d. A WCP table of chronological incidents.

368. Khun Sittiporn describes reading the documents provided and being surprised by the suggestion in the arbitration that there was a buy-back arrangement associated with the REC SPAs. He explains that he would have regarded the exercise of any such right by Mr Suppipat as giving rise to a breach of clause 18.3 (Misrepresentation) or clause 18.17 (Material Adverse Effect) under the Common Terms Agreement for the Watabak Facility (**WTA**)[310].

369. The documents provided did not include Symphony's Request for Arbitration (dated 26 January 2016); but this was subsequently provided by

[308] Wallaya WS 2 [21]

[309] Wallaya WS 2 [22]

[310] Sittiporn WS 1 [22]-[23]

WCP on 24 March 2016. Nor, surprisingly, did the documents provided include the Application for Emergency Measures (dated 26 January 2016) or the Emergency Arbitrator's Order (dated 17 February 2016), and these documents have not been found in SCB's disclosure exercise. Fullerton's letter of 29 January 2016, which was forwarded by Khun Natarin on 26 February 2016, did, however, refer to the Application for Emergency Measures.

370. By an email exchange of 25-26 February 2016, Khun Supalun of SCB requested WCP to send "*Global transaction agreement which contemplate the buy-back option*" to which WCP responded: "*as explained over the phone, such agreement is the sole allegation of Khun Nopporn and has never been signed*." No response to this email has been identified or, therefore, disclosed by SCB.

371. SCB produced a summary chart of the existing arbitration proceedings (with metadata of 29 February 2016). It states that in relation to "*Part A – Existing arbitration on ownership of shares in REC*", "*The arbitrator issues an injunction prohibiting Fullerton to transfer REC shares but refused to give injunction prohibiting REC to transfer shares in WEH as REC is not party to the SPA*". The Claimants point out that this is a misleading summary because the EA Order did not engage with the possibility of REC transferring shares in WEH. In relation to "*Part B – Potential future litigation to unwind the transfer by REC of WEH shares*" it states, "*KPN is planning to sell all 61% shares in WEH held by REC to a new entity to cut any relation between REC and WEH*". The Claimants allege that this demonstrates that this was KPN's scheme to protect KPN's interest alone.

The 17 March 2016 meeting and the ring-fencing strategy

372. On 17 March 2016, being one month after the EA Order of 17 February 2016, a key meeting took place between Khun Nop, Khun Nuttawut, Khun Weerawong and the WEH Managers. Khun Weerawong's evidence was that this meeting was convened by Khun Nop to brief the advisors on the ongoing legal dispute and the rationale for and steps taken to ring-fence WEH, as well as to discuss the ASA[311].

373. It was at this meeting that the idea of a "*ring-fencing strategy*" was specifically proposed by Khun Weerawong[312]. According to this, there would be a sale of the WEH shares to a connected third party. Ms Collins originally described this as a "*related*" party in her First Witness Statement[313], but

[311] Day 31/96:2-8

[312] Lakhaney WS 1 [113]; Day24/36:20-23. Khun Weerawong confirmed in his evidence that he proposed the idea in a meeting with SCB after SCB had told him that simply providing a legal opinion would not be enough: WS 1 [36]-[40]

[313] Collins WS 1, [245]

submitted a Third Witness Statement explaining that Mr Weerawong did not use the term "*related*" during the meeting but that her understanding from the meeting was that "*the buyer … would need to be someone with whom the KPN Group had a pre-existing relationship*" rather than a familial one[314]. In cross-examination, Ms Collins said that someone "*close*" was required since Khun Nop had still not paid Mr Suppipat in full and would need to do so in the future. I consider that Ms Collins' original description is likely to be the truth of the matter. The plan was to move the shares away from Mr Suppipat but always to keep them under Khun Nop's control by placing them in the hands of a relative of his. This fact demonstrates that this was not a plan to "ring-fence" the shares at all (as they would still be under Khun Nop's control), but rather to ensure that any award which Mr Suppipat obtained in the arbitration was rendered nugatory.

374. It was Khun Weerawong's evidence that the ring-fencing strategy was a "*necessary reaction to the risk that WEH would lose its sole source of financing at the time as a result of NS's claims in the arbitrations… I therefore developed the strategy in order to save the company and, in doing so, to protect KNG's only asset. All this was done on the basis that the transaction must be carried out in accordance with Thai law*".[315] I consider this to be untruthful evidence for the same reason. It is also inconsistent with his firm advice at the time that Mr Suppipat's claim for rescission in the arbitration would fail.

375. In cross-examination, when Khun Weerawong was asked if this strategy was "*trying to ensure that even if Khun Nopporn won the arbitration, he would not be able to get back the WEH shares*", he responded that "*he would not be able to get the REC shares, but the … WEH shares … will be replaced by money, which is equivalent to value of the WEH shares*". However, Khun Weerawong admitted that he "*knew perfectly well the effect of the transfer was likely to be that there was no money within the original structure with which to pay Khun Nopporn*".

376. Khun Arthid and Khun Weerawong contended that it was a key element of the ring-fencing strategy upon which Khun Weerawong advised that the sale of the WEH shares would be for fair value[316]. In this regard, Khun Weerawong's evidence as to his understanding of what Thai law required was: "*As a matter of Thai law, such a transaction would need to be made for value (i.e. not for free) and in good faith (which I took to mean fair value in this case)*"[317]. Further, Khun Weerawong alleged that "*I suggested* [at the 17 March 2016 meeting] *that whoever did* [viz. bought the shares] *should be independent, though that was not in fact a legal requirement for the transaction".* I consider

[314] Collins WS 3, [5]

[315] Weerawong WS 1 [49]

[316] D11 and D13 Written Closing Submissions [41]

[317] Weerawong WS 1 [40] and see too Day 31/51:1-9

this also to be untruthful evidence; and indeed Dr Kasem was clearly not independent of Khun Nop.

377. The WEH Managers claim their understanding of the ring-fencing was as follows:

a. Ms Collins thought that the underlying reason behind the ring-fencing was "*so that the company could get funding and continue to survive. It was to ring-fence [WEH] from Nick's rescission claim.*"[318] She said she thought that "*the ability to pay Nick would be on the survival of the business … there was no money if this business went bust"*[319]. She understood that the REC SPAs did not prevent a sale of the REC or WEH Shares.[320] Ms Collins' evidence was that she was not aware of any reason why the ring-fencing proposal would not be permitted and she assumed that Khun Weerawong had signed off on it from a legal perspective.[321]

b. Mr Lakhaney said he understood that the ring-fencing was meant to prevent Mr Suppipat from coming back into the structure whilst ensuring payment to Mr Suppipat[322]. Mr Lakhaney's understanding was that the arrangement was "*perfectly legal, presented by the W in WCP*".[323]

c. Khun Thun thought that "*the purpose is to make sure that Wind is not going back to be contaminated so we can continue with the financing of Watabak we can drawdown money to pay contractors and avoid default at Watabak; and Wind can continue to develop its projects*".[324] It was his evidence that Khun Weerawong confirmed that it was legal and was a true sale which would be legally binding, so that Mr Suppipat could not interfere.[325]

378. I do not accept this evidence. As will be seen, I find that each of Khun Thun, Mr Lakhaney and Ms Collins knew and intended (like Khun Weerawong) the

[318] Day21/80:13-17 - it was not to "*block NS*".

[319] Day 21/80:21 – 81:1

[320] Collins WS 1 [235], [236]

[321] Collins WS 1 [243], [245]

[322] Day 26/33:8-22

[323] Day25/73:16-20

[324] Day23/115:25-116:12. Khun Thun also denied that he knew that the ring-fencing would prevent NS from recovering his shares or their value: Day24/98:8-13

[325] Thun WS 1 [120]

"*ring-fencing solution*" to deprive Mr Suppipat of payment under the REC SPAs and any subsequent arbitral awards which enforced it.

1.25% stake for WEH Managers

379. During the 17 March meeting, and after Mr Weerawong had left the meeting, it was orally agreed between Khun Nop, Khun Nuttawut and the WEH Managers that the WEH Managers would each receive a 1.25% stake in WEH[326].

380. The WEH Managers say that this deal was but the fourth iteration of what they called "*WEH Managers' Incentive Schemes*". The First was the pre-2015 original employment agreement between WEH (with Mr Suppipat in charge) and themselves. The Second culminated in the ASA. The Third stemmed from the MoU dated 24 August 2015 and would have awarded them a stake of any call option consideration payments.

381. Given the fate of the previous incentive schemes and (by then) the difficult relationship between Mr Suppipat and Khun Nop, the WEH Managers maintain that they were keen to ensure that the incentive scheme took the form of shares directly held in WEH (without conditions) rather than shares in a holding company, or a monetary payment or bonus based on an agreement or an assurance[327]. Further, they submit that the purpose of the shareholding was a legitimate employment incentive for the WEH Managers to continue working for WEH in order to help build its projects and raise money, despite the uncertainty surrounding WEH, given the Symphony Arbitrations.[328] They say that the Fourth Incentive Scheme was a natural evolution from the Third, given that the COA fell through.

382. The Claimants, on the other hand, submit that the 1.25% stake in WEH was a bribe from Khun Nop personally to the WEH Managers for their assistance in the dishonest ring-fencing scheme. That involved by necessity, amongst other things, Ms Collins and Khun Thun abdicating their responsibilities under the KPN EH SHA, in particular protecting Mr Suppipat from the wrongful sale of WEH shares (which was exactly what was planned). Accordingly, at this meeting, plans were hatched to terminate the KPN EH SHA.

[326] Collins WS 1 [21] and [218] }; Thun WS 1 [84]; Lakhaney WS 1 [99]

[327] Collins WS 1 [219]; Collins WS 2 [20] ; Lakhaney WS 1 [136], [137] and WEH Managers Written Closing [223]

[328] Collins WS 1 [284]; Lakhaney WS 1 [136]

Project Houdini presentation

383. Furthermore, on 18 March, Mr Lakhaney emailed Khun Thun, notably using their personal *gmail* addresses, rather than their professional email addresses. Mr Lakhaney asked Khun Thun to show Khun Nop and Khun Nuttawut "*a presentation on the key points from yesterday*", which he "*believe[d] captures everything including the basic points of a potential SHA*". Ms Collins gave evidence that: "*I do recall the Project Houdini document circulated by Mr Lakhaney on 18 March 2016 which set out the steps*…"

384. In this 18 March email, Mr Lakhaney states that, because Khun Thun is "*there*", he does not want to send the presentation on "*by email*". It is inferred by the Claimants (and I accept) that the reference to "*there*" is a reference to a dinner and party at the Narongdej family residence. The dinner is evidenced by various calendar entries: Nuttawut's iPhone calendar recorded a "*Dinner (Sir Anan Payarachun, Mr Anutin, Dr Wichit*)" and Khun Arthid's MS Outlook Calendar recorded "*Dinner with K. Nop Narngdej, Than Anand*." As such it appears the dinner involved Khun Nop, Khun Nuttawut, Khun Arthid, Khun Anand and Dr Vichit, joined by Khun Anutin Charnvirakul (at this date, of course, Khun Anand was the Chairman of the SCB Board of Directors; Khun Arthid was the CEO and Vice Chairman of ExCom; and Khun Vichit was the Chairman of ExCom).

385. This dinner event appears distinct from a far larger party that also took place that day. When asked about the "*dinner"* Khun Arthid said that: *"If that is between Khun Nop and Khun Anutin, I couldn't recall, because I only recall when there was a big party when Khun Anutin joined, the big party. I think that's the only dinner I recall. And I couldn't recall that on the night of March 18 we had dinner, and I didn't, I couldn't – I could not recall that I was told about this ring-fencing on March 18. The only date that I recall is when there was a team report this issue at the ExCom.*"[329] A photo on the Instagram of Khun Nuttawut, which was posted on 18 March 2016, also shows Khun Nop, Khun Anutin and Khun Arthid together.

386. According to Khun Arthid's calendar, the dinner did not start until 19:00 hrs; whereas we know from the "Date" line of the email to Khun Thun that it was sent to him at 15:47 hrs (i.e. in the middle of the afternoon). In cross-examination Mr Lakhaney unconvincingly suggested that he did not want to send the document by email to Khun Nop or Khun Nuttawut because WEH had had "*a series of leaks of information*"[330].

387. The "*Project Houdini*" presentation is a very important contemporaneous document. It referred to the following in particular:

a. Although WEH needed to remain 51% Thai-owned in order to comply with ALRO land requirements, there was sufficient Thai ownership "*to*

[329] Day 35/13:25-14:14

[330] Day25/60:24

allow for a significant portion of [REC's] WEH shares to be distributed to a foreign SPV."

b. The foreign SPV (notably called the "KPN SPV") could be based in any jurisdiction but "*given Sellers are HK Companies and a BVI injunction has been given, it may be best to avoid these jurisdictions."* That is a very odd statement to make if what was envisaged was a transaction intended to be in good faith and for proper purposes.

c. KPN would remain in control of the shares. This demonstrates that this scheme was not a genuine ring-fencing scheme at all.

d. A proposed shareholding structure, according to which *"Each Management member – Emma Louise Collins, Thun Reansuwan, and Aman Lakhaney (incl. wife Khadija Bilal Siddique) shall receive 1.25% of [WEH] shares currently owned by [REC]*".

e. A shareholders' agreement "*By and between Khun Nop Narongdej, Khun Nuttawut Phowborom, Khun Thun Reansuwan, Emma Louise Collins, Aman Lakhaney, Khadija Bilal Siddique and the KPN SPV*."

f. The REC SHA and KPN EH SHA would be terminated.

388. I find that each of the WEH Managers must have been aware at the time of the substantive terms of this presentation (as mentioned, Ms Collins gave evidence that she was aware of it on 18 March 2016[331]). The WEH Managers say that nothing was said to them about the proposed price for the shares[332]. They also say that there was no discussion about the means by which Mr Suppipat would be paid following the ring-fencing[333]: according to Ms Collins and Mr Lakhaney, it was simply understood and assumed that Mr Suppipat would then be paid[334]. I do not accept this. It is clear from the Project Houdini Presentation that the shares were to be transferred to a KPN-controlled SPV, out of Mr Suppipat's reach (avoiding the impact of the BVI Injunction), and that this was never intended to be a bona fide transaction; rather it was intended to benefit Khun Nop and disadvantage Mr Suppipat.

389. Regarding the dinner, the Claimants suggest that the purpose of this was to discuss Project Houdini and Khun Anutin's role in it as a potential nominee investor in WEH and that given the timing of the dinner, he was likely asked whether he was prepared to be Khun Nop's nominee in the same way that Khun Tassapon was subsequently approached and asked to sign back to back stock

[331] Collins WS 1 [249]

[332] WEH Managers' Closing [215]

[333] WEH Managers' Closing [216]

[334] Day 21/20:24-21:15, Day 25/77:10-21

transfer instruments[335]. Whether that be true or not (and I make no finding in that respect), no arrangements in this regard ultimately appear to have crystallized.

390. Khun Nop unpersuasively claimed that the Project Houdini document was not familiar to him[336] and he could not recall whether it was given to him on 18 March 2016[337]. Khun Nuttawut said that he could not recall anything being handed to him on this day[338] and claimed "*We have several discussion. There is something along this line, but I do not remember exactly on this one.*"[339] I reject their evidence.

391. Khun Nuttawut's evidence about the dinner was as follows:

> "***Q. And you discussed the proposal at that dinner?***
>
> *A. No, I don't think we have any discussion about anything about the case at all.*
>
> ***Q. So what did you discuss?***
>
> *A. We did not, my Lord.*
>
> ***Q. How do you remember that?***
>
> *A. It is the party with the long table, and there was more on the casual talk about everything about -- I mean, it is a casual talk and I am a junior in that table. So I sit in the corner of the table. If I am not wrong, it is 24 seats or 28 seats of table, and I was very junior and I sit very far away.*"[340]

392. It was Khun Arthid's evidence that he had *"[n]ever heard*" of Project Houdini and the ring-fencing was not discussed with him at this event which was *"purely about the socializing, it's not – it's nothing to do with the business at all.*"[341] I accept his evidence.

393. I find that the Project Houdini Presentation records what was agreed in the meeting on 17 March 2016 between the WEH Managers, Khun Nop and Khun Nuttawut. Mr Lakhaney and Khun Thun used their gmail addresses and wished to hand the document to Khun Nop and Nuttawut at Khun Nop's residence

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[335] Day 30/79:14-18

[336] Day 17/93:1-10

[337] Day 17/95:2-3

[338] Day 20/19:9-13

[339] Day 20/20:9-20

[340] Day20/21:3-14

[341] Day 35/15:5-6

because they knew that this was not a good faith proposal (hence the suggestion to avoid incorporating a SPV-transferee in Hong Kong or the BVI, and for Khun Nop to remain in control of the WEH shares after the sale) and was designed to be kept secret from Mr Suppipat, because (i) the WEH shares were to be transferred to a third party in order to defeat Mr Suppipat's arbitration claim and (ii) the WEH Managers would no longer be protecting his interests but instead would be receiving valuable benefits (the 1.25% stake in WEH) from Khun Nop. It is no coincidence that shortly after this meeting the KPN EH SHA and the ASA were terminated to relieve the WEH Managers of the obligations which they owed to Mr Suppipat's Companies. There is no evidence, however, that SCB and/or Khun Arthid was made aware of Project Houdini at this dinner.

SCB IPO Engagement Letter

394. On 22 March 2016 SCB submitted its finalized engagement letter for it to act as the sole financial advisor, sole book runner and sole lead underwriter of WEH and its subsidiaries in relation to the contemplated IPO in return for, inter alia, a non-refundable financial advisory fee of 0.75% of the IPO proceeds. This followed from SCB's Credit Committee meeting, on 10 March 2016, which considered the proposed IPO of WEH and how they had been informed that the market price of WEH should be approximately $1.3 billion. The letter was signed by Arthapong Porndhiti of the Investment Banking Division (**IBD**) along with the Chairman and Chief Executive Officer of SCB Securities Company Limited. SCB submits, and I accept, that none of the individuals who signed this letter were involved in the processes relating to drawdown on the Watabak Facility because that was (a) a matter of project finance dealt with by the CMD, and (b) involved legal issues dealt with – confidentially – by SCB Legal. The IBD was a separate part of the bank (as investment banking divisions of banks always are) because of the market sensitive nature of their work[342]. Khun Wallaya and Khun Anucha gave evidence to this effect.[343]

395. The Claimants put to Khun Arthid the inconsistency between SCB seeking the WEH IPO mandate at the same time as recognising the risks which the Arbitrations posed:

> "***Q. Why were you signing up an engagement letter for an IPO if you were seriously concerned that you might not be able to continue to lend to WEH because of the arbitration?***
>
> *A. My Lord, this is the normal practice that when you sign the FA or IPO, that the process for IPO will not take place right away. It will be a project that need to be prepared for a long time. It could be years, it could be two years. So for the bank to do our business, for the bank to prepare long−term*

[342] SCB Written Closing [208]

[343] Day26/148:19-25; Day28/65:21 - Day28/66:1

work in order to do a fundraising, if it can happen, then we can −− we need to prepare prior to −− a long time prior to the process. So we know that the problem happened at arbitration. What −− we still believe that once the arbitration award, we should see the clear result of what is going to happen. If the arbitration award, the project can no longer go on, the commitment to be the FA or doing the IPO will just cannot go further. I think that's the normal way of doing business.

Q. You see, I suggest to you that you wanted −− the bank wanted the business with WEH and the very profitable lending and IPO to proceed, and you were trying to find a way of reducing your risk of Khun Nopporn coming back?

A. You use "and", right; can you read again?

Q. Yes.

A. Yes, we treat this transaction that it will be a good business for project finance for us, and if the deal can go on and because the project will be up and running, the company, WEH, should be in a position to be able to do IPO. So that is the normal business of the bank. And on the other hand, if Khun Nop can do fundraising to IPO, it will reduce the risks of Khun Nopporn. And I think that's how to settle the dispute, and there should be no further issue between the buyer and seller."[344]

396. It was clearly the case that SCB was committed to the IPO of WEH and would do all that it could to ensure that the IPO would go ahead.

397. On 25 March 2016, NGI/DLV issued a Request for Arbitration against KPN EH/Fullerton under the KPN EH SPA (**the NGI/DLV Arbitration**). From the calendars, it appears that Khun Weerawong met with Dr Vichit on this day; and Khun Nop and Khun Nuttawut had a meeting at WCP.

SCB Summary Chart of Dispute

398. By this stage, SCB's legal department (at least) became aware of the dangers of the ring-fencing solution. In particular, on 25 March 2016, Khun Sittiporn of SCB emailed Khun Weerawong (copying in Khun Wallaya) "*a summary chart of [the] KPN dispute"* which had been *"prepared internally for SCB management*" and "*will form the basis for our meeting to be held next Tuesday (29 March)*". The chart is entitled "*Summary of KPN EH Dispute As of 2 March 2016*" and certain parts of that chart are legally privileged. However, in regard to the non-redacted parts, the chart highlights "*DISPUTE A: EXISTING ICC ARBITRATION DISPUTE BY SELLER AGAINST FULLERTON" and "DISPUTE B: WEH SHARE TRANSFER TO NEW INVESTOR =>, POTENTIAL THAI COURT CASE*". The latter is explained on

[344] Day30/124:10 - Day30/125:18

the basis that "*REC plans to sell 61% shares in WEH to New Investor to segregate shareholding in wind farms assets from REC*". (underlining added)

399. It follows that SCB's legal department considered that there was the potential for a Thai Court Case if the WEH shares were transferred to a new investor, presumably if that transfer were not a good faith transfer. This is reinforced by Khun Wallaya's evidence regarding Dispute B as follows:

> "***Q. It is right, isn't it, that this time you personally and your legal department contemplated a possible Thai court case in relation to the sale of these shares not being in good faith?***
>
> *A. I cannot answer this; it depends on the fact. That is why we asked Khun Weerawong to come and explain whether it is in good faith.*
>
> ***Q. Why did you write the words "potential Thai court case" if you did not have it in your contemplation?***
>
> *A. Because there's a Supreme Court ruling that if a transaction is found in ungood, unfair price or not in good faith, the transaction can be revoked.*
>
> ***Q. Yes, and you were concerned about it?***
>
> *A. That is why I asked Khun Weerawong to come and explain.*
>
> ***Q. What did you ask Khun Weerawong about at this meeting? I can't tell from here because someone has blanked it out, so ...***
>
> *A. I asked Khun Weerawong to explain the purchase price, and Khun Weerawong explained that the third party, an independent assessor, has assessed the share value.*
>
> *(Uninterpreted) And said this is fair price.*
>
> *(Interpreted) And said this is fair price.*"[345]

400. In cross examination the following exchange with Khun Arthid took place in respect of "DISPUTE B":

> ***Q. "neither after 17 February meeting, nor after 25 March or 29 March meeting, did anybody tell you that there was a proposal that the shares should be transferred?"***
>
> *A. "no one told me*" and "*I was not aware of this*".

401. There is no clear evidence that Khun Arthid *was* told at this time.

[345] Day28/75:24 - Day28/76:20

29 March 2016 meeting of SCB and WCP

402. A meeting was convened by SCB at its offices on 29 March 2016 involving representatives of both SCB Legal (Khun Wallaya, Khun Chanmanu, Khun Sittiporn and Khun Supalun[346]) and WCP (Khun Weerawong and Khun Phisit).

403. In cross-examination, Khun Wallaya said that her concern of 17 February 2016 about the risk of the WEH share sale being challenged "*led to the meeting of 29 March where Khun Weerawong came in to clarify that the share transfer had been done in good faith*". However, it was also Khun Wallaya's evidence that it was Khun Weerawong who asked for this meeting, rather than herself, and it was her understanding that he wanted it for the purposes of *"[e]xplanation of the sale transaction, whether it is in good faith or not good faith*".

404. Khun Wallaya admitted to having a different legal opinion to that of Mr Weerawong - whilst *"Mr Weerawong [had already] confirmed that … Mr Nopporn cannot return as a shareholder*", Khun Wallaya was "*doubtful of his view*". Similarly, it was Khun Sittiporn's evidence that, "*At first we think that there might be a chance or a legal theory that the transfer might … be questionable … When Khun Wallaya and SCB legal team had a meeting with Khun Weerawong we challenge him about the good faith of the transaction*". When Khun Wallaya was asked in cross-examination why she "*did not alert Khun Arthid or the executive committee"* of her concern about the WEH share sale being challenged before March, she said "*[t]hat is my personal legal opinion, and there could have been facts that I was not aware of, so it's not my position to go and talk to Khun Arthid about it*".

405. In her Second Witness Statement, Khun Wallaya's evidence is that at the 29 March 2016 meeting, Khun Weerawong advised that:

a. The REC SPAs only gave rise to a right to damages (interest on the missed payments) rather than rescission as a result of the missed payments;[347]

b. Khun Nop's Companies were proposing to transfer the WEH shares to a new investor in order to prevent Mr Suppipat from returning as a shareholder of WEH through REC;[348]

c. He was confident that they would have evidence to prove that the transfer to the new investor anticipated would be in good faith and at an appropriate price.[349] She said she "*asked Khun Weerawong to explain*

[346] Wallaya WS 1 [23]

[347] Wallaya WS 1 [24]

[348] Wallaya WS 1 [25]

[349] Wallaya WS 1 [25]

> *the purchase price, and Khun Weerawong explained that the third party, an independent assessor, has assessed the share value. And said this is fair price*". However, he did not tell her what the price was and it was her evidence that she did not ask him what it was "[*b]ecause it's agreement between purchaser and seller and the bank did not need to be involved in the price*".[350]

406. However, Khun Wallaya confirmed in cross-examination that she understood that an attempt to transfer the shares and to leave REC without shares and without money, gave rise to a risk of action in the Thai civil courts, including under section 237 TCCC (cancellation of a fraudulent act)[351].

407. It was Khun Weerawong's evidence that SCB's legal team "*need[ed] to be conservative, because they're bank's lawyers, so they ask several questions about, you know, how this thing will work and whether or not there is, legally, a possible way for Khun Nopporn to come back as shareholder of WEH. But I based my explanation on several Supreme Court decisions…"*[352] and "*They – they expressed concern and argue for the sake of clarification for me, and at the end of the meeting, when I fully explained the legal concept, especially no intention for asset stripping, because it would be a share transaction in good faith, you know, based on the fair value, then they said WCP come up with what we call "clean legal opinion"*[353]. He explained that "*"clean" means you don't put any exception, caveats, whatsoever, and I said yes, because these legal concepts are very clear in the Thai* ..". He also clarified that "*good faith*", in his view, meant "*fair value at the time of the sale*", which is normally assessed by "*retain[ing] a financial adviser ... recognised .... [on the] security exchange commission of Thailand*" and "*not intention to harm the creditors of the company*". He agreed that "*if the intention was to harm Khun Nopporn, it would not be in good faith whether or not Khun Nopporn was a direct creditor of REC*".

408. On SCB's case[354], the outcome of the meeting on 29 March was that WCP was required, as lawyers for WEH and Watabak, to produce an opinion as to the impact of the arbitration on SCB's lending and whether a transfer of the WEH shares to a new investor could be legal, legitimate and irreversible[355]. Numerous drafts of this opinion were produced by WCP from April 2016 onwards (**the First WCP Opinion**).

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[350] Day 28/76:13-7:7

[351] Day 28/87:9-14

[352] Day 31/72:16-21

[353] Day 31/73:3-9, with a "clean legal opinion" meaning an opinion without exceptions and caveats: Day 31/73:13-17

[354] SCB Written Closing [223]

[355] Sittiporn WS 1 [32]; Wallaya WS 2 [26], Supalun WS 1 [28]

409. Khun Wallaya agreed that it "*would have been outside [her] authority to decide that [she] would get an opinion from WCP rather than relying on the bank's own internal opinion*"[356]. She asserted it was "*for the ExCom's resolution"* and she *"Think[s] that it was ExCom*" who decided to get an opinion from WCP[357]. However, no relevant ExCom meetings were disclosed in this period. Later in her cross-examination, Khun Wallaya inconsistently asserted, "*I asked Khun Weerawong to provide a written legal opinion. It was in my authority and my responsibility. I didn't have to notify Khun Arthid or ExCom.*"[358] When questioned about her apparent change in stance regarding the authority required to request the provision of a legal opinion, Khun Wallaya attempted to make an unconvincing distinction between the instruction of WCP and the instruction of a third party, suggesting she had the authority to do the former but not the latter: "*if it is external legal opinion, it's the ExCom to make the decision whether we needed it or not, but for WCP it was under my responsibility*"[359].

410. Originally Khun Wallaya said, "*we also had Baker & McKenzie providing the legal opinion as well*". Whilst this opinion was withheld on the basis of privilege, Mr Davies-Jones KC informed the Court that, contrary to Khun Wallaya's evidence, in fact it "*was not obtained at this time in 2016*".

411. Khun Wallaya then explained, "*we use WCP because they have good understanding of the arbitration in Singapore*", even though they were *"Khun Nop Narongdej's and KPN Energy's lawyers*", on the basis that *"[i]f we obtain the third party legal opinions what we would get would be only a general opinion, not as specific as what we could obtain from WCP*". She was unable to satisfactorily explain why an independent lawyer could not be instructed and provided with the relevant documents in order to give his or her opinion, bizarrely suggesting that the reason against doing so was that an independent lawyer would give the same opinion as her[360].

412. This evidence of Khun Wallaya was unimpressive, unpersuasive, and she was an unsatisfactory witness. However, I find that there is insufficient evidence for the court to make a finding that the reason for her unpersuasive evidence was that she was in cahoots with Khun Weerawong in relation to the dishonest asset-stripping scheme; I find that it is more likely to have been that she was embarrassed by her woeful failure to take steps to protect SCB's position.

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[356] Day 28/89:24-90:3

[357] Day 28/88:23-89:23

[358] Day 29/6:12-17

[359] Day 29/9:25-10:5

[360] Day 28/87:2-88:3 and Day 28/84:16-86:10

413. Khun Sittiporn gave evidence that "*in Thailand it is ... very common practice for the bank to rely on lawyer of the borrowers*". When further questioned he said, "*I think another reason we have to rely on WCP opinion ... because this case is involving reputational risk to the company and it is very sensitive issue ... and at that time, I don't think there is any other law firm that can provide opinion about the pending arbitration, because WCP ... are handling the arbitration proceedings*"[361]. Khun Supalun said, "*My understanding is that it is not unusual for the borrower's counsel to keep advice that the lenders rely upon, ... where the borrower's counsel which is the one closer to the transactions, ... and in this case WCP is quite a reputable firm*".

414. Khun Weerawong similarly gave evidence that it was not unusual that WCP had been instructed:

> "***Q. You understood, did you not, from that that the bank were relying on your firm to produce an independent opinion?***
>
> *A. Correct.*
>
> ***Q. Right.***
>
> *A. In my role as the borrower's counsel.*
>
> ***Q. Well, what do you mean by that? Is it meant to be objective and independent or not?***
>
> *A. When -- when -- when you issue legal opinion, then it's normal practice that you issue to your client. But when the transaction require you to say that the bank can rely on your legal opinion too, that's what I mean.*
>
> ***Q. Then it has to be made objectively and in good faith?***
>
> *A. Everything, whether or not we issue legal opinion to anyone, it has to be made in good faith.*"[362]

415. Notably, at this point in time SCB had instructed two (properly) independent law firms in Thailand – Chandler & Thong-EK and Norton Rose. This was confirmed by Khun Parnu in cross-examination. Khun Parnu said he did not know why these firms were not asked to provide an opinion in relation to the Kasem transfer.[363]

416. This evidence of these other SCB witnesses was likewise unconvincing. However, I am prepared to accept that it is more likely to have been borne out of embarrassment at SCB's lack of scrutiny concerning Khun Weerawong's

[361] Day 29/72:7-73:6

[362] Day 32/120:3-17

[363] Day 27/81:13-82:5

inappropriate role as adviser in the transaction rather than for more sinister reasons.

417. So far as Khun Arthid is concerned, he alleged in cross-examination that he was "*never aware*" of "*a proposal that Mr Weerawong's company WCP should be asked to provide an opinion*" and that he was "*not aware that [Khun Wallaya] asked for [an] opinion*".

418. Khun Arthid also alleged that he *"did not know*" that the "*ring-fencing was proposed by Khun Weerwong on 17 March and then discussed on 29 March with Khun Wallaya*". He denied that he was ever aware of the proposal and asserted that he only "*became aware of the shares being transferred to Khun Kasem after it happened*". By contrast, Khun Nop, despite originally denying that the ring-fencing was ever discussed with Khun Arthid, later admitted in cross-examination that it was. However, I am unable to rely upon anything said by Khun Nop in evidence unless supported by a genuine contemporaneous document. I am accordingly willing to accept Khun Arthid's evidence in this respect.

White Boards

1 April 2016 White Board

419. I turn next to two other highly significant documents, namely the photographs of the contemporaneous white boards.

420. A photograph of a white board with "*Last Modified Datetime*" metadata of 1 April 2016 (**the 1 April 2016 White Board**) shows that, as of this date, the plan was for "NEW Co" to acquire REC's WEH shares for the price of only THB 2,400m i.e. US$68m.

421. In cross examination, Mr Lakhaney sought to distance himself from this image, claiming: "*I have never seen this before. It's not my handwriting*…"[364]. However he thought it was "*possible*" that the writing belonged to Khun Thun[365]. Ms Collins, too, said "*I have not seen that so I don't know what that is*."[366] Khun Weerawong similarly said "*That is not my writing*."[367]

[364] Day 25/91:7-15

[365] Day 25/91:11-13

[366] Day 22/40:14

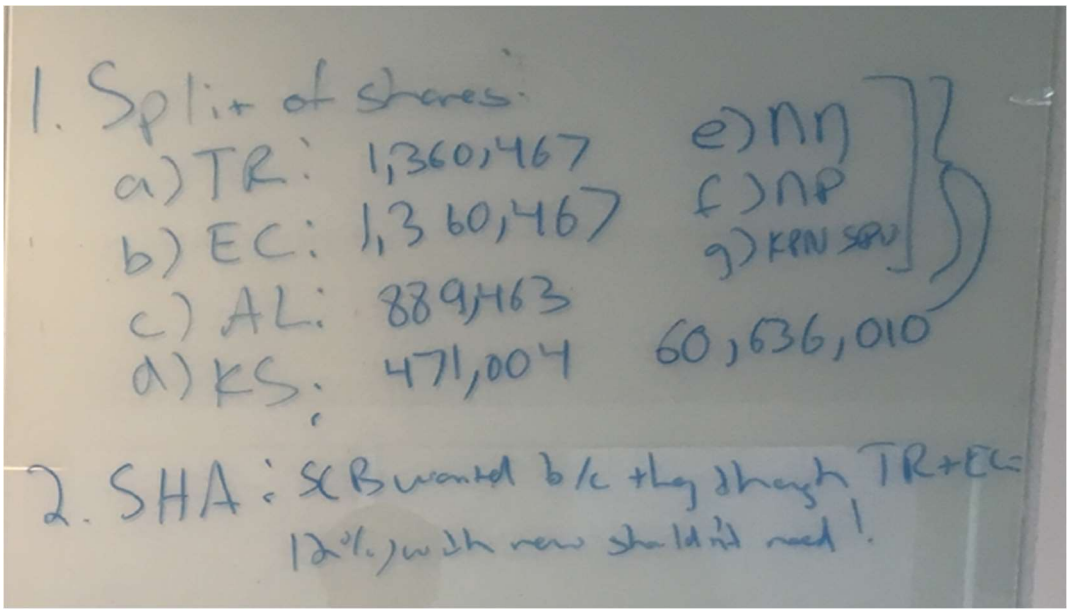
[367] Day 32/23:6

422. Mr Lakhaney accepted that the structure shown on the 1 April 2016 White Board was not an arm's length sale to a third party, rather *"it shows that there needs to be a relationship with any transactor"*[368].

7 April 2016 White Board

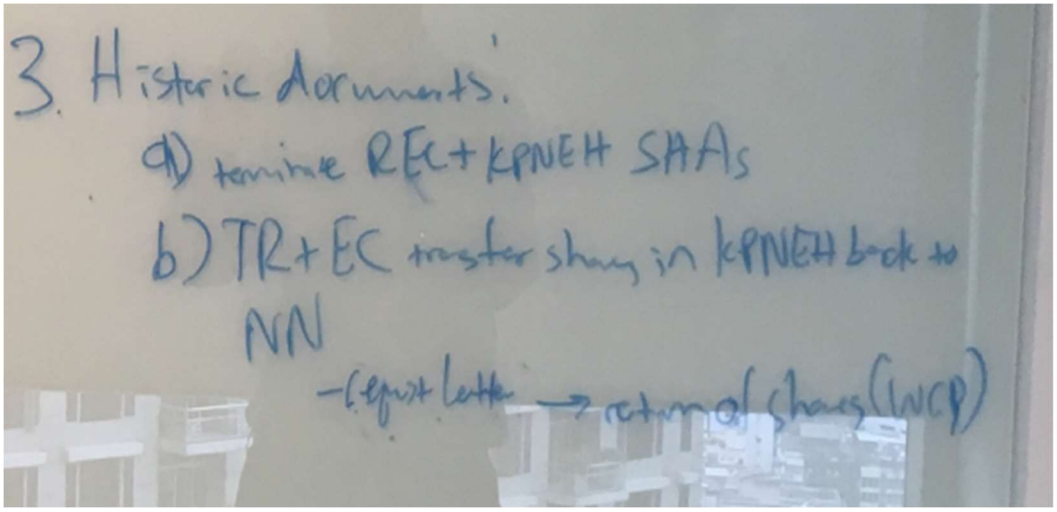
423. A second photograph of a white board with "Last Modified Datetime" metadata of 7 April 2016 ("**the 7 April 2016 White Board**") provides very important detail of the implementation of the share-stripping scheme and the Defendants' respective involvement, including:

a. SCB's wish for a shareholders' agreement (SHA):

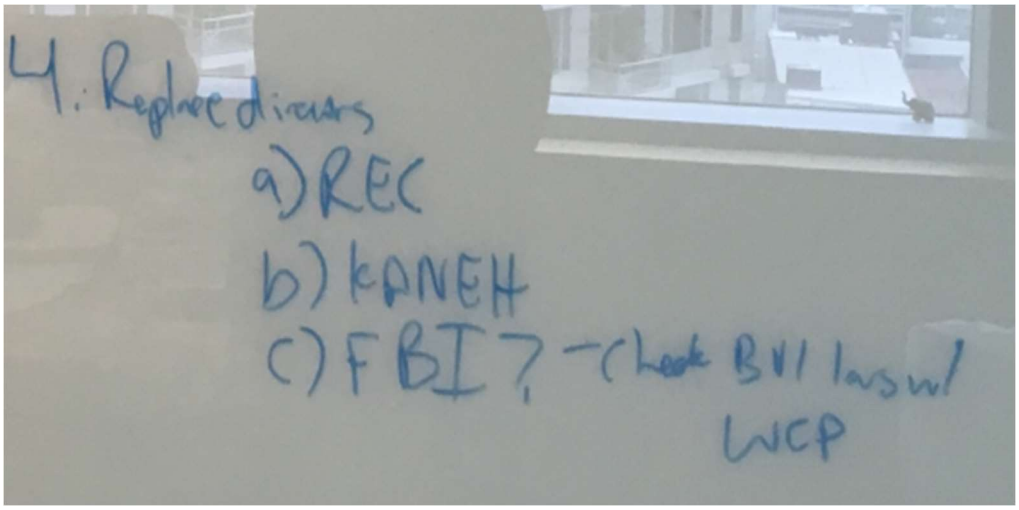


b. The need for "historic documents", to be terminated, to be arranged by WCP:

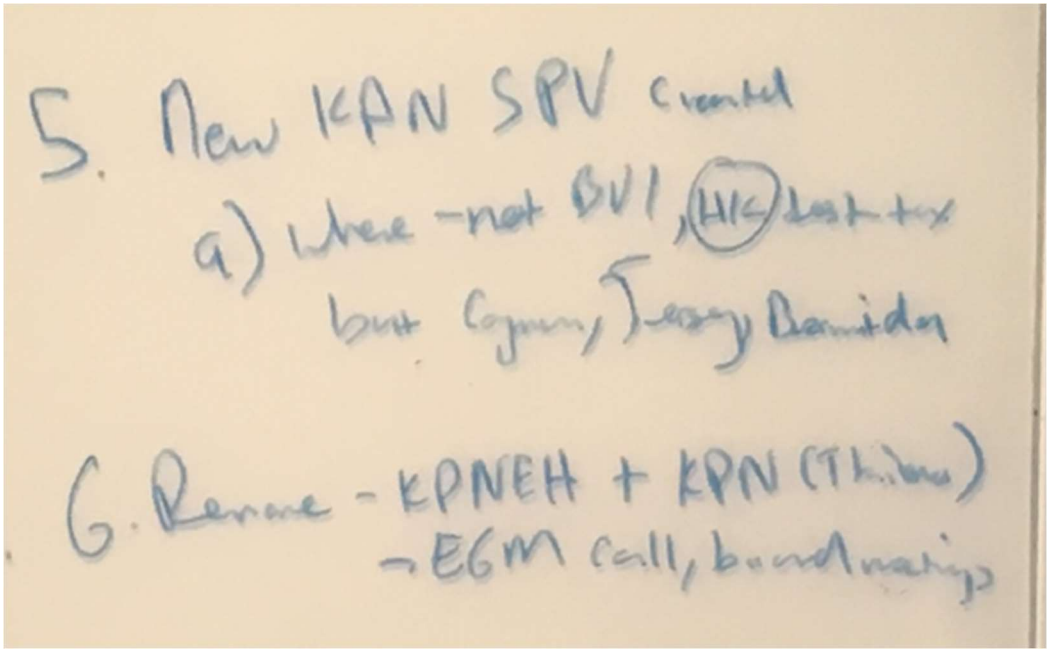
[368] Day 25/91:15-92:22



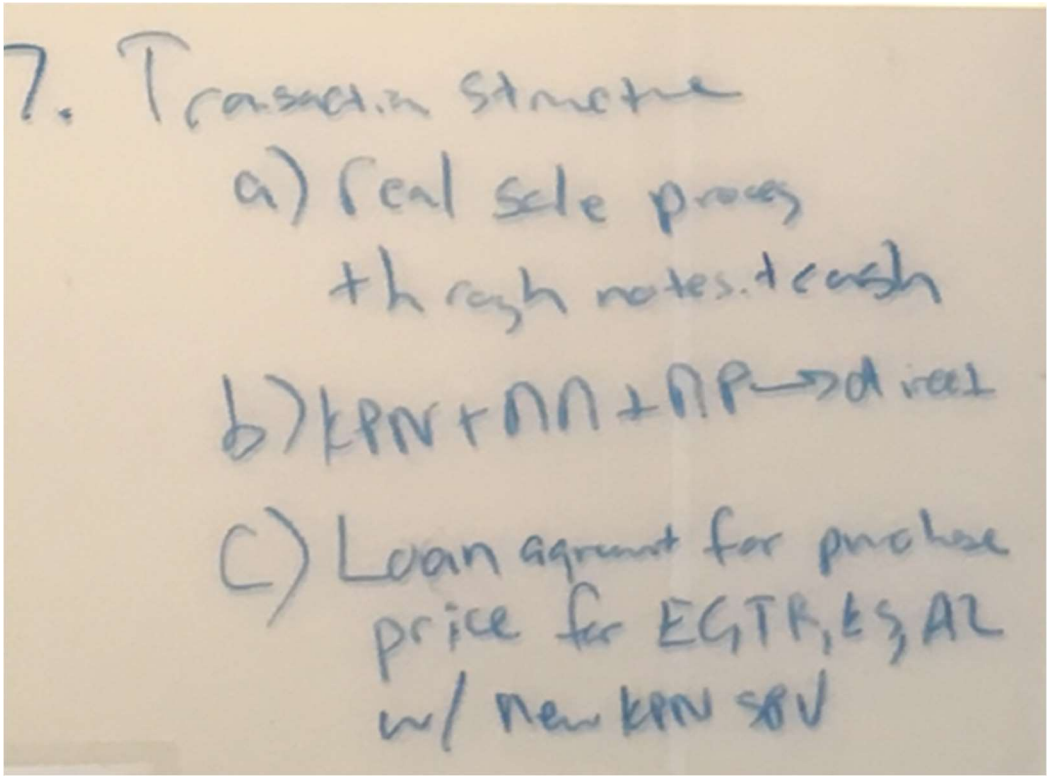
c. The replacement of directors, with WCP's assistance:



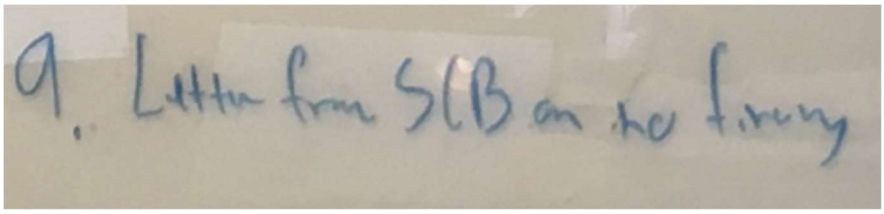
d. The plan to move the shares to an offshore SPV (which presumably ended up as Golden Music):



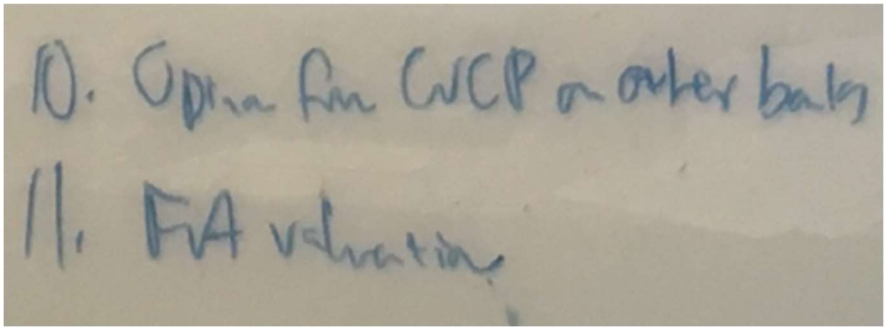
e. The need for a "real sale process", anticipating the sham loan agreements later created by the WEH Managers:



f. A letter from SCB "on no financing":



g. An opinion from WCP and "F[inancial] A[dvisor] valuation" (which led to the Ploenchit report):



424. Mr Lakhaney admitted that the handwriting on the 7 April 2016 White Board was his[369] and that he wrote this at some point after the 17 March 2016 meeting with Khun Weerawong[370]. As to the content of the 7 April 2016 White Board, he explained that "*I think what's in the Houdini presentation is largely from Mr Weerawong. I think I'm just plugging in bits and pieces to complete some of this, just in terms of steps*."[371] In relation to the references to SCB, Mr Lakhaney confirmed that he was getting this information "*probably from Khun Thun or maybe Weerawong. I don't remember*."[372] He confirmed that the reference to *"BVI lawsuit*" was to injunction proceedings in the BVI[373] (which had been brought by Mr Suppipat's Companies).

[369] Day 25/83:4-8

[370] Day 25/85:10-18

[371] Day 25.90:13-18

[372] Day 25/85:8-9

[373] Day 25/87:24-88:3

Termination of the KPN EH SHA

425. By this stage, Khun Nop, Khun Nuttawut, Khun Weerawong, Khun Thun, Mr Lakhaney and Ms Collins were all aware of the Project Houdini plan. Consistently with the reference on the 7 April 2016 White Board, and its reference to the need for "historic documents" to be terminated, an agreement terminating the KPN EH SHA was entered into dated 1 April 2016 (**SHA Termination Agreement**). However, on the Claimants' case this was actually created on 4 May 2016. They highlight that, according to Khun Weerawong's privilege log, a draft of the SHA Termination Agreement was circulated on 4 May 2016. Further, they refer to an email from Mr Lakhaney to Khun Thun on 26 April 2016 (**Mr Lakhaney's 26 April 2016 email**) which sets out that a step still to be carried out is "*SHA gets terminated*".

426. This strongly suggested that the SHA Termination Agreement was not executed on the date which it bears. As such, the WEH Managers accepted that the SHA Termination Agreement was signed after 26 April 2016 and Khun Nop and Nuttawut submit it was created in or around April or May 2016. I find that, as the Claimants maintain, it is likely that it was created on 4 May 2016, as the 7 April 2016 White Board anticipated.

427. When asked about the decision to terminate the KPN EH SHA, Khun Nop said that he was following legal advice and was not aware of the specific reason why this was necessary.

428. Khun Weerawong said that he thought he had "*advised in general*" that the KPN EH SHA should be terminated. When asked what this meant he said, *"[m]eaning that if they don't want to be bound with any agreements with Khun Nopporn, because at that point in time they seemed to be on different camps, then terminate them*."[374]

429. Khun Thun, when asked why it was necessary to terminate the KPN EH SHA at this point, said: "*I think first of all, first of all, I reiterate this, KPN EH is not my share. So I return the share – I will resign, I returned. Then I thought that should be enough. But then I think Aman or Mr Lakhaney suggested I need also to terminate it, because I signed it, or something like that*". Khun Thun accepted that he and Ms Collins, as at March 2016, were still able to prevent the sale of the WEH shares under their blocking powers under the SHA,[375] but he denied that, at this stage, he had decided to abandon his support for Mr Suppipat and instead to support Khun Nop.[376] I do not accept this denial.

430. According to Ms Collins, Mr Lakhaney "*just raised the fact that we would need to terminate the SHA*". She said she did not specifically ask him why this was necessary and they did not have a discussion about the blocking

[374] Day 32/83:24-84:4

[375] Day 23/92:16-25

[376] Day 23/93:19-94:12

mechanism in the SHA which could prevent the sale of the WEH shares.[377] Moreover, Ms Collins claimed never to have read the KPN EH SHA[378]. I consider her evidence on this topic to be implausible and false.

431. In short, each of the WEH Managers' evidence was unconvincing on this crucial topic. None of them could convincingly explain why it was necessary to terminate the KPN EH SHA at this time. The real reason it was terminated by them is, I find, as follows. The WEH Managers had defected to Khun Nop's camp and were actively assisting in the asset stripping sequence as envisaged by the Project Houdini presentation and White Boards. In return, they were allotted shares in KPN EH by Khun Nop. Under the KPN EH SHA (which was signed on the day the REC SPAs were executed), Mr Suppipat had entrusted Ms Collins and Khun Thun to use their powers under the KPN EH SHA (clause 7 and §2.3 of Schedule 2) to block any proposed decision by REC to sell its WEH shares (and the ASA obliged them to do so). It was accordingly necessary to terminate the KPN EH SHA (and the ASA) to free Ms Collins and Khun Thun of their obligations thereunder so as to enable them to facilitate the transfer of the WEH shares from REC to one of Khun Nop's nominees.

432. Mr Lakhaney's 26 April 2016 email also refers to Khun Thun and Ms Collins' exit from KPN EH which had not yet occurred. This indicates, as the WEH Managers admit[379], that the following documents were backdated:

a. A transfer instrument dated 1 April 2016, according to which Ms Collins transferred her 200,000 shares in KPN EH to Khun Nop. This has a created datetime of 27 October 2016.

b. A transfer instrument dated 1 April 2016, according to which Khun Thun transferred his 200,000 shares in KPN EH to Khun Nuttawut. This also has a created datetime of 27 October 2016.

c. A resignation letter for Ms Collins' directorship of KPN EH which is dated 1 April 2016.[380]

d. A resignation letter for Khun Thun dated 22 April 2016[381].

433. It is notable that the following text messages in particular were exchanged between Ms Collins and Mr Lakhaney on 7 April 2016, being the date of the Lakhaney white board which records the need for "historic documents" to be terminated:

[377] Day 21/77:23-78:22

[378] Day 22/27:25-28:3

[379] WEH Managers' Closing para 252

[380] Collins WS 1 [248]

[381] Thun WS 1 [143] .

[Ms Collins]: "*I want to leave*" […]

[Ms Collins]: "*Do u think we will ever make any money*"

[Mr Lakhaney]: "*Abn amro introduced a hnwi in power and renewable companies – very interested in WEH – between them and Orix who came to us there seems to be a lot of interest in us*"

[Mr Lakhaney]: "*If the share transfer happens this month I think we're good. If not…"*

[Mr Lakhaney]: "*Between borrowing 90 mm and SCB going all out for them with this structure, they have to go all the way now*"

[Ms Collins]: "*I hope u r right but it does feel sometimes like boys with toys"*

[Mr Lakhaney]: "*For sure, I think this is their first time with no mother / kris control but they definitely don't want it to end*"

7 April 2016 Meeting Minute

434. Further, a meeting minute produced by Mr Lakhaney *apparently* records a meeting which took place on 7 April 2016 at the WCP offices and was attended by Khun Nop, Khun Nuttawut, the WEH Managers, Khun Weerawong and Khun Phisit. The content of the minute includes:

a. The statement that the necessity for the ring-fencing scheme is because "*NS … seeking to re-enter the equity structure*", coupled with SCB's refusal to lend to WEH while that was even a remote possibility:

"WCP and KPN detailed their conversations with Siam Commercial Bank whereby SCB categorically stated that they could not support WEH / its Watabak project / T5 projects while there was a risk that NS could emerge as a major shareholder due to the arbitration

NS' legal position in Thailand made that an unacceptable risk for the banks".

b. The highlighting of the critical risk to WEH, if that block to the financing of Watabak was not urgently removed: "*There was further discussion about Watabak, its PPA deadline, and the need to urgently reach financial close otherwise be at risk for losing the project.*"

c. Khun Weerawong presenting a solution — which he confirmed he had only very recently discussed with Khun Nop[382] — in the form of "*a 'ring-fencing' structure*":

> *"WCP then detailed a 'ring-fencing' structure whereby REC will sell WEH to a 3rd party through an arms length agreement, payments, and with any other supporting documents required including a valuation to be completed by an independent 3rd part valuation firm in Thailand".*

435. However, Mr Lakhaney admitted in his Witness Statement that this minute was in fact prepared in January 2018, he said in connection with a proposed IPO of WEH[383]. It is common ground it was created after the fact (without any involvement of Khun Nop or Khun Nuttawut).[384]Mr Lakhaney explained that he chose falsely to date it as 7 April 2016 on the basis:

> "*I think ... there was another meeting at WCP scheduled for that day, I think around arbitration. ... The rest of it is embellished where we needed it to be embellished to try and find alternative explanations for the expense points. .... I think some of it was what actually happened at the meeting. Some of it is going to be things that happened subsequently that I just put in, and the rest of it will be things that we needed to put in for the expense points*".

436. Mr Lakhaney gave evidence that the date the minutes bear (7 April 2016) is incorrect. Instead, he says that on 17 March "*there was a meeting called -- I don't remember if it was Mr Narongdej or Weerawong, but there was a meeting called at the WCP offices to discuss the ring-fencing by Mr Weerawong.*"

437. In his Witness Statement, Khun Weerawong had suggested that this meeting *did* take place on 7 April 2016 as follows:

> "*43. Shortly after meeting with SCB, I met with Khun Nop and Khun Thun to propose the ring-fencing plan (which might or might not work since there was no funding commitment from SCB despite the plan). I then had a discussion with Khun Nop as to who would buy the shares. I suggested that whoever did should be independent, although that was not in fact a legal requirement for the transaction ....*
>
> *44. Following my discussions with Khun Nop and Khun Thun, Khun Phisit and I attended a meeting with KNG and the WEH management team at WCP's offices in Bangkok. On the basis of the minutes shown to me this took place on 7 April 2016. The purpose of this meeting was to open the*

[382] Day 31/96:12–17

[383] Lakhaney WS 1, [153] and [167]

[384] See Lakhaney WS 1, [158]–[171] and Day 25/93:10–16, suggesting that the document was required in connection with substantiating the accounting treatment of the WEH Managers' so-called Fourth Incentive Scheme.

> *floor to SCB's concerns over lending to WEH and to outline my strategy of ring-fencing the WEH shares from the legal dispute between KNG and Khun Nopporn.*
>
> *45. My recollection of this meeting has been aided by reviewing a minute of the meeting disclosed in these proceedings. I did not personally take a note of the meeting (and neither to my knowledge did Khun Phisit) and I was not provided with a copy of the minutes immediately after the meeting. As such, although I cannot be sure I expect the minutes were prepared by a member of the WEH management team.*
>
> However, Khun Weerawong accepted in his Second Witness Statement (at [5]) that he could have been wrong about the date of the meeting; and that he had only ever taken the date of the meeting from the meeting minute.

438. I reject this evidence in so far as it is suggested that there was a legitimate meeting on 7 April 2016 at which a bona fide ring-fencing scheme was discussed, in the light of Mr Lakhaney's admission that he created this false document in January 2018. Instead, I find that these minutes were created after the event by Mr Lakhaney in order to give the false impression that the ring-fencing scheme was a bona fide scheme rather than the dishonest asset-stripping scheme that it was.

Termination of ASA

439. On 3 May 2016, Ms Collins, Khun Thun and Ms Siddique (no doubt on Mr Lakhaney's instructions) wrote to NGI terminating the ASA in accordance with clause 5.1, noting that the ASA would be terminated after the lapse of 60 days from the date of receipt of the letter.

440. On the Defendants' case, neither Khun Nop nor Khun Nuttawut was party to or concerned with the termination of the ASA,[385] which the WEH Managers alleged was a separate decision made by the WEH Managers with the benefit of legal advice from experienced London and Singapore solicitors.[386]

441. In cross-examination, Ms Collins insisted that this was done "*because [they] kept getting threatening letters from Next Global*" and the decision to terminate "*was a separate discussion between the managers, and we were taking separate legal advice on that*"[387]. Khun Thun also alleged that the letters were the cause "*[t]o quite a large extent*". It was Mr Lakhaney's evidence that the WEH Managers "*got legal advice around our options and decided to terminate eventually because the situation was just untenable*", specifically he

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385 Day 17/109:21–22

386 Day 25/97:25 to 98/10

387 Day 21/72:17–22

alleged "*we were working with Norton Rose, we knew the lawyers there. They recommended a firm in Singapore called Peter Low LLC and we got legal advice from them*"[388] and also "*it was a completely untenable position to – getting these letters, being asked to take action against the current shareholders and trying to manage the business at the same time*".

442. I do not accept this evidence. I consider that the termination of the ASA was part of the scheme set out on 7 April 2016 White Board. It had to be terminated for similar reasons to the KPN EH SHA, which was to effect the asset-stripping sequence. This is because the parties knew that, following the transfer of the WEH shares away from REC, Khun Nop's Companies' REC shares would become worthless and therefore they would become unable to pay under the REC SPAs.

443. It appears that Khun Thun and Mr Lakhaney were by this stage contemptuous of Mr Suppipat. An illustration of this is afforded by an email dated 20 May 2016 from Khun Thun to Mr Lakhaney, in which he referred to Mr Suppipat as follows: "*MNS (M for mother fucker?)*".

444. The termination of the ASA, as well as the termination of the KPN EH SHA (under the SHA Termination Agreement), freeing the WEH Managers from having to act in Mr Suppipat's interests, both occurred in early May 2016. This was shortly before Ms Collins and Mr Lakhaney received their promised 1.25% stakes in WEH from Khun Nop on 23 May 2016, when two share transfer instruments were executed recording that Dr Kasem had transferred 1,360,467 WEH shares to each of them. Khun Thun received his stake on 29 August 2016.

445. In light of the WEH Managers' claim that this was a bona fide incentive scheme (which I reject), it is notable that false documents were produced in connection with WEH's proposed IPO to disguise the receipt of these management incentive shares (see below).

Drafting of First WCP Opinion

446. It was around this time, April 2016 and moving into May 2016, that WCP and Khun Weerawong in particular, started to liaise with SCB regarding the production of a legal opinion supporting the transfer of the WEH shares to a third party (ultimately Dr Kasem). This was the next element in the creation of the dishonest ring-fencing strategy, as anticipated on the 7 April 2016 White Board (above): the provision of a legal opinion from WCP pretending that the share transfer was a bona fide transaction.

447. According to the Defendants[389], the First WCP Opinion was drafted under the supervision of Khun Phisit and it was not the unilateral work product of

[388] Day 25/97:25 to 98/10

[389] D11 and D13 Written Closing [70] and Written Opening [31-41]

Khun Weerawong, although he accepted that the advice that it recorded was also his[390], and that he reviewed the draft opinion and provided comments before it was finalised.

448. An initial draft of the opinion was produced on 11 April 2016 and records the opinion as purportedly sought by SCB to "*provide an opinion to the Bank with respect to the dispute between the original shareholder and the current shareholder of Renewable Energy Co., Ltd. ("REC"), a major shareholder of Wind Energy Holding Co., Ltd. ("WEH"), which may affect the Bank's plan in providing financial support to investors in purchasing REC's assets and/or accepting transfer of liabilities of REC, including WEH shares of which REC is a major shareholder"* . The draft also shows that SCB wanted to know (i) *"the legal implications for the Bank in the event that REC transfers all of its assets and liabilities, including all WEH shares held by REC, to new investors*", (ii) whether Symphony could exercise its rights by requesting the cancellation of transactions and the disposal of shares if successful in the Arbitration, and (iii) whether the Arbitration might disrupt WEH's IPO plans.

449. The first draft of the First WCP Opinion was emailed from Khun Phisit of WCP to Khun Supalun of SCB on 18 April 2016. Notably, the Opinion sets out that "*REC wishes to dispose of, transfer or sell all its assets and debts, including the WEH shares … to new investors as this is considered necessary for business …. <u>The disposition, transfer or sale of these assets would not affect the issue of the payment of shares under the share purchase agreement between Fullerton and Symphony, whereby Fullerton would still be able to pay the share price to Symphony under the agreement</u>*." (underlining added)

450. This was plainly a lie and was, I find, part of the dishonest strategy to ensure that Khun Suppipat's companies could not recover the purchase price under the REC SPAs from Khun Nop's companies. In cross-examination, Khun Weerawong said that the statement that the share transfer would not affect the issue of payment was "*a mistake*" (albeit one for which Khun Weerawong blamed Khun Phisit and the WCP team)[391]. I find that it was not a mistake – it was a deliberate falsehood.

451. Khun Weerawong also admitted *"it's not right, because we shouldn't say that. We as lawyer, how could we talk about ability to pay because we have no clue about that. We can only talk about legal issues, and that's why I said it's a mistake. And the legal team and other team of SCB have not picked this up, as the point where we mislead them or anything. Not at all. Whenever I confirm to people I confirm about legal, legality, you know."*[392] Additionally, he said: "*The legal opinion is Fullerton is still obliged to pay*"[393]. Khun Weerawong

[390] Day 32/88 - 89

[391] Day 32/93:6-15

[392] Day 32/94:16-95:4

[393] Day 32/121:22-124:21

was compelled to admit that he "*knew perfectly well the effect of the transfer was likely to be that there was no money within the original structure to pay M Suppipat*"[394] and that after the transfer "*there is no legal basis on which Khun Nopporn could have obtained the money … from the future development of the WEH business*"[395].

452. Khun Sittiporn said that he didn't know how he was "*going to ensure that KPN paid Khun Nopporn if they had already sold the shares to Khun Kasem*"[396]. Khun Nop suggested only "*At that time I am still hope and live up to my commitment with Mr Suppipat. I'm thinking at that time try to find my best to pay him – the obligation*."[397] He claimed he had hoped that his speculative inheritance and "*another source*" would cover it[398]. I do not consider this to have been truthful evidence.

453. In the First WCP Opinion the view was also expressed that Symphony's rescission claim was likely to fail. As noted above, Khun Weerawong had earlier expressed to both SCB Legal and (separately) Khun Arthid his view that the rescission claim was bound to fail as a matter of substance (as, in due course, it duly did, but only for procedural reasons). However, the Opinion also acknowledged the possibility that it might succeed. In this regard, WCP advised that the dispute between Fullerton and Symphony would not have any legal impact on the transfer of REC's assets to new investors or on WEH's IPO, even if Symphony subsequently won the case and was able to request a Thai court to enforce the award ordering Fullerton to transfer REC shares back to Symphony (i.e. that the ring-fencing would be effective to achieve its intended purpose). That was, of course, highly dubious and would depend in particular upon the state of knowledge of the transferee of the shares.

454. It appears that the draft opinion was then reviewed by Khun Supalun and Khun Sittiporn of SCB, a process which they suggested was entirely normal; "*I think this is the way how we work, that when we receive a draft of comments and advice from the law firm, we review them and then we make comments or suggestions to it which we think is correct, and they are at their preview* [sic] *to change, review or even reject our comments*"[399].

455. SCB then returned this Opinion to WCP on 22 April 2016, with various notes having been made by SCB's legal department in track changes. The changes were designed to make the opinion even more unequivocal as to the

[394] Day 32/91:10-17

[395] Day 32/20:24-21:5

[396] Day 29/84:15-23

[397] Day 16/55:19-21

[398] Day 16/56:6-10

[399] Day 29/98:13-18

lawfulness of the ring-fencing strategy and accordingly to protect SCB's position. For example:

a. "*Note to WCP, please also state in the opinion that Article 10.3.1 of the [SPA] prohibits Fullerton from transferring REC's shares, but does not prohibit REC from transferring WEH shares to third parties. Therefore, even if REC transfers WEH shares, Fullerton will not be considered to have breached the agreement in any respect*".

b. *"Note to WCP, according to previous discussions at meetings, the Bank was informed by WCP that REC would transfer WEH shares to new investors honestly and pay renumeration, so please also state in the opinion how the share transfer would be carried out in order to be considered honest. Please also refer to Supreme Court judgements to support the aforementioned interpretation (if available) and also confirm that one Supreme Court judgement ordering the revocation of a fraudulent act under Section 237, whereby the plaintiff was not the defendant's creditor, has never been passed."*

456. Khun Arthid had lunch with Khun Nop on 10 May 2016, which he said he did not remember: "*First I couldn't recall I have lunch with him, and I didn't remember, even have – I had lunch with him, I didn't remember*."[400] Khun Arthid further distanced himself from any discussions on the share transfer, stating that, "*I never aware of – and I could confirm that Khun Nop never told me about selling the share to Khun Tassapon or Khun Anutin or Khun Kasem. I was aware about a structure when the – it first report at the ExCom*."[401] This lunch meeting was not put to Khun Nop in cross examination. Nor is there anything in the documentary record to support an inference that Khun Arthid was told about the share transfer to Dr Kasem at this time.

457. On the evening of 10 May 2016, Khun Supalun of SCB sent a chaser email to Khun Phisit of WCP (copying Khun Sittiporn of SCB): *"Further to our email below and our discussion last week regarding comments to the legal opinion to SCB on KPN matter, may we please follow up on the current status of the revised legal opinion krub? We appreciate your help on this matter*."

458. The documentary record suggests that Khun Arthid had lunch with Khun Nop and Khun Weerawong on 11 May 2016. Khun Nop was clear about Khun Arthid's involvement in obtaining the First WCP Opinion: "*I believe meeting with Khun Arthid and Khun Weerawong, and Khun Arthid mentioned that Khun Weerawong would satisfy his legal team. If SCB legal team okay then we can discuss further. That's what I remember. And then the involvement on the legal*

[400] Day 35/25:10-12

[401] Day 35/16:17-17:1

side Khun Weerawong handled."[402] However, nothing about the fact or content of this meeting was put to Khun Arthid in cross-examination[403].

459. On the same day, 11 May 2016, Khun Phisit emailed Khun Supalun and Khun Sittiporn: "*Please consider our revised legal opinion as advised recently. If you have any further comment, please feel free to contact us*." This version was amended to meet SCB's particular concerns, by (i) expanding the analysis of Symphony's rights under Article 10.3.1 of the Fullerton SPA (an amendment subsequently largely deleted), (ii) clarifying that if Symphony were to sue REC and the new investor when a potential IPO of WEH was under consideration, the SEC might ask for further information (but in the absence of a court order prohibiting an IPO, it would not be necessary to wait until the conclusion of any litigation), and (iii) including further wording to explain that as long as any share sale was an honest sale and took place for value, it would not be possible for Mr Suppipat to cancel it under s.237 of the TCCC.

460. The following day, 12 May 2016, Khun Supalun sent a revised version back to Khun Phisit (copying Khun Sittiporn): "*Thank you very much for your revised legal opinion krub. Please kindly see the attached file for our initial comments in marked-up for your consideration. Please however, do not yet issue the execution version of the opinion based on such revised draft since it may subject to any further comments from our senior management. We will confirm later whether additional comments would be added*." SCB's amendments to this draft included:

a. The insertion of a conclusion that REC's sale of the WEH shares would not breach Art 10.3.1 of the Symphony SPA,

b. An analysis of whether new purchasers of shares would be considered as acting honestly.

461. Even after WCP had effected the transfer of shares to Dr Kasem, it continued to draft the First WCP Opinion in conjunction with SCB.

462. On 16 May 2016 Khun Supalun of SCB emailed Khun Phisit (copying Khun Sittiporn) a further version of the First WCP Opinion, stating "*Please see the attached file for our additional comments on the legal opinion. Should all comments be acceptable to you, please kindly issue the execution version accordingly*.". This second batch of comments followed the first batch on 12 May. SCB's further amendments included the deletion of wording which suggested that the person challenging the transfer did not have the burden of proving that the transaction was dishonest. Further, the 16 May version of the Opinion contains the statement that "*the disposal, transfer or sale of assets will create no impact on the issue of payment of the share purchase price under the Share Purchase Agreement between Fullerton and Symphony, in which Fullerton retains the ability to make payment for Symphony in accordance with*

[402] Day 18/42:8-13

[403] SCB Written Closing [252]

the agreement". In cross-examination, Khun Weerawong frankly admitted, once again, that this was "*Misleading. And it's not right, because we shouldn't say that. We as lawyer, how could we talk about ability to pay*". It was indeed misleading as I find that the purpose of the ring-fencing was in fact to ensure that Fullerton lost the ability to make payment to Symphony in accordance with the agreement, as Khun Weerawong knew full well.

463. Furthermore, the drafts exchanged between WCP and SCB in this period continued to refer to REC's transfer of WEH shares in prospective terms despite the transfer purportedly[404] having taken place: e.g. "*REC wishes to dispose of, transfer or sell all its assets and debts, including the WEH shares held by REC (61% of all WEH shares) to new investors*".

464. When Khun Wallaya was asked in cross-examination "*why it is that it was appropriate for [SCB's] legal department to make changes aimed at strengthening the opinion which [she said she] disagreed with as opposed to asking them for their opinion*", she asserted that (uninterpreted), "*I think we want to make it more clear*"[405]. Further, she said that the comments "*come from my team, not myself*" and she "*didn't know [about this process of adding comments], because [she] wasn't consulted or asked*" as she "*delegated the job to Khun Sittiporn and he had the authority to handle the task*". She claimed she had not seen the various drafts[406] and that the only draft she read was the final draft presented to ExCom[407].

465. In cross-examination, Khun Sittiporn insisted, "*we want neutral opinion from WCP. … We want them as independent adviser to give a true opinion of the legal theory*". He sought to justify the legal team's comments on the basis "*we want to push back that, okay, they have to stand by their opinion, and if they cannot accept our proposal, then that means that the transaction is questionable. So we want to push it as far as possible to see that this is actually the fact, and then they can stand by their legal opinion.*"[408]. When asked why they "*were trying to make the opinion stronger*", Khun Sittiporn said, "*No because that's the point, that because we want to ensure that whatever they do is according with the law and it is allowable under the SPA. There is no issue on the SPA, that would be coming back to unwind the transaction or any things like that*"[409].

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[404] "purportedly" because the share transfer did not take place until later but the share transfer documents were dishonestly backdated – see below.

[405] Day 28/93:2-8

[406] Day 28/94:21-95:12

[407] Day 29/2:8-11

[408] Day 29/77:18-78:9

[409] Day 29/77:18-78:9

466. In the light of this evidence, whilst it is clear that Khun Weerawong knew that the First WCP Opinion was misleading, I accept that SCB may have simply been intending to protect their position by pushing WCP as far as they were willing to go in their support of the share transfer. In any event, despite SCB's questionable approach, there is insufficient evidence to find that SCB knew that the opinion was misleading and colluded in the production of a misleading opinion.

The Kasem Transfer

467. I turn next to the transfer of the WEH shares to Dr Kasem. REC sold its 59.46% shareholding in WEH to Dr Kasem, whom the Defendants maintain was acting as agent for Khun Nop's mother-in-law Madam Boonyachinda, for THB 2.4 billion (**the Kasem Transfer**). According to Khun Nop, he originally agreed the high-level terms of this sale, including in particular a price ("*slightly above book value*"), in March 2016.[410]

468. Khun Nop maintains that he and Madam Boonyachinda had a pre-existing financial as well as familial relationship[411]. Regarding Khun Nop's choice to sell to a familial relation, Khun Weerawong said: *"[M]y advice has always been that my clients need to comply with my advice, meaning that it has to be a payment made based on fair value. But I did not object the share transfer to family members, and that's what we have discussed …"* [412]. It was Madam Boonyachinda's evidence that "*Khun Nop … explained that if [she] didn't buy the shares, the bank [would] turn the tap off, stop the financing and he will lose his investment*" but that she made it a condition that her identity would not be disclosed. I do not believe her evidence.

469. The Claimants contend (and as will be seen I accept) that the 'trigger' for the sale was Symphony's application to the ICC Emergency Arbitrator seeking to expand the scope of the Tribunal's injunction concerning the REC Shares (see below); that the sale and transfer in fact occurred after 25 April 2016 and the relevant documents were backdated;[413] and that Madam Boonyachinda only became involved much later in response to steps taken by Dr Kasem in Hong Kong in mid-2018.[414]

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[410] Nop WS 1, [103]–[104] ; Day 34/18:15–22.

[411] Nop WS 1 [102]

[412] Day 31/120:6–10.

[413] RAPOC, [83.2]

[414] Day 34/48:9–12

(1) REC Notices and Minutes

470. The next step in the dishonest ring-fencing scheme was to change the board of REC in order to give the impression that an independent board approved and oversaw the transfer of the shares to Dr Kasem, as well as seeking to protect Khun Nop, Khun Nuttawut, Mr Lakhaney and Khun Thun from legal action by Mr Suppipat and his companies. This was again one of the steps anticipated on the 7 April 2016 White Board.

471. Three REC board meetings are recorded as occurring on 22 and 25 April 2016 through a series of REC Notices and REC Board Minutes:

a. The "**First REC Meeting**", referred to as no.2/2559 and no.2/2016 in the documents, is evidenced by the "**First REC Notice**" and "**First REC Minutes**" and apparently occurred on 22 April 2016;

b. The "**Second REC Meeting**", referred to as no.3/2559 and no.3/2016 in the documents, is evidence by the "**Second REC Notice**" and "**Second REC Minutes**" and apparently occurred on 22 April 2016;

c. The "**Third REC Meeting**", referred to as no/4/2559 and no.4/2016 in the documents, is evidenced by the "**Third REC Notice**" and "**Third REC Minutes**", and apparently occurred on 25 April 2016.

472. The Minutes record the resignation and replacement of the directors of REC and the unanimous resolution to sell 64,717,411 WEH shares to Dr Kasem.

473. The REC Minutes and Notices were prepared by WCP.[415] According to Khun Weerawong: *"Khun Pratumporn, I expect on the instructions of Khun Nop or Khun Thun, prepared the necessary notice and minutes of the REC board meetings that took place to replace the existing directors of the company and to transfer the shares in WEH to the new investor. I do not recall performing a detailed review of the documentation that was required to effect the change of directors but I am reminded by the documents shown to me (privilege in which is not waived) that I provided some input.*" Khun Pratumporn is an associate at WCP. I find that Khun Weerawong was in fact at the heart of this next dishonest stage of the plan.

<u>Resignation and appointment of Directors</u>

474. The REC Minutes purport to record the resignation and appointment of various REC directors.

475. The First, Second and Third REC Minutes ("**the REC Minutes**"), align with the Claimants' pleaded case that:

[415] Day 33/32:14 to 33:23.

a. Khun Nop ceased to be a director of REC around 22 April 2016;[416]

b. Khun Nuttawut ceased to be a director of REC around 25 April;[417]

c. Khun Thun ceased to be a director of REC around 22 April;[418] and

d. Mr Lakhaney ceased to be a director of REC around 22 or 26 April.[419]

476. Khun Weerawong claimed that the REC directors needed to resign because: "*When you have conflict of interest or potential conflict of interest, you should not participate in the decision. In this case, I advise it because I am concerned with the fact that Khun Nop also – I don't recall who were the directors at that point in time, but it seems that all of them have some kind of conflict…"*[420]. He said his "*action … was aimed to make sure that the resolution adopted by the board has no legal flaw because directors have conflict of interest.*"[421] He admitted, however, that *"...eventually if [Mr Suppipat], as he claim, could come back to become shareholder of REC, then the first thing that he would need to do is to sue everyone involved, based on the concept of conflict of interest*."[422] When Khun Nuttawut was asked about this change of directors in cross-examination, he asserted that Khun Nop made this decision based on WCP's advice. However, he could not explain why WCP would give such advice.

477. Mr Lakhaney explained that he resigned because: "*I think I had been superfluous for a long time. I joined REC to make it an investment company and it was just an empty shell at this point that didn't do anything*". But REC still owned all the shares in WEH at this point, as Mr Lakhaney admitted[423]. Mr Lakhaney's evidence was that he understood from the 17 March meeting that WCP wished to deal with the execution of the new structure and that did not involve him.[424] It is his evidence that he simply signed the documents that were provided to him. He said that there was a resignation letter and two documents in Thai. Whilst the Thai documents were in fact the First REC Notice and the First REC Minutes, Mr Lakhaney claims that he was not aware of this at the time of signing. I do not believe this evidence. I do not consider

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[416] RAPOC, [4.1]

[417] RAPOC, [23.2]

[418] RAPOC, [6.2]

[419] RAPOC, [7.2]

[420] Day 32/28:14-22

[421] Day 32/30:13-18

[422] Day 32/29:19-23

[423] Day 25/71:8-72:12.

[424] Day 25/73:7-74:16, Day 26/8:19-24

that Mr Lakhaney would have been so cavalier in signing documents without understanding what they were.

478. Khun Thun apparently understood that because he was "*sitting at WEH level*", a potential conflict of interest could arise, and he understood that it was considered appropriate for him to resign, which he did.[425]

479. In short, I do not accept the evidence of Mr Lakhaney and Khun Thun. I find that they knew – as the 7 April 2016 White Board made clear - that their removal as directors was an essential element of the dishonest ring-fencing scheme to which they were parties.

480. The corresponding appointments of three new incoming directors ("**the New REC Directors**") are recorded in the First and Second REC Minutes. Khun Prai Bualuang, a retired Vice Admiral of the Thai military, and Khun Santi Piyatat, a practising lawyer, who founded his own law firm nearly 20 years earlier, were appointed to replace Khun Thun and Khun Nop. Khun Woranit Chaihan, a retired Captain of the Royal Thai Navy and a former Royal Guard, was appointed to replace Mr Lakhaney and Khun Nop's brother, Khun Kris.

481. As to how the New REC Directors were chosen, Khun Nop's evidence was that he approached his cousin, General Suwanamas, and sought his suggestions for the New REC Directors. Upon General Suwanamas' advice, Khun Nop had an introductory meeting with the New REC Directors at the Sofitel Hotel, attended also by Khun Nuttawut and Khun Thun. He says that during this meeting, the New REC Directors were told what to expect of their role and of the need to sell WEH shares and the valuation. At the conclusion of the meeting, the New REC Directors agreed to act as directors and were paid fees in cash[426].

482. I find that these new directors were simply stooges to assist in the dishonest scheme.

Resolution to approve Kasem Transfer

483. The Third REC Minutes purport to record the unanimous resolution to sell 64,717,411 shares (c.59.45%) in WEH held by REC to Dr Kasem at the price of only THB 37.08 per share (i.e. a total purchase price of THB 2,400,000,000).

484. With regard to the meeting's alleged "*consideration"* of the sale, it is recorded that "*The said sale price was determined to be reasonable by the financial adviser of the Company, Ploenchit Capital Co., Ltd., which was appointed by the Company to evaluate the WEH shares held by the Company*."

[425] Thun WS 1, [143]

[426] Nop WS 1 [138]

However, as is described below, the way in which this valuation was obtained from Ploenchit was itself dishonest and the Ploenchit report did not even exist at this time (25 April 2016).

485. Notably, a final signed version of the Third REC Notice and Minutes contains specific reference to Ploenchit (see below), rather than simply the "*company's financial adviser*". In response to the Claimants' question as to whether the final signed version of the Third REC Notice and Minutes was drafted by WCP, Khun Weerawong said "*I think so*"[427]. This was later corrected in re-examination[428] - the document was probably drafted much later during the Orix transaction in October 2016 (see below).

Creation of the Notices and Minutes

486. The creation dates of the REC Notices and Minutes are not agreed.

487. Khun Weerawong was willing to accept that the REC notices and minutes were drafted after the event,[429] but went so far as to suggest that this was a normal, acceptable practice:

> *"In my experience, it is not uncommon in Thailand for supporting documentation such as board minutes to be prepared after the meeting has taken place and I did not think it was unusual for board minutes to be finalised several months after the meeting had taken place. The lack of a formal board minute completed at the time does not negate the fact that the directors met on a particular day and voted on the matters in question.*"[430]

488. In cross-examination, Khun Weerawong again asserted that minutes "*would be prepared after the meeting*"[431] but added that "*the wordings would have to come from someone at the meeting*"[432] and that WCP associate Khun Pratumporn Somboonpoonpol had "*said that she worked with the company secretary*"; "*she just draft it from (…) facts given by someone else*"[433]; "*we*

[427] Day 32/42:12-24

[428] Day32/142:19-2 and Day 32/143:1-12.

[429] See Day32/32:16 - Day32/33:3 and Day32/38:11-19.

[430] Weerawong WS 1 [55]-[56]

[431] Day32/33:21-22

[432] Day32/40:17-22

[433] Day32/41:15-16

don't write something up by ourself because it's not our practice"[434]. Khun Weerawong also said that he understood there to have been informal written resolutions made at or prior to the relevant REC meetings, from which the formal minutes were subsequently derived – but that he never saw any such informal resolutions and was unable to say where any such documents would be located[435]. He also alleged that "*short form*" minutes existed in April 2016[436]. However, no party has produced either (i) the purported "short form" minutes claimed to have existed in April 2016 or (ii) any contemporaneous documentation making reference to the alleged short form minutes.

489. I consider that all of Khun Weerawong's evidence, by which he sought to explain away the drafting of these board minutes after the event, to have been dishonest and false. The manufacturing after the event of these minutes was simply a further element of the dishonest ring-fencing scheme, being part of the attempt to make it look legitimate.

490. I should add that I place no weight on the statements given to the Thai police by the New REC Directors, Khun Prai, Khun Woranit and by Khun Santi in a civil claim brought by him. They were not called to give evidence before me and their statements are in certain aspects obviously false (for example, Khun Santi said that "*he approved the performance of the said legal act of the selling of shares on 25 April 2016*").

(2) Kasem Agency Agreement

491. An agency agreement between Dr Kasem and Madam Boonyachinda was purportedly also entered into on 25 April 2016 ("**Kasem Agency Agreement**"). Under this agreement, Madam Boonyachinda supposedly appointed Dr Kasem as her agent to enter into an agreement with REC to purchase the WEH Shares, transfer them to a foreign company and hold the shares in the foreign company on her behalf. Madam Boonyachinda pretended to explain the need for an agency agreement and for secrecy "*because of the 112 criminal case and because our family is civil servants, and at the time my husband was ill and we have a reverence — we hold reverence to the royal family and we could not get involved with this kind of criminal case*"[437]. She said that Dr Kasem was selected as agent because of "*the urgency of the situation and … because Dr Kasem is Khun Nop's father and because of the bank's process of the KYC*".

[434] Day32/46:5-6

[435] Day32/44:6-22

[436] Day 32/45:3-46:12

[437] Day 34/24:21–25

492. Madam Boonyachinda's explanation is immediately undermined by the fact that Khun Nop admitted in cross-examination that he did not even inform his lawyers that Madam Boonyachinda was the ultimate shareholder in the Kasem transfer despite the fact that he "*knew that [his] lawyers were saying to SCB that the purchaser was [Dr] Kasem*".

493. The Kasem Agency Agreement was, once again, drafted by Khun Weerawong. I find that it was drafted for dishonest reasons. In his First Witness Statement, Khun Weerawong said that:

> "*58. Shortly before the sale of the WEH shares took place, Khun Nop told me that Khunying Boonyachinda was to be the purchaser. He said that she did not want to be named and asked if Dr Kasem could act as her nominee. From a legal perspective this was possible. Given that Khunying Boonyachinda wanted to ensure that the arrangement was kept confidential, Khun Nop asked and I agreed to draft the Kasem Agency Agreement informally myself as a personal favour to him. I did not charge for the work and did not consider it appropriate to do so in the circumstances and where WCP was not taking Khunying Boonyachinda on as a client at this time.*
>
> *59. To minimise the risk of the undisclosed principal relationship being discovered, to the best of my recollection, I drafted the agency agreement by hand and then asked my secretary, Ms Sukanya Khongkerdlap, to type it up at home. Given that the arrangement was to be confidential, I did not want anyone else at WCP to find the agreement on the firm's filing system.*
>
> *60. Once the agreement was typed up by my secretary, a physical copy of the document was handed to Khun Nop by me. I have since checked with my secretary, who confirmed that the laptop on which the agreement was typed up which belonged to her sister has been replaced and the original file is therefore no longer available.*
>
> *61. I was not involved in the execution of the Kasem Agency Agreement (or indeed the other documents recording the sale).*"[438]

494. I do not believe this evidence, which I consider to be obviously false. The suggestion that Khun Weerawong would need to keep such a significant document secret from his <u>own firm</u> is frankly ridiculous.

495. Similarly, in cross-examination it was Khun Weerawong's evidence that, before 25 April[439], he "*asked [his] secretary to do it [prepare the Agency Agreement] outside of the office … Then she print[ed] [it] out and then deliver[ed] it to [him] … By hand …. [he] asked to .. meet Khun Nop outside of the office …. Then [he] deliver[ed] the document to him*". When asked why this elaborate procedure was necessary, Khun Weerawong alleged that it was

[438] Weerawong WS 1 [58] – [61]

[439] Day 32/128:19-22

"*to be kept confidential, meaning that [his] colleagues shouldn't have any information*". Additionally, he said that he did not consider that there was any need to disclose the agency arrangement to SCB nor did he understand that this arrangement would present any issues for SCB in circumstances where (i) the purpose of the arrangement was to implement the ring-fencing strategy, (ii) Madam Boonyachinda was as much a family member as Dr Kasem, and therefore all of the potential future benefits of any upside in WEH's value would remain available to Khun Nop, and (iii) Khun Nop would have ongoing responsibility for the business of WEH regardless.[440] Again, I consider this evidence to be obviously untruthful. The suggestion that SCB would not care who the purchaser of the shares was, if it were another family member of Khun Nop's, is also ridiculous.

496. Whilst Khun Weerawong said that he was not privy to the execution of the Kasem Agency Agreement, it was his evidence that Khun Nop confirmed to him shortly afterwards that it had been duly executed.[441] Khun Weerawong denied that he created this document in 2018 and that it was deliberately backdated to 2016 in order to prevent Dr Kasem co-operating with the court in Hong Kong which in May 2018 had issued an injunction preventing dealing in the WEH shares (see below)[442].

497. The Defendants rely upon the fact that, they say, Khun Nop gave unchallenged evidence that the Kasem Agency Agreement was signed by Dr Kasem on 25 April 2016, which is corroborated by Khun Supaporn Wonganan's (**Khun Supaporn**) evidence. However, the Claimants highlight that there is no Civil Evidence Act Statement for Khun Supaporn's evidence and the Defendants failed to call her as a witness even though she is the only person who purportedly witnessed the signing of both the Kasem SPA and the Kasem Agency Agreement.

498. Similarly, Madam Boonyachinda alleged in cross-examination that she had "*signed the … agency agreement with Dr Kasem in 2016*" and said that "*Both documents, the agency appointment documents and the other documents, they were prepared — they were arranged at the same time*"[443].

499. However, Madam Boonyachinda's evidence in cross-examination as to the whereabouts of the alleged hard copy of the Kasem Agency Agreement purportedly signed by her on 25 April 2016 was wholly unconvincing: "*I didn't keep it myself, but I have people who keep documentations for me. Because I'm old and my brains are not working well, people work for me would keep a copy*

[440] Weerawong WS 1 [63]

[441] Weerawong WS 1 [61]-[62]; Day32/128:19 - Day32/132:9.

[442] Day 32/132:3-9

[443] Day 34/37:19–21

for me."[444] When asked to identify who would have kept her copy Madam Boonyachinda said "*I have so many people working for me, I can't really remember who exactly keep this document, but if I make an enquiry, I'm sure someone is keeping the document safe for me*."[445] When it was put to Madam Boonyachinda that she did not have any involvement at all with WEH before the middle of 2018, her evidence was "*No, it's not. I –my recollection confirm that it's not, but I could be wrong…*"[446]. When asked what she did in relation to WEH before mid-2018, she said "*I can't remember but as far as I'm aware, I didn't do anything…I can't remember really.*"[447] I find that the truth is that she did not have any involvement at all with WEH before the middle of 2018.

500. I accept the Claimants' case that the Kasem Agency Agreement was backdated and actually produced for the first time on 14 May 2018 following the injunction relating to WEH shares which had been made by the High Court of the Hong Kong Special Administrative Region on 11 May 2018 with which Dr Kasem expressed an intention to fully comply (which I address next). I accept the Claimants' contention that it was a method of circumventing this intention. Consistently with the Claimants' case, the earliest version of the Kasem Agency Agreement has "*Created Datetime*" metadata of 14 May 2018. No party has produced a copy of the Agreement with metadata earlier that 14 May 2018. No native Word document version of the Kasem Agency Agreement exists.

The Hong Kong Injunction

501. Before turning next to explain the circumstances concerning the false creation of the backdated Kasem SPA itself, I set out my findings as to how the Kasem Agency Agreement was likewise falsely created and backdated in May 2018 in response to Dr Kasem's 'change of heart' to cooperate with proceedings in Hong Kong in favour of Mr Suppipat, which meant that Khun Nop had to find another party who was willing to replace Kasem as nominee. I find as follows.

502. On 11 May 2018, Mr Suppipat's Companies, on an ex parte application in Hong Kong proceedings HCCT 31/2018, were granted an injunction by the Hong Kong High Court against Golden Music to prevent it from disposing of or dealing with or diminishing the value of the 41,216,398 shares it held in WEH for the period up to and including 16:00 hours on 18 May 2018 ("**the HK Injunction**"). For context, Golden Music is the SPV referred to on the 7 April 2016 White Board which received part of the Relevant WEH Shares and further

[444] Day 34/47:17-20

[445] Day 34/48:1-4

[446] Day 34/48:23-49:1

[447] Day 34/49:2-8.

distanced them from Mr Suppipat's reach. The Claimants have alleged (and I accept) that Golden Music held those shares as a nominee for Khun Nop.

503. On 14 May 2018, Mr Suppipat's Companies, through their legal representatives Deacons, notified Golden Music and Kasem of the HK Injunction. I find that as a result on or about this date the Kasem Agency Agreement was created and backdated by Khun Nop, Khun Nuttawut and Khun Weerawong.

504. Golden Music did not attend the return date on 18 May 2018 and the HK Injunction was continued until further order. On 21 May Symphony wrote to Golden Music's directors informing them of this.

505. On 22 May 2018, Dr Kasem, "*in [his] capacity as the majority shareholder*" of Golden Music wrote to Christian Iuliano, Artemis Enterprises Ltd and Bartley Advisors Ltd, as "*the directors and nominal shareholder*" of Golden Music, "*RE: REQUEST FOR GENERAL MEETING OF GOLDEN MUSIC LIMITED*". He set out how he has "*been notified, under cover of a letter from Deacons dated 14 May 2018, that I am the majority shareholder of [Golden Music]*" and has been informed about the Hong Kong Injunction Order, with which he "*intend[s] to act in full compliance*" and to ensure he is able to do so, "*request[s] the directors of [Golden Music] to call for a General Meeting*" to ensure compliance with the Order. He expressly put the directors on notice that:

> *"(a) I shall maintain and preserve my present majority shareholding…*
>
> *(b) I have not authorized, approved or entered into any arrangement transferring any of my present majority shareholding in the Company to any other person or party. If the Company should receive any information or documentation that purports to effect a transfer of any part of my shareholding in the Company, the Company shall disregard and treat these as unlawful and contact me directly and immediately for clarification and confirmation.*"

506. On 23 May 2018, having learned of these developments, Madam Boonyachinda wrote to Premier Fiduciary Limited (**Premier**), instructing them to appoint and register Khun Surat Chiracharasporn (**Khun Surat**) as the new director of Golden Music, which took place on 24 May 2018. Khun Surat said that he "*never spoke to Madam Boonyachinda*" but "*when [he] was offered the job by Khun Weerawong and Khun Nop [he] had no reason to question the offer because normally Khun Weerawong would offer [him] a job occasionally … job like being a director of companies … they're not like permanent jobs*". Further, he said that *"[t]he company is an SPV and it was set up to hold shares and it would – it need to have the director to hand over documentation*"[448] and that he was "*told briefly that [his] job was to execute documents of the*

[448] Day 33/5:10-11

company"[449]. He said he did not speak to the outgoing directors[450]. This is obviously highly suspicious.

507. A letter dated 24 May 2018 was sent to DLA Piper by Khun Surat confirming that Madam Boonyachinda was the beneficial owner of the 459,109,350 shares registered under Dr Kasem's name. In cross-examination, Khun Surat indicated that Khun Weerawong had asked someone to bring this letter to him. Further, he confirmed that he would have signed *"[w]hatever Mr Weerawong had written*"[451]. Khun Weerawong was clearly centrally involved in these dishonest events.

508. A further letter dated 24 May 2018 was sent by Khun Weerawong to DLA Piper and confirms the same beneficial ownership structure. The letter refers to the Kasem Agency Agreement (discussed above) and states that:

> "*Based on our review of the Agency Appointment Agreement, we hereby confirm that, in accordance with the relevant laws of Thailand, Khun Ying Kokeow Boonyachinda, the undisclosed principal, is the ultimate beneficiary owner of the 459,109,350 shares of the Golden Music Limited currently registered under the name of Mr Kasem Narongdej, the agent*."

509. By a letter dated 25 May 2018 Madam Boonyachinda wrote to Khun Surat, enclosing the Kasem Agency Agreement and an Instrument of Transfer and stating:

> *"I, as beneficiary owner and legitimate shareholder in the Company, hereby notify you as a sole director nominated by me as follows:*
>
> *I hereby notify you that 459,109,350 shares…now registered under the name of Mr Kasem Narongdej in the books of the Company do not belong to him but to me and that he holds the Shares as my nominee according to the Agency Appointment Agreement*
>
> *I hereby notify you that the Agency Appointment Agreement was terminated and I would like to disclose myself as the legitimate owner of the Shares.*
>
> *I hereby request you to issue the director resolution approving the transfer of Shares from Mr Kasem Narongdej to me according to the Instrument of Transfer…"*

510. On 7 June 2018, Baker & McKenzie wrote to Golden Music, Khun Surat and Bartley Advisors Limited, "*on behalf of*" Dr Kasem. This letter explains that Dr Kasem has received no response to his letter of 22 May and has become aware that Khun Surat is the new director. As such, it reiterates the request for

[449] Day 33/5:10-11

[450] Day 33/11:9-12

[451] Day 33/31:21-23

a General Meeting with the intention of proposing a resolution that Khun Surat be removed from office since "*As the majority shareholder of the Company, Dr Narongdej has grave concerns as to the present governance and management of the Company, and in particular, whether this will jeopardise the compliance with the Order…*".

511. Further, the recipients are put on notice that:

> *"(a) Dr Narongdej shall maintain and preserve his majority shareholding…*
>
> *(b) Dr Narongdej has not and will not authorise, approve or enter into any arrangement transferring any of his present majority shareholding in the Company to any other person or party. If the Company should receive any information or documentation that purports to effect a transfer of any part of my [sic] shareholding in the Company, the Company shall disregard and treat these as unlawful and contact our Firm directly and immediately for clarification and confirmation…"*

512. Despite this, on 13 June 2018 Khun Surat signed a resolution approving the transfer of Dr Kasem's shares in Golden Music to Madam Boonyachinda pursuant to an instrument of transfer and resolving to enter her name into the Register of Members. Khun Surat admitted that he had "*seen the Hong Kong injunction … after [he had] taken on the directorship around June or July*". However, he asserted that he "*did not know*" about the injunction and the letter from Dr Kasem before he signed the resolution on 13 June. On 14 June 2018 Khun Surat requested Premier HK to modify Golden Music's shareholder register to reflect the transfer to Madam Boonyachinda.

513. On 18 June 2018 Premier HK notified Khun Surat that the resolution could not be effected as "*…there are now clear instructions that the shareholder [Kasem] does not want any shares transferred from his name*". On 19 June 2018 Premier HK informed Dr Kasem of Khun Surat's request and Kasem responded again confirming he had not authorized any such transfer. On 20 June 2018 Baker & McKenzie on behalf of Dr Kasem again wrote to Khun Surat reiterating that Kasem had neither agreed to nor executed any agreement, instrument of transfer or bought and sold notes to transfer his Golden Music shares to Madam Boonyachinda. On 21 June 2018 Dr Kasem made a statement to the Hong Kong police in connection with the transfer to Madam Boonyachinda.

514. Despite all this, on 25 June 2018 Khun Surat recorded the transfer of 459,109,350 shares in Golden Music from Dr Kasem to Madam Boonyachinda on the basis of an undated instrument of transfer and undated bought and sold notes which do not record any consideration having been received for the shares but purportedly bear the signature of both Dr Kasem and Madam Boonyachinda. Madam Boonyachinda was now registered as the holder of the Golden Music Shares. Dr Kasem subsequently impugned the authenticity of these documents.

515. On 26 June 2018 DLA Piper HK on behalf of Golden Music wrote to Baker & McKenzie on behalf of Dr Kasem, referring to the Kasem Agency Agreement and stating that Khun Surat was satisfied that "*(b) Dr Kasem has acted as the agent of KY [Madam Boonyachinda] in acquiring the WEH Shares and the GML Shares; and (c) Dr Kasem is holding the GML Shares on trust for KY*."

516. On 27 June 2018 Mr Suppipat's Companies made another *ex parte* application to the Hong Kong court in proceedings HCCT 31/2018 to appoint a receiver over the Golden Music Shares. The receivership application was dismissed. Mr Suppipat's Companies appealed.

517. On 29 June Dr Kasem applied *ex parte* in the Hong Kong proceedings HCA 1525/2018 for an injunction restraining Khun Nop and Madam Boonyachinda from dealing with the shares in Golden Music registered in Madam Boonyachinda's name. The Hong Kong court granted this injunction (**the Kasem Injunction**). On 3 July 2018 Dr Kasem sought an order that the Golden Music share transfer be reversed and asserting his beneficial ownership of those shares. On 5 July 2018 Dr Kasem applied for leave to serve the Kasem Injunction.

518. Between 5 and 6 July 2018 Madam Boonyachinda and REC made 18 transfers of funds between them totalling THB 970,133,884.

519. On 10 July 2018 the Hong Kong Court of Appeal dismissed Mr Suppipat's Companies' appeal against the dismissal of their renewed *ex parte* application to appoint a receiver over the Golden Music Shares. The following day, Dr Kasem's solicitors threatened to apply for an injunction restraining GML from dealing with its WEH Shares.

520. On 12 July 2018 Khun Nop made an affirmation in the Kasem Injunction proceedings in which he asserted that Madam Boonyachinda beneficially owned the WEH shares transferred to Kasem as well as the shares in Golden Music; and that Madam Boonyachinda had paid approximately $68m to REC in respect of the WEH shares.

521. On 23 July 2018 Baker & McKenzie on behalf of Kasem wrote to DLA Piper on behalf of Golden Music, repeating: "*We reiterate that our client takes issue with the authenticity and validity of the documents relied upon to effect the transfer of shares in his name to Ms Khunying Kokeow Boonyachinda. It is imperative that our client is given immediate access to the documents relied upon to effect the transfer.*"

522. Ultimately, the claims brought by both Mr Suppipat's Companies and Dr Kasem before the Hong Kong courts failed.

(3) Kasem SPA

523. Supposedly dated on the same day on which the Kasem Agency Agreement purports to be dated, namely 25 April 2016, a Share Purchase Agreement (**the Kasem SPA**) records the agreement to sell 64,717,411 shares (c.59.45%) in WEH held by REC to Dr Kasem. By clause 3.2 thereof the consideration was payable in 4 instalments between 25 August 2016 and 25 May 2017. The Kasem SPA was drafted by WCP[452] (which is common ground) and purports to be signed by (i) Khun Santi and Khun Prai for REC, and (ii) Dr Kasem.

524. On the Claimants' case, the Kasem SPA was created on 17 May 2016 or later. In this regard, Khun Weerawong's privilege log refers to a "*Draft share purchase agreement between Dr Kasem and REC re WEH shares*" of 17 May 2016. The log also lists an "*Email in relation to the share sale and purchase transaction between Dr Kasem and REC"* of 12 October 2016. Further entries in the privilege log refer to circulating drafts of the Kasem SPA on 18, 25 and 26 October 2016. As such, the earliest contemporaneous reference to an SPA between REC and Dr Kasem is on 17 May 2016 (but it may have been created later).

525. The Claimants highlight that the earliest *signed* copy of the Kasem SPA has a "Created Datetime" metadata of 29 October 2016 **(First Signed Kasem SPA)**. However, Khun Nop and Khun Nuttawut submit that the "Created Datetime" is the date on which a PDF document is created or compiled and is not dispositive of the question of when the underlying original document was created and/or signed (where the PDF is evidence of the signature).

526. I reject the Defendants' case that Dr Kasem signed the original version of the Kasem SPA in the presence of Khun Nop and Khun Supaporn at the Narongdej house on the date stated on it, namely 25 April 2016. As already mentioned, the only supposed witness to the signing of the Kasem SPA (other than Khun Nop), Khun Supaporn, has not been called by any of the Defendants to give evidence in these proceedings[453] (although she did give sworn testimony in Hong Kong).

527. Khun Nop's evidence, which the Defendants say was unchallenged, was that: "*With respect to the signing of the Kasem SPA and the Agency Agreement, I remember these events clearly because my father's birthday is 24 April and I asked him to sign the documents the day after his birthday, on 25 April 2016. …. Ms Wongnan took the Kasem SPA to the house. The Kasem SPA was signed in the same area [as the Agency Agreement] after that was explained to Kasem. When both documents had been signed, I took the Agency Agreement to KKB to sign on the same day. I do not know what happened to the Kasem SPA. … Once the Kassem SPA was signed, I am not sure where it was taken, however, to the best of my recollection Khun Supaporn took that away. I did not take it*

[452] Weerawong WS 1, [64] (and earlier [51]) ; Nop WS 1, [112]

[453] Claimants' Closing [413]

with me"[454]. Madam Boonyachinda alleged that she "*remember[ed] vaguely that [Khun Nop] had witnessed his father signing the SPA when the document were presented to me*". Further, Khun Weerawong gave oral evidence that Khun Pratumporn told him on or around 10 May that she had already sent the documents for signature for Khun Nop to take to Dr Kasem to sign on 25 April[455] and that his colleagues confirmed there was an SPA at the time of the Second WCP Opinion[456].

528. Whilst the Defendants say Khun Nop's evidence on the signing of the key documents by Kasem on 25 April 2016 was unchallenged, I do not accept that. The following cross-examination took place:

"***Q. Can you explain why there is no copy of the transfer to your father, which bears a date which is earlier than May 2016?***

A. Which document are you referring to, please?

Q. The transfer to your father

…

Q. … if we look at {G4/379.15}, that is a signed version and that has a created date of 13 May. I suggest to you that these documents were all created after Mr Suppipat had made his application for a prohibition on sale of the WEH shares?

A. I disagree with that.

Q. Let's have a look at {G4/379.30}. This is the SPA said to have been entered into on 25 April 2016 between KPN Energy and your father to purchase the shares. Now, this document has a created date of 29 October 2016, and we have not been able to find any version of it, signed or unsigned, before October. Can you explain that?

A. For this SPA, my Lord, I witness my father sign when Ms Supaporn brought the document to the house, and I learn about this at a later stage, that we need to -- not to, I would say, rather amending the contract on the interests, but I think the lawyer just decide to keep the signing page, and redo the front part on the interest only, which I did explain to my father, that is what I remember on this.

Q. When do you say that you witnessed your father sign?

A. On 25 April.

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[454] Nop WS 1, [113]

[455] Day 32/64:6-14

[456] Day32/95:21 – Day 32/100:7

Q. Then you say the lawyer decided to keep the signing page and redo the front part?

A. Yes.

Q. What do you mean by that?

A. There is an interest clause in this, that is what I explained, and I did explain to my father about that. But I don't know the details. This is what I got from the lawyer, the WCP lawyer, on the interest clause.

...

Q. Let's have a look at {G4/379.41}, which is the agency appointment agreement, and that is one which, if we look at page 6 {G4/379.41/6}, that's on the left-hand side, that is a signature of Madam Boonyachinda, your signature as witness, and the signature is said to be that of Khun Kasem?

A. Yes.

Q. And again, the metadata of this is, and the earliest one we have been able to find, is 14 May 2018?

A. That is impossible, because Mr Weerawong hand this document to me myself, and then I took the document for my father to sign.

Q. So you stand by your evidence, do you, that none of these documents were backdated; it was a genuine transfer of directors in April of 2016, yes?

A. Yes, on the 25th, because this is the document that I took for my father to sign.

Q. You know that your father denies signing, don't you?

A. Yes, and there is a court ruling in Thailand about this already, that we didn't force his signature.

Q. There is a court ruling that your father did not turn up to give evidence that his signature was forged, and therefore despite the expert evidence suggesting that it was not a genuine signature, the application was dismissed; that is correct?

A. Not only that, they also look into the intention of forgery, his signature, and they also look into the -- who really the investor for the company, and the conclusion is that it is not the family, it's me. ..."

529. I am unwilling to rely on any of Khun Nop's evidence unless it is corroborated by a genuine contemporaneous document. His evidence in this respect is not so corroborated. I find that the Kasem SPA was created after 25 April 2016. There is no documentary evidence of a signed or unsigned SPA

created before this date. I therefore do not accept that Khun Nop witnessed his father signing the Kasem SPA on 25 April 2016.

530. This finding is strongly supported by the fact that in cross-examination, Mr Lakhaney was shown an email he sent on 27 October 2016 to Ms Collins and Khun Thun where, following a request from a potential purchaser of WEH (Orix – see further below) for the relevant transaction documents, he stated: "*Nuttawut tells me everything will be approved tonight, signed tomorrow by Dr Kasem…"*. Mr Lakhaney admitted that he recalled that the significant item missing or remaining to be signed was the Kasem SPA and that he spoke to Khun Nuttawut about this[457]. Otherwise, the WEH Managers claim that they were not involved in the Kasem SPA or the Kasem Transfer Instrument, and the circumstances in which those documents came to be produced are beyond their knowledge[458]. Notably, neither Khun Thun nor Ms Collins replied to Mr Lakhaney's 27 October email raising any queries – this strongly suggests, and I find, that they too were aware that (at least) the Kasem SPA had not been signed as of 25 April 2016 and indeed, was not signed until much later.

531. I consider it likely that the WEH shares were as a matter of fact transferred to Dr Kasem sometime in May 2016. In any event, I find as a fact, in the light of all the surrounding evidence, that Khun Nop, Khun Nuttawut, Khun Weerawong, Khun Thun, Mr Lakhaney and Ms Collins all knew that the shares had been so transferred and that this was designed to put them beyond the reach of Mr Suppipat's creditor-companies.

(4) Kasem Transfer Instrument

532. It is common ground that as a matter of Thai law, the operative step in effecting the sale of a private limited company subject to the Thai Civil and Commercial Code (**TCCC**) is the transfer of shares (rather than the contract for sale).

533. The share transfer instrument for the Kasem Transfer[459] ("**the Kasem Transfer Instrument**"), according to which the WEH Shares were transferred to Dr Kasem, is on its face likewise dated 25 April 2016. It was drafted by WCP (which is common ground).

534. On the Claimant's case, the Kasem Transfer Instrument was in reality created on 12 May 2016 or later. Even on the Defendants' case, the Transfer Instrument was created on or before 13 May 2016.

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[457] Day 26/65:4-6:24

[458] In this regard, the WEH Managers rely on: Collins WS 1, [245] ff., Lakhaneey WS 1, [121] ff., Day 23/140:14-140:16, Day 23/139:15-139:23,

[459] Weerawong WS 1 [64]

535. The earliest unsigned version of the Kasem Transfer Instrument has "Created Datetime" metadata of 12 May 2016. The earliest signed version of the Kasem Transfer Instrument has "Created Datetime" metadata of 13 May 2016. No party has produced a version of the Kasem Transfer Instrument with earlier metadata. Two further versions of the Kasem Transfer Instrument have a created or family date 13 May 2016.

536. Khun Weerawong's written evidence was that he was not involved in preparing the Kasem Transfer Instrument and does not know when or how it was executed by Dr Kasem. However, it is Khun Weerawong's understanding that the sale of the Relevant WEH Shares to Dr Kasem proceeded, with the approval of the New REC Directors, on 25 April 2016. This understanding derives in particular from (i) Khun Pratumporn having allegedly told Khun Weerawong that the share transfer documentation had been given to Khun Nop for signature by Dr Kasem on 25 April,[460] (ii) from the date borne by the Kasem Transfer Instrument (recording the transfer of the Relevant WEH Shares from REC to Kasem),[461] and (iii) from Khun Weerawong having supposedly drafted the Kasem Agency Agreement around 25 April 2016.[462]

537. The receipt for stamp duty for the Kasem Transfer is dated 10 May 2016. Khun Nop and Khun Nuttawut highlight that this was 15 days after the execution of the share transfer on the date it bears, 25 April 2016, with 15 days being the period of time allowed by Thai law for the payment of duty following a transfer.

538. On 18 May 2016, WEH's shareholder list was submitted to the Thai companies register showing Kasem as the legal owner of the shares as at 25 April.

539. In the light of the foregoing, whilst I do not accept that it occurred on 25 April 2016, it is not possible to establish precisely when the Kasem Transfer Instrument was created.

(5) Tassapon Transfer Instrument and Revenue Receipt

540. Curiously, a further share transfer instrument also purportedly dated 25 April 2016 - which names Khun Tassapon Bijleveld (**Khun Tassapon**) as opposed to Dr Kasem as transferee but is otherwise identical - was also produced and signed by Khun Prai, Khun Woranit and Khun Santi (**Tassapon Transfer Instrument**).

[460] Day32/64:5-9

[461] Day32/61:4 - Day32/63:17

[462] Day32/78:11-13

541. An unsigned Tassapon Transfer Instrument was attached to an email sent on 9 May 2016 from WCP to Khun Nop's personal assistant at the KPN Group, copying in Khun Weerawong and Khun Nuttawut. The email itself states, "*Khun A, Please find attached the share transfer instruments for your signing arrangement …*". Notably, this occurred at a time when, on the Defendants' own case, the same REC shares had already been transferred to Dr Kasem pursuant to the Kasem SPA and Kasem Transfer Instrument dated 25 April 2016. The falsity of the case advanced by Khun Nop, Khun Nuttawut and Khun Weerawong regarding the signature of the Kasem SPA is accordingly transparent.

542. In cross-examination, Khun Nuttawut said, when asked about this 9 May 2016 email, "*I didn't pay attention, and I did not do the coordinating of everything*". Khun Weerawong did not respond to the email and in cross-examination said, "*I don't read all the emails that's sent to me*".

543. On the Claimants' case, the Tassapon Transfer Instrument was created on 8 May 2016. On Khun Nop's case, it was created on or before 8 May 2016. The unsigned Transfer Instrument has "Created Datetime" metadata of 8 May 2016. I find as fact that the document was created on 8 May 2016.

544. Further, a revenue receipt for stamp duty regarding the supposed transfer to Khun Tassapon was produced on 10 May 2016. In cross-examination, Khun Weerawong said that, "*[t]he mistake was my associate because she should have looked at it when she got it back instead of just carry it to the Revenue department, got it paid and then realised later on*". However, Khun Weerawong was unable to explain why the draft transfer instrument was sent by email dated 9 May and denied knowing about a proposed sale to Khun Tassapon. Khun Weerawong confirmed that "*the truth is that the Revenue department first stamped a copy of the share transfer in favour of Khun Tassapon and were then asked to use the same money and the same receipt to transfer to Khun Kasem*". He said this was "*because they knew that it's a mistake*". Whilst this mistake was apparently rectified on 11 or 13 May, the revenue did not change the date from 10 May.[463] I reject Khun Weerawong's evidence; I consider that he is lying about this.

545. Also on 10 May 2016, Khun Pratumporn emailed Khun Thidarat (of KPN) copying Khun Nuttawut and stated: "*As discussed just now, please print out **5 copies** of the blank share transfer documents as attached, and arrange for K Tassapon to execute all copies*". This attached a blank share transfer instrument for the transfer of WEH shares from Khun Tassapon to an unidentified recipient which was left blank.

546. In cross-examination, Khun Nop alleged that the "*confusion*" arose from the fact Dr Kasem did not immediately agree to be Madam Boonyachinda's nominee and, as a result, he "*touch[ed] base with Khun Tassapon in case [he was needed as] a backup*". Khun Nop said he communicated this alternative to

[463] Day 32 / 70:7-15

Khun Nuttawut, who instructed WCP, but failed to "*update*" Khun Nuttawut when Dr Kasem ultimately agreed to act as nominee. I find that this evidence is also a lie.

547. Unsurprisingly, even Khun Nop could not explain why Khun Santi and Khun Prai were signing a share transfer instrument on 10 May 2016, prepared the previous day, in favour of Khun Tassapon, if there had already been a completed sale to Dr Kasem on 25 April 2016: "*I don't know, to tell you the truth. I don't know why he sign. And I am not the one who took the document for him to sign.*"[464] Khun Nop conceded the obvious, namely that if anybody knew that there had been a sale to his father on 25 April 2016, they could not possibly agree with there being a transfer to Mr Tassapon on 10 May 2016[465].

548. Khun Nuttawut was also asked to explain why a transfer form to Khun Tassapon had been prepared and unsurprisingly he had no explanation for this: "*I do not recall – I do not remember why there is a document regarding Tassapon. I do not – I cannot explain. There might be a preparation of something, a discussion about.*"[466] Khun Nuttawut accordingly sought to distance himself from this falsehood: "*I do not involve in this. I only heard Tassapon is one of the person that Khun Nop would like to discuss with…. There is a conversation, if I am not wrong, during which the ring-fence, that either Khun Nop would like to have his father or have Tassapon as the buyer*."[467] But when it was pointed out that he was copied in on the relevant email exchanges, Khun Nuttawut was forced to pretend that he did not read them: "*I do not remember I see this one back then, even though I have cc in there, there is several document my Lord, that I don't pay attention to, especially the one which is not addressed to me*."[468] This evidence was again a barefaced lie.

549. The Claimants allege that, on or around 26 April 2016, Mr Suppipat became aware that Khun Nop was attempting to sell REC's WEH shares to Khun Tassapon[469]. Accordingly, in a letter to Khun Tassapon dated 26 April 2016, Symphony set out that it "*has been made aware*" that Khun Tassapon "*may be pursuing the purchase of shares of [WEH]*" and puts him on notice of the "*ongoing ICC arbitration*". The letter made it clear that the ownership of REC shares was the subject of ongoing arbitral proceedings; and it set out the terms of the EA Order and BVI Injunction before concluding that: "*Based on the foregoing, if you were to complete the Transaction: Having been duly informed*

[464] Day 17/123:10-19

[465] Day 17/123:20-124:3

[466] Day 20/36:14-22

[467] Day 20/37:7-9

[468] Day 20/39:20-23

[469] Khun Nuttawut WS 1 [92]

of the above dispute, the Purchaser would not be deemed a good faith Purchaser." Khun Tassapon did not respond.

550. Further, Mr Suppipat's Companies wrote to Khun Nop's Companies on 26 April 2016:

a. Emphasising that the terms of the existing EA Order provided that *"Fullerton Bay Investment Limited is prohibited from disposing of the shares, representing 49% of the share capital it holds in Renewable Energy Corporation Co., Ltd…and any other action having an economic effect similar to the disposal and/or transfer and/or encumbrance of the shares, pending the resolution of the present dispute between the Parties by way of the final award in the arbitration between the Parties*"

b. Making clear that "*the sale of WEH shares by [REC] has a similar economic effect as the sale of [REC] shares by Fullerton or KPN EH since the WEH shares constitute the sole asset of [REC]. Fullerton and/or KPN EH are therefore prevented from disposing of their stake in WEH pending the resolution of the ICC arbitration proceedings*."

c. Noting that any sale of the WEH shares by REC would require Fullerton's approval under the REC SHA and would therefore constitute a "dealing" with the REC shares, being in breach of the BVI Injunction which was subject to criminal sanctions.

d. Concluding: "*We therefore respectfully request that you immediately take any appropriate action to cause [REC] to cease and desist from selling the Shares*."

e. Further explaining that the WEH Shares constituted the sole asset of REC such that their sale would violate the EA Order and that any sale of WEH shares held by REC would also constitute a breach of the BVI Injunction.

551. On 26 April 2016 Symphony wrote in the same terms to Ms Collins, Khun Thun and Ms Siddique and further reminding them of their obligations under the ASA:

> "*Any sale of WEH shares by [REC] will frustrate NGI's, DLV's and Symphony's rights under the Share Purchase Agreements. We therefore respectfully request that you immediately take any appropriate actions to ensure that KPN ET, Mr Tassapon Bijleveld, and/or any of his companies which may be involved in the Transaction, cease and desist from selling/purchasing any Shares, pursuant to your undertakings under the Advisory Services Agreement."*

552. It is notable that shortly after receiving this letter, on 3 and 4 May 2016, the WEH Managers terminated the ASA and the SHA Termination Agreement.

Application to Emergency Arbitrator

553. On 27 April 2016 Mr Suppipat's companies made an application to the Emergency Arbitrator, copied to WCP (including Khun Phisit) as Khun Nop's Companies representatives, for the interpretation and/or modification of the Emergency Arbitrator's order to confirm inter alia the disposal and/or transfer of Relevant WEH shares by REC was prohibited.

554. Mr Suppipat was accordingly taking active steps to prevent the disposal of the WEH shares, as I find was known to Khun Nop, Khun Nuttawut, Khun Weerawong and the WEH Managers.

555. On 29 April 2016 Khun Nop's Companies, through WCP, set out their objections to the EA Interpretation Order Application on the basis (in particular) that it lacked merit in that it: *"wrongly assumes that if REC sells its shares in WEH, that in itself "would have an economic effect similar to the disposal and/or transfer of the REC Shares by Fullerton." That cannot be the case when the Claimant has not even alleged that any alleged sale of REC's WEH shares is at an undervalue*." This was said despite the fact that, as Khun Nop knew full well, at that time they were contemplating a sale of the WEH Shares at only THB 2.4 billion (USD 68m). This was wholly misleading.

(6) Purchase Price

556. Under the Kasem SPA, the 64,717,411 WEH shares were then sold for book value at THB 2.4 billion (c. USD 68m, THB c.37.08 per share). In line with this, it was Madam Boonyachinda's evidence that she agreed to pay THB 2.4 billion for the shares and that this price was derived "*from the book value and the company's financial circumstances at the time*", as calculated by Khun Nop. Yet Madam Boonyachinda did not look at the accounts for the calculation.

557. Khun Weerawong's evidence was that the Relevant WEH Shares had been sold to Dr Kasem for fair value fixed by 25 April 2016 by agreement between the New REC Directors and Dr Kasem on behalf of Madam Boonyachinda, and in accordance with the price range identified by an independent financial adviser (in the event, Ploenchit): "*I don't have the number. But I know the basis that it's going to be fair value. That's what I learned*"[470], and "*I heard that it would be a fair value on the date that the transaction would take place, but how the price would be determined would be based on the financial advisor's price range.*"[471]

558. With regard to her ability to pay the purchase price, Madam Boonyachinda alleged that she "*had 1 billion THB from … [her] own account and the rest were loans*". In her Witness Statement, Madam Boonyachinda set out the

[470] Day32/21:17-24

[471] Day32/23:13-16

totality of her assets and, with one exception, provided an approximate value for each of them. The total value is less than 1.6 billion THB.

559. Madam Boonyachinda alleged that she had raised 970 million THB from selling her antiques to Khun Nop himself, although she was unaware how Khun Nop himself had been able to raise the funds to pay for them. It is wholly implausible that he could have done so, given his inability to pay the purchase price under the REC SPAs.

560. Madam Boonyachinda also alleged that she could not remember when this supposed sale of antiques took place, as nothing was ever written down about it and she even accepted in cross-examination that the antiques are "*[s]till at our house*", meaning the house she shares with Khun Nop. I find that there was no such sale of antiques to Khun Nop. With regard to the supposed loans, it was Madam Boonyachinda's evidence that Khun Nop arranged these and she did not communicate with any of the lenders herself. I reject all of this evidence which I find is obviously untruthful.

561. Further still, the purchase price was not paid at the time of signing the Kasem transfer documents. In this regard, Khun Nop said in cross-examination that he did not expect to be paid "*immediately"* for the Kasem transfer as Madam Boonyachinda would be paying the $68 million in "*instalment[s]*" which, he alleged, had been consented to by the REC board. Indeed, Khun Nop admitted that *"[m]ost of the money*" which Madam Boonyachinda had borrowed in order to pay the purchase price "*had been lent to [him] directly or indirectly*" by REC itself and none of it has yet been paid back.

562. Four promissory notes, which were disclosed as part of a PDF clip of documents, purport to set out that Dr Kasem has promised to pay KPN Energy (Thailand):

a. THB 1,000,000,000 by 25 August 2016;

b. THB 500,000,000 by 25 November 2016;

c. THB 500,000,000 by 25 February 2017;

d. THB 400,000,000 by 25 May 2017.

563. The notes are dated 25 April 2016 and apparently signed by Dr Kasem and Madam Boonyachinda. However, the PDF clip they are part of has a "Created Datetime" of 15 July 2017 and a "Last Modified Datetime" of 1 June 2018. The Claimants maintain that Madam Boonyachinda's signature was added to the promissory notes in the PDF between 31 May 2018 and 1 June 2018. It is true, as Khun Nop and Khun Nuttawut contend, the "Last Modified" date provides no information as to what modifications were made at that time. Nonetheless, in view of all of the other evidence concerning backdated documents referred to above and below, as well as the false evidence given by Khun Nop and Madam Boonyachinda concerning the supposed signing of the Kasem SPA, it is highly unlikely that these promissory notes are genuine.

(7) The Ploenchit Report

564. The next part of the dishonest scheme, as envisaged by the 7 April 2016 White Board, concerned the obtaining of a false valuation report by a financial adviser to support the share sale to Dr Kasem at an undervalue. The minutes of the Third REC Meeting record the board's approval of the sale of the WEH shares, setting out that, "*The selling price reflects the book value that the Company's financial advisor has analysed and say that the price is reasonable*". The "*Company's financial advisor*" was Ploenchit Capital Limited (**Ploenchit**). Ploenchit was approved by the Thai SEC and had links to the Bank of Ayudhya, one of the largest banks in Thailand[472].

565. On the Claimants' case, there was no report from Ploenchit until 15 June 2016 or later. The WEH Managers state that Ploenchit submitted its first report on 22 June 2016 (and subsequently on 25 and 28 October 2016).

566. However, Khun Nop and Khun Nuttawut suggested that a short form report was created on or about 21 April 2016. Similarly, Khun Weerawong suggested that a short form report existed in April 2016. I do not accept that evidence for the reasons set out below.

567. Separately, Khun Nop and Khun Nuttawut suggested that a longer form report was created on or before 15 June 2016 (with cosmetic changes made in October 2016). Khun Weerawong suggested that the longer form report existed on or before 22 June 2016 (again, with cosmetic changes made in October 2016).

Alleged short form Ploenchit Report

568. Khun Nuttawut's evidence was that he first received a short-form Ploenchit report in hard copy, by hand, in or around April 2016[473]. In cross-examination he said that he received this in downtown Bangkok, and that this report was "*a few pages long.*"[474] He claimed that the short form report was based on the following: "*I gave them information of Wind Energy of the two projects. And it was not a difficult thing to do, the valuation, from the two project, financial projection and discount –and cash flow projection. So that's why it was done long time ago, just waiting for another 75% to make it more beautiful, take it this way, to worth the – to cover the expensive price that we pay for Ploenchit*."[475] He further claimed "*It doesn't come in the 30 – the range, the*

[472] Weerawong WS 1 [84] , Thun WS 1 [126]

[473] Nuttawut WS 1 [82]

[474] Day 19/141:15-23

[475] Day 20/67:2-15

Ploenchit report, even the first, the draft one that I have, or the later one, is done in range. It doesn't done in exact baht. It was done in range of from what baht to what baht. That is their valuation opinion. The first draft and the final draft doesn't make much difference on that part."[476]

569. Khun Nop and Khun Nuttawut argued that the alleged receipt of a 21 April short form report is consistent with Khun Nuttawut's i-Phone calendar, which records that Khun Nuttawut had contact with Khun Sasiprin, Ploenchit's Chairman, in the lead up to and following 21 April. However, the Claimants point out that the two meetings between Khun Nuttawut and Khun Sasiprin on 29 January 2016 and 2 February 2016 pre-dated Khun Weerawong's advice to obtain a financial report. Further, the next diarised meeting post-dates the purported short form report as it took place on 25 April 2016.[477]

570. Khun Nop claimed in his Witness Statement[478] and in cross-examination that, "*before the [Kasem] transfer ... Khun Nuttawut shows me one Excel table about the range of the value of the share price*" which he said was from Ploenchit Capital Limited[479] albeit he later said he had simply *assumed* it was from Ploenchit[480]. He said *"I get from Khun Nuttawut a piece of paper…Just one paper with the – I remember it is like an Excel sheet on it."*[481] He claimed the Excel spreadsheet gave a price range[482] and that Khun Nuttawut "*said this is the book value of the company*."[483]

571. Khun Nuttawut alleged in his Witness Statement and in cross-examination that he had received a hard copy of the short-form report on or about 21 April. However, he did not agree on the form of the alleged initial Ploenchit report: he said he thought it was "*a few pages*" and accepted that it wasn't a spreadsheet but rather *"it was like DCF, discount cash flow. It is like a table with some text*".

572. In cross-examination, Khun Weerawong similarly alleged (for the first time) that Ploenchit had provided a summary valuation by 21 April 2016[484]; his colleague, Khun Pratumporn, told him that "*there was a short form opinion, maybe one page*" from a financial adviser that "*advised them that this price*

[476] Day 20/67:16-25

[477] Day 55/120:21 to 121/9

[478] Nop WS 1 [130]

[479] Day 16/57:7-58:11

[480] Day 17/137:14-138:11

[481] Day 17/136:8-12.

[482] Day 17/136:13-14

[483] Day 17/135:20

[484] Day 31/117:1-14

range is fair value"[485]. Khun Weerawong said that he did not ask for the one-page version of the document, nor was he shown the document by Khun Pratumporn[486]. Khun Weerawong said he believed that REC's board of directors had this report at the time they "*resolved to sell the shares based on fair value*". Further, Khun Weerawong said since there was an opinion as to fair value in April 2016 an updated version of the opinion could be made on a later date using the same date as the original date of the opinion and that this is not backdating in Thailand[487].

573. In contrast, in his Witness Statement, Khun Weerawong stated significantly that, "*I received a draft version of Ploenchit Capital's valuation report … on 15 June 2016. I cannot confirm whether this was the first time I saw the Ploenchit Report, but it may have been*"[488] and made no reference at all to the alleged one-page report. Additionally, in response to questioning as to why he did not refer to the one-page document in the Second WCP Opinion, Khun Weerawong said this was because he did not see the document[489]. Further, Khun Weerawong said he got confirmation from his colleague that they had reviewed all of the documents in the Second Opinion[490].

574. Ultimately Khun Nop accepted that Ploenchit were not instructed until well after the shares were transferred[491] and, when it was put to him that Khun Nuttawut "*must have lied*" to him when he said the report was from Ploenchit, he was compelled to accept that: "*I don't know he is getting from someone. I don't know who. But I see that for sure."*[492]

575. I find that there was no such short form report and Khun Nop's, Khun Nuttawut's and Khun Weerawong's suggestion that there was one is yet another lie.

576. Similarly, it was Khun Thun's evidence in cross-examination that Khun Nuttawut had told him that a draft report had been produced in May 2016 prior to the transfer although he did not see this report and did not ask to see it[493]. He explained: "*this full report I agree yes is prepared in June, … my understanding was that the price that the board of KPNET considered was based on certain*

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[485] Day31/109:5-11

[486] Day31/110:15-25

[487] Day31/116:9-18.

[488] Weerawong WS 1 [87]

[489] Day31/119:14-25

[490] Day32/107:2-11

[491] Day 17/140:4-7

[492] Day 17/140:21-25

[493] Day 23/122:15-20 and Day 23/124:13 - 125:4

preliminary range that they, that there was some preliminary work done before." I reject that evidence. I find that his understanding is wrong.

577. Finally, Khun Wallaya alleged that she had been informed in March 2016 that an earlier valuation had been obtained[494]. I reject that evidence as well. Being generous, it may be that Khun Wallaya was misremembering after the passage of time.

578. My findings are confirmed by Ploenchit's Chairman, M.R. Sasiprin Chadrata. He is a friend of Khun Nuttawut. Khun Nuttawut had engaged the firm previously on other transactions. By a letter of 28 June 2022 (**Sasiprin Letter**), M.R. Sasiprin responded to a request for clarification, which was submitted in relation to the arbitration proceedings, explaining that Ploenchit did not even begin preparing their report until May 2016 and first submitted a report on 15 June 2016. Nobody suggested that Khun Sasiprin would have any reason to lie about this.

579. Khun Weerawong's response to the Sasiprin Letter was evasive: "*I cannot comment on that*"[495]. Khun Nuttawut simply maintained his position, despite this clear evidence[496].

580. In line with the Sasiprin Letter, the earliest documentary evidence of the Ploenchit Report is its circulation by email of 15 June 2016 ("**First Ploenchit Report**"). No party has been able to provide either a copy of the purported (variously "short form"; "one page"; "few pages"; or "Excel table") version of the Ploenchit Report which is claimed to have existed prior to 21 April 2016. Nor has any party been able to produce any contemporaneous documentation referring to the purported short form report prior to 21 April 2016.

581. I therefore find that there was no such short form report. This episode is significant because it shows how Khun Nop, Khun Nuttawut and Khun Weerawong in particular, were willing to tailor their evidence under cross-examination to support each other and advance a dishonest case.

(8) Baringa Valuation

582. On 26 May 2016 Mr Lakhaney emailed Baringa asking them to produce a valuation of REC's shares in WEH which Ploenchit could use "*for their own work*". Specifically, "*to target c. THB39 / share or less for WEH, which is basically book value…Date would be as of March 31st, 2016*". He then explained that "*KPN's lawyers will also look over the presentation and add language etc. to get what they need … Will be used to justify the price at which*

[494] Day 28/76:16-25

[495] Day 31/127:22 .

[496] Day 20/61:25-62:5

a transfer of KPNEH's WEH shares takes place" (emphasis added). In cross-examination, Khun Nuttawut was unable to explain the use of tense, which makes clear that the sale of the shares to Dr Kasem had not yet taken place.

583. On 5 June 2016 after Mr Stefan Gebski of Baringa replied saying that "*the valuation I can so far achieve using sensible assumptions is c.42 THB/share*", Mr Lakhaney responded insisting that "*ideally I would like it around THB 38 – 39 so we can just say book value per share makes sense …*". When it was put to Mr Lakhaney that this demonstrated him telling Baringa what to do and what to say, Mr Lakhaney agreed: "*Really, yes, yes.*"[497] This was not honest behaviour.

584. Mr Gebski then provided a presentation with the desired "*38 THB/share*" valuation on 7 June 2016. Mr Lakhaney made changes to this which included changing the date from June 2016 to April 2016. As to why he altered the date, Mr Lakhaney said "I *believe Khun Thun asked me to…They wanted it dated earlier, probably around the time when they were – - when they transferred the shares.*"[498] He accepted that it was his "*assumption" that "they wanted it to look as though it had been prepared in advance of the sale*"[499]. Again, this was not honest behaviour.

585. With regard to the Baringa valuation, Mr Lakhaney suggested that the granular work undertaken by Baringa was at least in part aimed at satisfying the Thai revenue,[500] whose "*super-aggressive*" approach also contributed to the decision to back-date Ploenchit's finalised report:[501]

> *"**Mr Justice Calver: Why would you need to have it backdated to have it when the transaction happened for tax reasons?***
>
> *A: My understanding is Thai tax authorities are super-aggressive. This is the reason we spent four months on tax planning with the original transaction, and whether they accept the valuation after the fact was not clear, so at this point, this is what I thought. Given the amount of money involved, it sounded reasonable."*

586. I do not accept this evidence. The truth of the matter is that the back-dating was required as part of the dishonest asset-stripping exercise to make it seem that the valuation was carried out before the Kasem SPA was entered into.

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[497] Day 25/114:2-4

[498] Day 25/115:12-16

[499] Day 25/115:17-19

[500] Lakhaney WS 1, [122]–[124]

[501] Day 26/123:3–12.

(9) The long form Ploenchit Report

587. With Baringa's supposedly independent valuation secure, this could now be fed on to Ploenchit by Mr Lakhaney. Mr Lakhaney and Khun Thun were central to placing pressure on Ploenchit to produce the figures that Khun Nop's team desired so far as the value of the WEH shares was concerned:

a. On 7 June 2016 Mr Lakhaney emailed Ploenchit, attaching the presentation by Baringa, which Mr Lakhaney had procured and inputted, stating: "*please find attached a financial model together with a valuation model for WEH. Please also find attached a valuation presentation which includes a summary of scope, WEH overview, financial statements, valuation and a list of documents reviewed*." Mr Lakhaney accepted that this email demonstrated him essentially sending Ploenchit a pre-pack for their valuation.[502] Moreover this was a pre-pack into which he had already had significant input. This was no independent valuation.

b. On 7 June 2016 Ploenchit emailed Mr Lakhaney copying Khun Thun and Khun Nuttawut, stating: "*Thank you for your files. I understand that Ploenchit Capital (PC) will verify your model and valuation presentation. After we agree, the company will use it with other parties. [Ploenchit] will study the model and the presentation within this week and discuss with you next week. Do you have free time on either Tue 14 or Wed 15?*"

c. On 9 June 2016 there was an exchange between Ploenchit and Mr Lakhaney and Mr Lakhaney and Khun Thun demonstrating Ploenchit's discomfort with what they were being asked to do; and that Mr Lakhaney expected those involved at Ploenchit to do nothing more than what they were told: "*Ploenchit is not sure on the purpose of this valuation"* – and Mr Lakhaney to Khun Thun *"Hey – can you speak to these guys, not sure what's going on. Cash flows are hardcoded because they came from the individual models, but I had a different understanding on what they would be doing from Nuttawut*."

d. On 10 June 2016 Ploenchit emailed Mr Lakhaney, copying Khun Thun and Khun Nuttawut with further questions, to which Khun Thun responded: *"Instead of going back and forth on this. Can we sit down next Monday and talk through some of the ending points? So we can conclude this exercise please?"*. On the same day, Khun Thun forwarded this email to Mr Lakhaney, noting "*Talked to Nuttawut again on this. He hasn't talked to their boss yet…I think. Will keep pushing as well to end this…"*.

e. On 14 June 2016 Khun Thun emailed Ploenchit, copying Khun Nuttawut stating "*Thank you for your time meeting with us the other day.*

[502] Day 25/116:1-10

As discussed in the meeting that it is important for us to conclude this exercise within this week and for PCL to send out a draft within Wed 15th June 2016 for us to discuss and finalise. We are looking forward to receive your draft report tomorrow."

f. On 15 June 2016 Ploenchit sent the First Ploenchit Report to Khun Thun, Mr Lakhaney and Khun Nuttawut, stating "*We would like to submit a presentation of WEH valuation as the attachment*." The First Ploenchit Report has only one metadata date of 15 June 2016. Khun Nop and Khun Nuttawut argue that this Report indicates that the long form report was first created "*on or before 15 June 2016*".

g. Also on 15 June 2016 Khun Nuttawut's diary noted "*Lunch Mr Sasiprin*".

588. Khun Nop, Mr Lakhaney and Khun Thun all admitted in cross-examination that they did not see a full report from Ploenchit until after the Kasem Transfer. In cross-examination, Mr Lakhaney confirmed: "*The Ploenchit report was done after the transaction. At the time I believed it was purely for tax purposes which made sense to me and later, especially around Orix, I understood it had other purposes*"[503]. I do not accept Mr Lakhaney's evidence that he "*believed it was purely for tax purposes."* I find that Khun Nuttawut, Khun Thun and Mr Lakhaney were heavily involved in getting Ploenchit to provide a false "independent" written justification the valuation of the under-valued shares under the Kasem SPA, as the 7 April 2016 White Board plan envisaged would occur.

589. Accordingly, I find as a fact that the Ploenchit Report was not produced until after the Kasem Transfer had taken place.

590. The cover of the Ploenchit Report was dated *"April 2016*": I find that this was backdated in order to mislead the reader into thinking the report had been produced before the board of REC considered the share disposal to Khun Kasem.

591. On 21 June 2016 Khun Thun emailed Ploenchit copying in Mr Lakhaney, requesting "*a draft which dated 21 April 2016 on the cover please"*. On 22 June 2016 Ploenchit responded, attaching a version of the Ploenchit Report now dated "*21 April 2016*" on the front page. This again shows Khun Thun and Mr Lakhaney heavily involved in the dishonest scheme.

592. So far as this false backdating is concerned, Khun Nuttawut disingenuously said in evidence: "*I don't know what Thun said, but during around that time in April we have a meeting of REC directors, so he might want to have it to be consistent or around that time*."[504] Khun Thun accepted it was he who asked Ploenchit to date its report 21 April 2016; and his evidence was that he did so

[503] Day 26/19:23-20:13

[504] Day 20/72:12-16

because he was told that the board meeting (at which the Kasem transfer was approved) happened between 22 – 25 April 2016 by either Khun Weerawong or a team member at WCP or Khun Nuttawut.[505] I do not believe that evidence.

593. I find that the Ploenchit valuation was falsely backdated in order to fit with a series of purported events in April 2016 including the Kasem Transfer itself, which did not themselves take place until later (as described above).

594. I also find that the Ploenchit Report was required in order to mask the fact that the Kasem transfer was at a gross undervalue. This is also evident from, amongst other matters, Mr Lakhaney's email to Ms Collins of 13 June 2016 referring to a meeting with Khun Nop and Khun Nuttawut in which Mr Lakhaney instructed, in respect of the slides to be prepared: "*Slide 3: Show WEH valuation at US$ 2bn / THB 70 bn and the majority of it coming from the 5 projects*." The slides which Mr Lakhaney ultimately circulated to Dheeraj Aggarwal of WEH on the same date included amongst other matters reference to the fact that "*Raising THB 9-10 bn in a domestic IPO is very doable (SCB, Phatra, Asia Plus views previously)*" which stands in stark contrast to the assumptions upon which Ploenchit was instructed to proceed and did proceed.[506]

595. Finally, the Claimants allege on their primary case that Dr Kasem's signature was forged on the Kasem SPA and other documents which were produced after the event and backdated. I do not have sufficient evidence to conclude that the signature was forged. Dr Kasem was not called to give evidence. Moreover, the Claimants on whom the burden lies, elected not to adduce expert handwriting evidence, despite having sought and been granted permission to do so at the first CMC in these proceedings.

(10) Repeated failures to update the WEH share register

596. Despite the fact that s 1139(2) of the TCCC requires the "BOJ5" list of shareholders to be updated (a) at least once a year; and (b) in any event, within 14 days of its AGM, WEH's BOJ5 current at 11 April 2016 was not updated within the next year, or within 14 days following its AGMs of 30 September 2016 or 9 September 2017. The BOJ5 was only updated on 20 April 2018, when Khun Nuttawut and Khun Thun filed a version current as at 17 April 2018, pursuant to a subpoena issued by the Thai court.

[505] Day 23/147:4-13

[506] C's Written Closing [522]

597. Mr Lakhaney's awareness of the failure to update the BOJ5 is revealed by his 4 October 2016 email to Justin McCarthy of AON insurance in relation to D&O insurance:

> "*We did not notify insurance companies of the transaction [(the Kasem transfer)] only for confidentiality as we did not want news to leak at the time to the old shareholder. As private Thai companies are only required to update the Ministry of Commerce of updated shareholder 1x per annum (which becomes public), we will take our time in disclosing this*".

598. When it was put to Mr Lakhaney that this was "*an indication that you were deliberately keeping the change of shareholders quiet so that Mr Suppipat would not discover it*", Mr Lakhaney denied it and said that *"[u]pdating the public BOJ5, again not my responsibility. I was simply relaying KPN's decision which I obtained from the company secretary, Kookai*". He suggested that the secretary's instructions included that they should take their time to disclose the Kasem Transfer. He said that his thoughts on this were *"[b]asically that it is required once a year, is what she told me. It is not a particularly big item. It is a small fine if you don't and that's it.*"[507] I do not accept this evidence which I consider to be untruthful.

599. When Khun Nuttawut was asked about the failure to keep the BOJ5 updated he said. "*This is part of the registrar of the company is doing. It's not me handling that thing*"[508]. I consider that this failure to update the BOJ5 was a deliberate part of the asset stripping scheme and that Khun Nop and Khun Nuttawut knew that.

600. Prior to this, in the course of the REC SPA Arbitrations, Khun Nop and Khun Nuttawut had caused Khun Nop's Companies repeatedly and falsely to deny that any attempts had been made to transfer REC's WEH shares to a third party (including by letters to the Tribunal dated 26 July 2016 3 August 2016 and 15 August 2016); and further failed to produce an updated internal WEH shareholder ledger, on the pretext, which I reject, that WEH denied their requests to disclose that document.

601. When the BOJ5 was eventually belatedly filed, the share certificate serial numbers were renumbered and all recorded as having been issued or reissued on 17 April 2018.

602. Khun Thun's evidence in the arbitrations of 1 September 2018 was that the decision to do this was unanimously approved by the WEH Board of Directors (i.e. Khun Nop, Khun Nuttawut, Khun Pradej and the WEH Managers), purportedly on the basis that it would make the WEH shares easier to track.

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[507] Day 26/4:22-5:9

[508] Day 20/123:21-124:4

Rather, I consider the truth to be that this was done to make it more difficult for Mr Suppipat to trace where the WEH shares had gone.

603. Indeed, Khun Thun accepted that it was a "*side effect*" of renumbering the shares that it "*made it more difficult to see what had happened to the shares"*[509]. I consider it to have been more than a "side effect" as he well knew.

604. In her witness statement Ms Collins claimed that the shares were renumbered due to the intended IPO. In cross-examination, she was asked "*why … the shares [were] going to be renumbered*" and responded: *"I can't remember. Because of an IPO, and we would be issuing new shares*". She later asserted that: "*I was not aware of the renumbering until after the board meeting … At previous board meetings it was agreed they were going to renumber for the IPO. At the board meeting that I wasn't at, it was approved to renumber and I was not aware of that*." However, when she was then asked "*why .. it was necessary to renumber the shares as part of the IPO planning*" she responded, "*I don't know. I can't recall*."[510] I find that Ms Collins knew that the real purpose of the renumbering was so as to hinder any attempt by Mr Suppipat to trace the whereabouts of the shares.

(11) Watabak waiver request and 17 May Credit Committee Meeting

605. With the asset-stripping scheme well advanced by mid-May 2016, on 16 May 2016 Watabak submitted a request to SCB for various consents and waivers regarding the conditions precedent to drawdown under the Watabak facility. This was after Watabak had, on 12 May 2016, failed to make substantial payments to GE, the turbine supplier, and under the terms of the TSA a 42-day clock started ticking on GE's right to suspend and/or terminate the TSA. Watabak's request of SCB explained, under the heading, "*Delay of payment under Turbine Supply Agreement*" that the amount of $12,820,888.50 and THB 64,382,344.50 had been due and payable on 12 May 2016 but had not been paid owing to a delay in drawdown under the Watabak Facility. This would put Watabak in breach of the TSA with GE and in breach of clause 18.8(a) of the CTA if the default in payment was not cured, waived or otherwise remedied in time. Watabak signalled its desire to seek drawdown on 31 May 2016 in order to remedy this breach. It also sought a waiver from any breach of the CTA which might have arisen as a result of this default, as well as relating to its share pledge obligations.

606. SCB's CMD accordingly prepared a presentation dated 17 May 2016, summarising Watabak's request for consideration by the Credit Committee that day. On 17 May 2016, a Credit Committee meeting was held and also attended by Khun Sittiporn, Khun Supalun, Khun Anucha, Khun Parnu and Khun Jittinun. The minutes of this meeting show the question of further lending to

[509] Day 24/43:25-44:2

[510] Day 22/83:11-16, Day 22/87:1-18-44:2-9

WEH to be progressing through the bank, although they do not record any discussion of the transfer of the WEH shares. However, it was Khun Anucha's evidence that members of the Credit Committee discussed the fact that "*REC (Khun Nop) sold 61% shares held under WEH to his father (Dr Kasem) to prevent project interruption*".[511] It was unanimously resolved to approve the drawdown, but with conditions including a review by a technical adviser to consider whether the COD could be commenced according to the original plan and SCB Legal considering the reputational risk from the arbitration.

607. The Credit Committee resolution records that Khun Parnu informed the Credit Committee that Khun Nop's Companies had not paid the price under the REC SPAs in full[512]. He confirmed in cross-examination that this was the first time that this matter was brought before the Credit Committee[513].The resolution records that "*Credit Committee was of the view that the Bank must not be exposed to reputational risk and suffer any damage from the mentioned issues*". The sentence after this is redacted. Khun Parnu could not explain what he understood would happen after this meeting as a result of this discussion[514]. There appears to have been no investigation as to why SCB's prior belief that USD 175m had already been paid now appeared to be untrue. Further, there is no written record of Khun Supalun and Khun Sittiporn informing the Credit Committee of the plan to sell WEH shares (or if it be the case by 17 May, of the fact that they had already been sold), despite the Committee's express concerns about reputation risk and damage as a result of the arbitration. Khun Supalun claimed: "*I do not recall the draft First WCP Opinion being discussed at this meeting*."[515] and Khun Sittiporn claimed: "*I recall attending this meeting, but nothing further about it beyond what I read in the resolution*."[516]

(12) Emergency Arbitrator's refusal

608. On 17 May 2016 the Emergency Arbitrator refused to hold that the EA Order precluded REC from selling WEH shares. Its finding was that "*there is not sufficient evidence on record in the present case of any imminent transaction involving the WEH shares by the respondents that could cause serious or irreparable harm to the claimant*." The Emergency Arbitrator clearly was kept entirely in the dark by Khun Nop about his asset stripping plans.

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[511] Anucha WS 1 [35]

[512] Day 27/50:23-25

[513] Day 27/51:1-4

[514] Day 27/53:6-9

[515] Supalun WS 1 [33]

[516] Sittiporn WS 1 [39]

(13) Finalisation of First WCP Opinion

609. At the same time, on 18 May 2016 Khun Supalun of SCB emailed Khun Phisit of WCP (copying Khun Sittiporn) saying, "*As discussed last night, we understand that the final version of the [WCP] opinion is being reviewed by Khun Weerawong please forward us the final draft version of the legal opinion for our reference*". Khun Phisit responded on the same day, to Khun Supalun (copying Khun Sittiporn): "*As discussed last night, please consider the revised draft as per attached, also the clean version as well*."

610. Later on 18 May 2016, Khun Sittiporn responded to Khun Phisit (copying Khun Supalun) and confirmed: "*We are fine with your further comment. Please arrange for the issuance of the opinion, and send us a scanned copy krub. Thank you*." Khun Phisit replied: "*Please consider our opinion as per the attached. The original one will send to you soon."* The final draft of the First WCP Opinion was attached to Khun Phisit's email to Khun Supalun. It is dated 16 May 2016, not 18 May 2016. Whilst Khun Nop and Khun Nuttawut state at paragraph 79 of their Written Closing Submissions that "*there was no reason why this document could not have been dated 18 May, and no benefit was derived (or is said to have been derived) from it being dated 16 rather than 18 May 2016*", it is notable that the date chosen of 16 May is the same day on which Watabak submitted its request to SCB for the consents and waivers regarding conditions precedent to drawdown under the Watabak facility. The waivers were duly granted.

611. As to the content of the First WCP Opinion:

a. It continued to refer to REC's sale of WEH shares in prospective terms and to an unknown investor;

b. In the background "Facts" section, the opinion set out the relevant proposition that REC wishes "*to dispose of, transfer, and sell all assets and debts of REC, including WEH shares… to new investors for reasons of business necessity. The disposal, transfer or sale of assets will comply with the laws and the Company's Articles of Association, including the general business practices such as having an expert assess the asset price …*". It continues falsely to state: "*The disposal, transfer or sale of assets will create no impact on the issue of the payment of the shares purchase price under the Share Purchase Agreement between Fullerton and Symphony, in which Fullerton retains the ability to make payment for Symphony in accordance with the agreement*". Khun Weerawong suggested in his Witness Statement the reference to Fullerton's ability to make payment under the Fullerton SPA was a typographical error, having regard to the Thai words used, and that the draft ought to have referred to Fullerton retaining the *obligation* to pay Symphony under the

SPA[517]. I do not accept that evidence. I consider that this was deliberately misleading.

c. In section 2, the two questions that WCP was asked to advise upon are identified: (i) if successful in the arbitration, would Symphony be able to revoke the transfer or disposal, and unwind the same, and how far; and (ii) might Symphony then be able to take steps to suspend/impede WEH's plan for an IPO. These were both issues of great importance to SCB.

d. At section 3.2 the nub of the advice is given under the heading: "Risks that the Bank requested to be analysed". At page 7 the advice concludes that:

   i. As a recovering shareholder, Symphony might have a claim in damages against the director responsible for the transfer. However, Mr Suppipat's companies could not request revocation of REC's sale of shares to a new investor.

   ii. Even if Symphony became a shareholder of REC again, it would not be able to revoke the transaction because it would not be a creditor of REC. Since Symphony was not (and could not become) a creditor of REC it has no standing under s.237 TCCC.

   iii. The sale would not be a breach of Art 10.3.1 of the REC SPAs because WEH was not a party to the REC SPAs.

   iv. Similarly, since the WEH shares are not a disputed asset in the Arbitration, Symphony could also not impugn the transaction under s.5 of TCCC (i.e. breach of good faith). Thus:

   "*The Firm is of the opinion that Symphony cannot request for the rescission of the juristic act or sale of REC shares by claiming that it was an act made in bad faith under Section 5 of the Civil and Commercial Code, as Section 5 provides that "in exercising the rights or performing the obligations, each person shall act in good faith", this is a general provision and in order to apply to the provision, there is a burden of proof [on the alleging party] to prove to the court on the said alleged act in bad faith. Most importantly, the status of Symphony which appears in the relevant facts has its own relevant governing law, which are, the rights of shareholders under section 1169 or creditors exercising the right to rescind the juristic act under section 237 of the Civil and Commercial Code…*

   As for the new investors who will buy shares or assets of REC, if new investors are acting in good faith, meaning that the new

[517] Weerawong WS 1 [72]

investors have considered that REC shares or assets are tradable as it is not the disputed assets in the arbitration between Symphony and Fullerton. Moreover, Fullerton and REC are separate legal entities. The said arbitration is also a dispute in the level of REC's shareholders, where REC is not a party in the said arbitration proceedings. Therefore, it is for the matter of the parties in the dispute to proceed with the claims against the counterparties. In addition, REC is the rightful owner of WEH's shares and therefore [REC] has the right to sell the shares in accordance with the laws and articles of association. There is no prohibition under the agreement or any other law that prohibits the transfer of such shares to third parties. Furthermore, the sale of such WEH shares will be the sale and transfer of right being done at a fair and appropriate price and with actual payment for the consideration. Furthermore, the rationale for the sale of the REC shares or assets is clearly supported by business reason. The above transaction is therefore considered a sale and purchase made in good faith…".

v. Further, since REC was the lawful holder of the WEH shares, and there was no prohibition on its transfer out of the WEH shares, the transfer would not constitute a dishonest exercise of rights even if the transferee was aware of the arbitrations.

612. These were in fact highly contentious conclusions. However, this gave SCB the comfort that it required to lend.

613. So far as SCB's oversight of this process of editing the First WCP Opinion is concerned, it was Khun Supalun's evidence that, *"I made draft changes and I discussed with Khun Sittiporn because I am working immediately with him and we revert the draft to WCP, but Khun Wallaya learn about this comment later on*" and since "*the final draft come through on 18 May. We must have report to her at the latest on 18 May 2016*", confirming "*as far as I am aware at least she aware of the draft on the 18 May at the latest but she may have known before, from Khun Sittiporn*". Khun Sittiporn said that he could not recall if he discussed with or told Khun Wallaya about the changes he was suggesting – "*this is a day to day's work and normally she is very busy person*"[518].

614. Khun Arthid claimed that SCB was not solely reliant on the opinion of WCP and that *"We also listened to legal, our legal team, their view. We also have – we also listened to the risk team about all of this feedback or thinking from each party before the executive committee make consideration onto this subject.*"[519] Khun Arthid said that he paid attention to what was said by the

[518] Day 29/76:8-16

[519] Day 30/64:13-22

SCB legal team as to the content of the WCP Opinion and also as to the legal views of the SCB legal team as to the risks involved[520]- and further that SCB's approach was based on looking at both of those and not simply on looking at what they were told about the WCP Opinion.[521]

615. Khun Weerawong was not copied into the various communications between SCB and WCP in respect of the First WCP Opinion (and nor was Khun Arthid).

(14) SCB awareness of the Kasem Transfer

General remarks

616. The SCB witnesses consistently asserted that they were not aware of the Kasem Transfer until after it happened:

a. Khun Anucha said he believed he first found out about the transfer to Kasem on 18 May 2016[522].

b. Khun Parnu said he was sure he only learnt about the transfer to Kasem after it had happened[523].

c. Khun Kittipong gave evidence to similar effect and inferred that he became aware that WEH's shareholder had changed shortly before the 24 May 2016 (when he sent an email attaching a letter about the change of shareholder – see below)[524].

d. Khun Wallaya said that, as far as she was aware, no one at SCB knew about the transfer to Kasem before it happened[525].

e. Khun Sittiporn and Khun Supalun's evidence was that they only found out about the transfer to Kasem after the fact[526].

f. Khun Anucha, when asked "*whether approval was obtained for the change of control before these shares were sold to or by REC*",

[520] Day 30/65:14-18

[521] Day 30/65:19-22

[522] Anucha WS 1 [35]

[523] Parnu WS 1 [45]

[524] Kittipong WS 1 [12]

[525] Wallaya WS 2 [31]

[526] Sittiporn WS 1 [43.3] ; Supalun WS 1 [34]

responded that he did "*not … know of*" this and it was his evidence that he thought that "*this sale was done before they informed the bank*" [527].

g. Khun Arthid's evidence was that he only became aware of the transfer to Kasem after the shares had been transferred[528]. In cross-examination he alleged that he only became aware of it when it was discussed at the ExCom meeting of 25 May 2016[529] and was unable to recall being told about the ring-fencing strategy before it was implemented: "*I was not consulted about the share transfer before it occurred and certainly did not make any suggestions to Khun Nop… about who the shares should be transferred to*" and "*I became aware of the shares being transferred to Khun Kasem after it happened"* [530].

617. However, Khun Weerawong suggested in cross-examination, when asked "*Who knew [about the Kasem transfer] at the bank in April 2016?*", that "*I'd say they all know*".

618. I do not accept Khun Weerawong's evidence on this. I find as a fact that SCB did not know that the shares had been transferred to Kasem until after the event. This finding is supported by the contemporaneous 18 May 2016 memorandum which Khun Sittiporn prepared to be sent by Khun Wallaya to Khun Arthid annexing the final draft of the First WCP Opinion and summarising its contents. With regard to its content, under the section entitled "*Remarks from [SCB internal] Legal Function for the consideration of the proposed financing transaction*", which is heavily redacted, is the comment, "*the working committee of the bank has not obtained any information concerning the new investors, including the details of the sale and purchase of shares*". Both Khun Wallaya[531] and Khun Sittiporn[532] confirm the truth of this statement. Their evidence in this respect was not challenged in cross-examination, and the Claimants advanced no allegations of dishonesty against either Khun Wallaya or Khun Sittiporn. I accordingly accept it.

619. In cross-examination, Khun Wallaya was taken to the 18 May memorandum. She admitted that she had doubts on at least the following passages from the section "*Summary of Legal Opinion from WCP*"[533]:

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[527] Day27/152:4-11.

[528] Arthid WS 1 [47]

[529] Day35/10:18-19, Day35/12:13-16, Day35/20:12-13 and Day35/31:19-24.

[530] Arthid WS 1 [47] and Day30/66:12 - Day30/68:16.

[531] Wallaya WS 2 [29]

[532] Sittiporn WS 1 [38]

[533] Day 29/20:19-22

a. Subparagraph (e): "*The fact that the new investors have acknowledged the dispute in the arbitration between Symphony and Fullerton does not cause the sale and purchase of shares in WEH to be the abuse of their rights*."

   Khun Wallaya said she *"may not agree*" with this.

b. Subparagraph (f): "*Therefore, the dispute between Fullerton and Symphony which is under the arbitration proceedings and/or the case where Symphony may claim against REC and the new investors before Thai courts in the future to revoke the transfer of shares in WEH shall not affect the legality of the transfer of all assets and debts of REC (including shares in WEH) to the new investors and the initial public offering of WEH shares. There is no other legal actions which shall cause the group of former shareholders to become the shareholders in WEH.*"

   Khun Wallaya said "*I may have doubts*" on this.

620. Khun Wallaya explained in her second witness statement that she remained of the view that it could be harder to prove good faith if the investor was aware of the dispute between Mr Suppipat and Khun Nop before the share purchase; however, WCP's opinion had confirmed that the transfer could still be valid and she could see that a lot would depend on the facts[534]. Khun Wallaya explained in cross-examination that *"[i]t doesn't matter we have different opinion; this is the fact I have to present to the ExCom and let them decide*"[535]. Khun Sittiporn confirmed that Khun Wallaya made clear to him her concerns about the risks which the bank faced as to the setting aside of the transfers and a possible claim under Thai law by Mr Suppipat[536] - and also that he agreed with them[537].

SCB "Top executive meeting" of 18 May 2016

621. An email from Khun Supalun of SCB records that on 18 May 2016 a "*top executive meeting with WCP*" took place during which it was discussed that "*Fullerton will make a collateral placement of the 1st instalment share purchase price and applicable accrued interest at ICC Singapore."* The belatedly disclosed calendar entries record an entry for a meeting on 18 May 2016 appearing independently in each of the calendars of Khun Arthid, Khun Weerawong and Khun Wallaya, which is recorded as having been attended by:

   a. Dr Vichit;

[534] Wallaya WS 2 [28]

[535] Day 29/19:21-20:9

[536] Day 29/65:20-25

[537] Day 29/66:1-9

b. Khun Arthid;

c. Khun Weerawong;

d. Khun Wallaya;

e. KPN.

622. Khun Wallaya's Outlook calendar entry shows the location as "34", which Khun Wallaya indicated in her Fourth Witness Statement was likely "*a reference to Dr Vichit's office on the 34th floor of SCB's offices*". In this Witness Statement, she alleged, "*It is not clear from my diary if I was invited to attend this meeting. It is common for time to be blocked out in my calendar for other people's meetings to ensure that I would be available in case the need to contact me or ask me to join those meetings … I have no recollection of a meeting with Khun Weerawong, Dr Vichit and Khun Arthid together to discuss anything to do with WEH*"[538]. In cross-examination, she took a stronger position and asserted that *"[t]here had never been any meeting amongst the four of us, myself, Khun Arthid, Dr Vichit or Khun Weerawong" and said that "[t]here wasn't any meeting on this day*"[539].

623. Khun Weerawong, when asked about the "*top executive meeting*", said however: "*I remember that I was called to confirm my legal position. And I did confirm it*." Whilst he said that he did not recall who was present at the meeting, once he was referred to his calendar entry Khun Weerawong said, it "*could be Khun Arthid and, you know, Dr Vichit, maybe, if the name's in there*".[540] Khun Weerawong was not asked in cross-examination whether he identified Dr Kasem as the purchaser during the meeting.

624. On 19 May 2016, Khun Supalun emailed Khun Phisit (WCP) and stated: *".. We understand from the top executive meeting with WCP yesterday that Fullerton will make a collateral placement of the 1st instalment share purchase price and applicable accrued interest at ICC Singapore. Could you please kindly advise whether such collateral placement must be in cash only or SBLC could also be allowed? Also, please kindly share any ICC's regulation regarding such collateral placement for our information krub. …".*

625. Notes made by a member of the RMD team on 18-19 May 2016, set out SCB's "*Concern"*, "*1. How to supervise Mr Nop to make the cash placement + no withdrawal at later date + SCB does not finance [the cash placement]*" and "*2. How to specify this as the conditions under the facilities agreement or as the conditions precedent to the drawdown?*".

626. This indicates that the idea of a cash provision first arose out of discussions between SCB and WCP on 18 May 2016. In this regard, Khun Arthid said that

[538] Wallaya WS 4 [5]-[6]

[539] Day 29/29:25 - Day 29/30:11

[540] Day 32/88:6-24

the imposition of the Escrow Condition (the cash placement) was something he came up with[541] and this was not challenged[542]; it was intended to ensure that payment was made under the REC SPAs: "*I want to make sure that if the structure of the share that sell to Khun Kasem, according to the logic that WEH is the one that owned the asset, so we want to make sure that by both spirit and by structure, by legal enforcement that the bank has, we should try to impose something to control and make sure that it will happen and address our concern*".[543] This idea was subsequently adopted at an ExCom meeting on 25 May 2016 (see below).

Presentation identifying Dr Kasem

627. An SCB presentation, which had a Last Modified datetime of 19 May 2016, is the earliest document in SCB's disclosure which refers to Dr Kasem[544] (**SCB's Kasem Transfer Presentation**). The document refers to the Credit Committee meeting on 17 May so SCB reasonably submits that it cannot have been produced until after the 17 May[545].

628. So far as the contents of this document are concerned:

a. The first page summarises the position under the various facilities as at the time of the 17 May 2016 Credit Committee meeting. This includes a reference to the Watabak Facility: "*Drawdown could not be made because ECA has [not] yet been signed / targeted SCOD on 1 MAY 2016; Targeted COD: 31 October 2016*".

b. The second page contains what appears to be a summary of the Credit Committee meeting of 17 May 2016 which sets out the waivers being requested by Watabak, the concerns expressed by the Credit Committee at that meeting and the resolution it passed approving those waivers subject to confirmation from the Lender's Technical Adviser ("*LTA (Technical)*") that the project could still achieve COD by 31 October 2016.

c. On the same (second) page, there is also a summary of three further points of discussion and concerns raised in response to them. The first appears to record the news that the WEH shares had already been transferred to Dr Kasem and the recipient(s) expressing surprise and

[541] Arthid 1 [52] and Day 30/90:18-20

[542] SCB Closing [290]

[543] Day 30/90:22 – Day 30/91:4

[544] SCB Closing [284]

[545] *Ibid*

concern that SCB had not been informed in advance of this transfer, along with a question as to whether the transfer could have been made in good faith if Dr Kasem had been aware that Khun Nop was in dispute with Mr Suppipat:

> *"1. REC (Khun Nop) sold 61% of the shares held in WEH to Khun Nop's father (in order to not impact the Project).*
>
> ***The Legal Advisor said that it was in Good Faith.*** *(The son did not have money; the father stepped in to help.)*
>
> *Concern : 1. The father did not know that the son was being sued? Is that Good Faith?*
>
> *2.* ***Why did the Bank not know of the change in shareholders? Does approval not need to be requested?****"* (emphasis added).

The reference to *"Legal Advisor"* must have been a reference to Khun Weerawong on behalf of WCP in its capacity as legal advisors to WEH.

d. The second point sets out concerns as to how SCB could be assured that Nop would pay the "*(84 MUSD*)" plus interest potentially due under the REC SPAs and alludes to such monies being "*deposited at the arbitrator*":

> *"2. Take money from late payment (84 MUSD) + penalties/ interest to be deposited at the arbitrator.*
>
> *Legal Advisor promised to allow late payment, but there are penalties/ interest (15% annually).*
>
> *Concern : 1.* ***How to control Khun Nop from taking the money to deposit? + not take it out later*** *+ SCB not Finance?*
>
> *2. Will it be set as a condition in the loan contract or precondition for withdrawal?"*(Emphasis added).

The reference to $84m was a mistake; it should have been to $85.75m – this relates to the $85.75m cash placement (see below).

e. The third point raised concerns as to how SCB could be sure that Khun Nop would make the final payment under the REC SPAs and emphasised the need for a final settlement with NS:

> *"3. An additional of 500 MUSD awaiting payment when the 6 projects (including WTB) COD or WEH IPO.*
>
> *Concern : 1. How will we know there will be money to pay for the next installment [sic]? (WTB will COD OCT 2015, full withdrawal of 4,765 million baht.)*
>
> *2. If not paid, the same problem will be experienced again.*

-The chairman said that it must be explained to the BOD

-The Best Way is for Khun Nopporn to receive the money, withdraw the suit, and signs for not to get involved again.

(If he does not sign, he will come back and pressure again.)"

18 May 2016 internal Summary of Controversies

629. Certain notes with a similar content to SCB's Kasem Transfer Presentation also exist. These are headed *"Summary of controversies among shareholders 18/05/59* [which is 18 May 2016 in the Thai dating convention] (**SCB's Summary of Controversies**). According to SCB, these also appear to have been taken by a member of the RMD team (which was what Khun Supalun thought was likely the case when he was shown these notes[546]). In respect of these notes, Khun Anucha's unchallenged evidence was that he thought these referred to "*a meeting on 18 May 2016, where members of the CC were informed that REC had sold its shares in WEH to Khun Kasem"*[547].

630. The Summary of Controversies demonstrates that:

a. SCB was aware by 18 May 2016 that the purchaser was Khun Nop's father (Dr Kasem):

"*REC (Khun Nop) sold WEH shares to REC totally to Khun Nop's faither so that Khun Nop would not be involved with WEH any further*

→ *Legal advisor said that this is done with good faith since the son does not have the money and the father offers to help*

There are some concerns about the change of WEH shareholders that the bank is not aware of. Would not this require approval from the bank? → *Legal department [REDACTED]"*

b. Notwithstanding the proposed sale, SCB had serious concerns about Khun Nop's ability to pay the outstanding sums under the REC SPAs:

"Legal advisor says that according to the purchase contract, late payment is allowed but with interest.

…

[546] Day 29/101:2-3

[547] Anucha WS 1 [35]

3. Even with the payment by Khun Nop (84 MUSD + default fee), there is still another payment of 500M USD to be gradually paid for WEH projects' COD (6 projects) / WEH IPO.

Concern: How do we know Khun Nop has the money to pay. The next payment would be during COD of Watabak Project (loan withdrawal from the bank has been performed for the total amount of 4,765M THB), if Khun Nop cannot make payment same problem will return.

→ This issue has not been reported to the president officially that if Watabak applied for COD, Khun Nop would have to pay again.

Khun Wallaya confirmed that the reference to "legal adviser" in that document was not a reference to her.[548]

c. The matter was sufficiently serious so as to require an explanation to the Board (the reference to "Dr" in this extract being a reference to Dr Vichit and this extract demonstrates that he had been involved in discussions about the proposed strategy before it was escalated to ExCom):

"Remark

**Dr. Said we need to explain this to BOD.*

**Best Way of this instalment payment is that Khun Nopporn takes 84 MUSD + default fee, withdraw the lawsuit and sign a paper affirming not be involved.*

→ This choice is not preferred because it is possible the Khun Nopporn will be pressuring again."

Dishonest change of shareholder letter

631. A letter, purportedly dated 26 April 2016, signed by Khun Nuttawut and Khun Thun and addressed to Khun Arthid, sets out that "*the Company [WEH] would like to inform the bank that since the bank has suspended financial support for various projects of the Company, the Company has now changed its shareholder structure. KPN Energy (Thailand) Co., Ltd …sold and transferred all shares to Mr Kasem Narongdej on 25 April 2016*" (**Change of Shareholder letter**). It also set out that the directors of REC had changed on 22 and 25 April 2016.

632. This was another false document prepared by Khun Nuttawut, Khun Thun and Khun Weerawong, as despite its date, this letter was actually prepared by WCP in mid May 2016.[549]

[548] Day 29/42:24-43:15

[549] Weerawong WS 1 [66]

633. Khun Nuttawut accepted in cross examination that "*maybe [the letter]is not prepared on that date*"[550].

634. Khun Thun said in cross-examination that this letter was not signed until early May 2016 and was backdated in order to correspond with the date on the Kasem Share Transfer Instrument. He tried to explain the backdating on this basis: *"…the reason it is put 26 April because we were trying to be – sort of conform with the loan agreement. You need to, it is information covenants, my Lord, that you need to inform the bank immediately if there is any changes*."[551]

635. Khun Weerawong's evidence in his witness statement was that this letter was only prepared by WCP in "*mid-May 2016 rather than on the date it bears*"[552]. When Khun Weerawong was asked why his firm was co-operating with WEH in lying to SCB, of which he was a non-executive director, all he had to say was: "*This one – this one is not good*"[553]. The fact that he was seeking to lie to SCB suggests that SCB were, as they maintain, unaware of the Kasem Transfer until after it took place.

636. On 24 May 2016, Khun Kittipong circulated the Change of Shareholder Letter prepared by WCP in mid-May to (amongst others) Khun Supalun, Khun Sittiporn, Khun Parnu and Khun Jittinun of SCB. Khun Kittipong's internal covering email advised: "*Please find the change of WEH shareholder letter which we have to include it in Excom, Presentation tomorrow*". It was Khun Kittipong's evidence that: "*It is usual for us to update ExCom when major shareholders in our clients have been changed. I infer from this email that I had become aware, shortly before this email, that the shareholders in WEH had been changed and that I (or someone else) had asked Khun Kanyarat to send confirmation so that we would have the details available for the ExCom meeting on the following day*."[554] Considering their extensive involvement in the First WCP Opinion in May, which indicated that the transfer of WEH shares had yet to take place, it is surprising that neither Khun Supalun nor Khun Sittiporn sought any explanation as to why SCB had not been informed earlier of the share transfer to Dr Kasem (supposedly) on 26 April 2016.

637. It was Khun Arthid's written evidence that he had no recollection of receiving this letter. He explained: "*It is common for letters from clients making formal notifications to be addressed to me as the head of the bank. In practice I do not read them. Correspondence addressed to me at the Bank is assigned to the appropriate team at the Bank and dealt with accordingly*."[555] This was a

[550] Day 20/118:16

[551] Day 23/139:1-4

[552] Weerawong WS 1 [66]

[553] Day 32/59:11-60:10

[554] Kittipong WS 1 [12]

[555] Arthid WS 1 [51]

somewhat unconvincing answer but, surprisingly, this document was not put to Khun Arthid in cross-examination and I am accordingly willing to accept Khun Arthid's evidence (not least because this document was falsely backdated by its authors).

638. It was suggested by Khun Parnu in cross-examination that all the bank knew at the point it received the Change of Shareholder Letter was that there was a proposal to sell the WEH shares to a new investor: "*we don't know if it is Khun Kasem who is the investor. But early sequence -- I mean, before this, we have been informed by the WEH legal counsel that they informed the bank that one alternative is to find a new investor to buy the shares*."[556] Since it is clear that the bank had already been told on 18 May 2016 that the Kasem Transfer had occurred, SCB submits that Khun Parnu's evidence is not indicative of dishonesty, but is simply the product of the passing of time (leading to confusion about the precise timeline)[557]. I am, on balance, willing to accept that explanation.

639. With regard to SCB's view of the significance of the Kasem Transfer, the SCB witnesses' evidence was:

a. Khun Anucha said he viewed it as a transfer within "*the same group*"[558] and that he understood the ultimate beneficial owner to be Khun Nop[559]. However, he accepted that that he "*would have been concerned both as to good faith and as to the fairness of the price*", such that "*[i]f it were at book value then … [he] would have some doubts on whether it's done at fair value or not*".

b. Similarly, Khun Parnu accepted that it *"[was] the position that the executive committee, so far as [he] could tell … were treating the owner and the person in charge at all times as being in truth Khun Nop*"[560].

c. Khun Wallaya accepted in cross-examination that she "*thought that despite a change in shareholding there would be no real difference … and Khun Nop Narongdej would remain in charge*"[561].

d. Khun Kittipong said the change of shareholder did not "*surprise*" him since he viewed it as the client's "*right … to sell their shares*".

[556] Day27/55:20 – Day27/56:6

[557] SCB Closing para 300

[558] Day 26/152:17-25

[559] Day 26/157:23-25

[560] Day 27/95:24-96:3, Day 27/104:5-105:11

[561] Day 28/61:18-21

e. Khun Arthid's evidence was that:

i. When he was informed of the Kasem Transfer, he did not pay attention to all of the details; however, his understanding was that the Relevant WEH Shares had been sold to Khun Nop's father, with the deal structured to enable Khun Nop to retain control of the company and to prevent Mr Suppipat regaining control of WEH.[562]

ii. He understood that this arrangement would facilitate Khun Nop's ongoing access to the Relevant WEH Shares to enable him to meet his companies' payment obligations under the REC SPAs: "*So your belief at all times in 2016 and 2017 was that although the shares had been transferred to Khun Kasem, Khun Nop would have available to him the value of those shares in order to pay Khun Nopporn if he was required to do so, is that right? Yes, I think so.*"[563]

iii. He did "*have concern about this transaction that Khun Nop was trying to avoid to honour to make the milestone payment … that's why we request the clause for – the condition for the company, for him to undertake the payment, the milestone payment need to fulfil, need to be honoured …*"[564]. This concern was also expressed in his Witness Statement[565].

iv. He alleged that: "*I got the feedback from Khun Nop that he will keep honour and will pay according to the milestone payment*"[566] and knew that SCB had the option of calling default otherwise.[567]

I accept this evidence of Khun Arthid and the other SCB witnesses.

SCB Presentation summarising dispute

640. Slides prepared by Khun Sittiporn of SCB which are titled "*Summary of REC / WEH Shareholders Dispute*" and dated 25 May 2016 were then updated. Underneath the heading "*Summary of Key Facts*", a new line is added which states: *"It had been identified that New Shareholder is Khun Nop Narongdej's*

[562] Day30/76:15 - Day30/77:25

[563] Day30/83:23 - Day30/84:3

[564] Day 30/84:15-24

[565] Arthid WS 1 [48]

[566] Day30/80:15-17.

[567] Day30/88:18-22.

father." This again supports SCB's case that it only discovered this fact on 18 May 2016.

641. Further, a new *"Executive Summary"* page in this presentation identifies the steps taken to mitigate the risk of Mr Suppipat returning, including the proposed requirement for the placement of $85 million with the ICC Court of Arbitration and the introduction of a new cross default provision to be triggered if Fullerton defaulted on its obligations under the Fullerton SPA:

> "*To mitigate risk of Former Shareholder's return as indirect shareholder in WEH, it is suggested that:*
>
> *• REC transfers WEH Shares (59%) in good faith/ at fair price to New Investor (SCB not to involve in funding).*
>
> *• Fullerton's (Buyer) placement of apprx. USD 85 Million + 15% interest to ICC Arbitration.*
>
> *• Fullerton's default in future milestone payments under SPA will trigger cross default at Project Company's level."*

642. Khun Sittiporn himself does not recall preparing these slides, but thinks that he would have prepared them as an internal record rather than as a presentation to be made to members of the ExCom[568].

ExCom Meeting of 25 May 2016: consideration of Watabak Facility

643. Upon the recommendation of the Credit Committee, the issue of drawdown on the Watabak Facility was next considered by SCB's ExCom on 25 May 2016. On the Defendants' case[569], there was nothing abnormal in the matter only coming to ExCom at this time; whilst ExCom met every two weeks, matters were only formally referred to it once there was a decision to be taken. Accordingly, although the dispute between Fullerton and Symphony became known to SCB in early 2016, there was no decision to be made in respect of whether further funds might be drawn down on Watabak until after WEH had formulated a solution to address the problems created by this, and for this reason the matter was not referred to ExCom until May 2016.[570]

644. Since the Credit Committee's conditional waiver of default arising from Watabak's failure to satisfy a number of conditions precedent (e.g. provision of the share pledge, execution of the CTA), further formal requests had been sent out by Watabak in a letter dated 24 May 2016. These were: (i) an extension

[568] Sittiporn [43.2]

[569] D11 and D13 Written Closing para 91

[570] Day30/29 - 30

of the deadline for submitting its 2015 audited financial statements to SCB, (ii) a waiver of any default arising from its failure to pay GE on time under the TSA and (iii) consent to include default interest payments to GE in the definition of "Project Costs" in the CTA. These needed to be considered at the ExCom meeting too.

645. This ExCom meeting of 25 May 2016 was attended by, amongst others, Dr Vichit, Khun Arthid, Khun Wallaya, Khun Anucha, Khun Supalun, Khun Sittiporn, Khun Parnu, Khun Kittipong and Khun Jittinun.

646. The resolution of the ExCom first summarises the waivers that had been considered by the Credit Committee and sets out the concerns expressed by that committee, including that the bank must not suffer any damage or be exposed to reputational risks as a result of the lawsuit between the former and current shareholders of WEH.

647. Khun Wallaya spoke to the issues arising from the lawsuit and explained to the meeting that Fullerton stood ready to make the cash placement in order to settle the dispute and that the transfer of WEH shares to a new investor would not be void if it "*is made in good faith and in compliance with the law*".

648. The ExCom considered that:

a. It was reasonable to require *"the Legal Advisor of WEH Group"* (WCP) to prepare two further legal opinions: one "*on the issue of whether the transfer of the shares from KPNET to the new shareholder has duly and validly been made and is irrevocable*", and the other, to be accompanied by supporting evidence, confirming that the cash placement had been made. The BRD was further required to conduct KYC checks on the new shareholder.

b. The projects would hit COD within the scheduled date, and that there was a cushion of six months afterwards. "*Furthermore, the project is a project with project financing, whereby the Bank has collaterals, and the shareholders have invested the equity portion in the project in the full amount; and the Power Purchase Agreement (PPA) for the project has been signed. At present, the dispute between Symphony and Fullerton does not affect the operations of the project*".

649. The ExCom made resolutions granting the waivers sought. It resolved to impose two conditions precedent and one condition subsequent on drawdown:

a. a further opinion should be obtained from WCP on the issue of whether the transfer of shares had duly and validly been made and was irrevocable (**the Second WCP Opinion**);

b. KYC on the new shareholder should be conducted; and

c. (the condition subsequent) cash or a LOC should by November 2016 be placed with the ICC or a competent Thai court of US$85m plus interest

at 15%, being the first tranche claimed under the Fullerton SPA (the **Escrow Condition**).

650. There was no challenge by the Claimants to the accuracy of the ExCom resolution as a description of what happened at the meeting on 25 May 2016. The resolution was circulated in draft to those who had attended the meeting (i.e. numerous people against whom no allegation of dishonesty is made) and they were invited comment on it; and the text was finalised thereafter.

651. A memorandum, titled *"Initial Drawdown of Watabak Financing: Additional Conditions Precedent, Conditions Subsequence [sic] and Additional Events of Default imposed by EXCOM dated 25 May 2016*.", which converted the requirements imposed by the ExCom into formal obligations under the facility documents was prepared by SCB Legal on 27 May 2016. The conditions were negotiated with WCP as counsel for the borrower. A draft dated 1 June 2016 contained inter alia the following:

a. A new condition precedent requiring *"Delivery of Watabak's Financial statement as at the end of December 2015 signed by auditor."*

b. A new condition precedent requiring *"Delivery of Weerawong CP's legal opinion on due authorization, validity and completion of WEH shares transfer (59.46%) from KPNET to Khun Kasem Narongdej. The opinion is also to confirm that the share transfer is irrevocable, made in good faith at a fair price (based on the opinion of an SEC approved independent financial advisor acceptable to SCB) and in no event will the Former Shareholder have legal ground to return as a direct or indirect shareholder in WEH."*

c. Various conditions subsequent to be completed by 30 November 2016 including evidence that the $85.75m plus interest had been deposited with the ICC Court of Arbitration or the Thai Court and a legal opinion that this constituted lawful satisfaction of Fullerton's obligation to make payment of the full amount of the share purchase price and applicable interest already due.

d. An additional event of default: *"Failure by Fullerton and/or KPN Energy Holding to make any payment of the Remaining Amount due under the respective REC Share Purchase Agreements shall constitute an EOD under CFA of Watabak (and CFA of other project companies to whom SCB will provide financing)."*

652. The final wording was not issued until 23 June 2016, when it was combined with the various waivers and consents SCB had agreed to grant to enable drawdown to occur.

653. Khun Arthid, when asked in cross-examination why he did not insist that the money from the Kasem Transfer, or at least enough of it to make up the $87.5 million plus interest, was placed in escrow *immediately*, said that: *"... to make the customer to go with the idea we need to put that into the condition of the loan. And to make – and to make that condition in the loan there is a process*

to negotiate, to propose to the client, make the client accept". He further explained, in response to a similar question: "*Again, I explained that it took some time to execute it, and from the bank point of view we believe that the interests of the seller will be protected by the interest that when there's been delay or whether the time go by when there's a verdict from the arbitration, it will be included in the interest that the seller need to have or to receive from the buyer. / So that's what we are focusing on – we may not focusing on make it happening right away, but our principle has been executed accordingly and go by the step of the bank*"[571].

654. Later in his cross-examination, Khun Arthid indicated that Khun Nop's lack of ability to pay was part of the reason the cash placement requirement was delayed:

> "***Q. If you wanted to ensure that the money was paid, why did you not ensure or require the $85 million to be paid into escrow or a Thai bank immediately, or was it because you knew there was no money?***
>
> *A. I think not so sure that there is no money. Of course we know all along that Khun Nop trying to mobilise, trying to do the fundraising, but what I explained to my Lord is that there are a period of the negotiation when we launch, when we request for this condition, the customer did not accept it right away, but we want -- we put it in condition to make sure that if they cannot accept, then we will not go on with them.*"[572]

655. Khun Wallaya's explanation as to the delay was: "*The bank had no power to force the parties of contract to act….It was the bank's decision how they fix the timing. I wasn't aware of that. I wasn't involved.*"[573]

656. As to whether anyone at this meeting enquired as to why the US$85m had not already been paid in January 2016, Khun Parnu said that he could not "*recall the detail during the meeting. But my understanding, client agreement, is that the arbitration is still on, so it had to wait until they have a resolution on the arbitration*". Further, when questioned if he had asked "*in [his] capacity as head of the relationship with WEH, and KPN, whether they had the money to pay and why they had not be paid*", Khun Parnu said that "*we understood that the – KPN and Khun Nop as I mentioned is the same group, so we believe that they should have the capacity. But, again, we don't have any analysis on that*."[574]

657. Moving forward in time, on 24 June 2016, an SCB employee (Khun Pattayoth Limpapath) sent an email with the Subject line, "*Thank you for*

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[571] Day 35/34:8-35:23

[572] Day30/92:13-24

[573] Day 29/49:3-25

[574] Day 27/62:10-22 .

Watabak loan drawdown" to various individuals including: Khun Thun, Khun Kanyarat Kanaprach, Khun Parnu Chotiprasidhi, Khun Kittipong Wejjanchai, Khun Sittiporn Thanyarattana, Khun Supalun Chaisiri and Khun Jittinun Chatsiharach. Khun Pattayoth sets out that, "*I would like to take this opportunity to congratulate and thank you for everyone's effort on the successful loan drawdown of Watabak project krub. It has been a really challenge transaction and what a team effort that led us to this point … Thank you Watabak team for your great response and kindness. Thank you SCB's legal team for your excellent help and for putting up with me on all urgent request krub* …". SCB's condition above, namely a legal opinion from WCP on the due authorisation, validity and completion of the WEH share transfer from REC to Dr Kasem, had therefore apparently been met[575].

658. Following this drawdown, the COD for the Watabak Project was achieved and Watabak commenced operations on 24 December 2016. The CODs have now also been reached for all of WEH's other Future Projects (on 28 September 2018, 28 September 2018, 23 November 2018, 28 December 2018 and 14 March 2019).

SCB's lack of awareness of Kasem SPA purchase price

659. All of SCB's witnesses confirm that they were not aware of the price paid under the Kasem SPA[576]. Khun Jittinun, who had the closest involvement in the drawdown process as the lead for the CMD, states that she would not expect to have learned the price paid because "*this is a shareholder matter*"[577].

660. It was suggested to Khun Arthid that he would already have known the price by the time this information was reported to the ExCom, which he denied[578]. There is no evidence of the ExCom learning the price at any point in 2016. Specifically, as regards the 25 May 2016 ExCom meeting: (i) the price payable under the Kasem Transfer was not referred to in any of the papers for that meeting; (ii) it was not referred to in the resolution of that meeting; and (iii) a draft of that resolution was circulated to numerous people, including Khun Parnu, Khun Jittinun and Khun Kittipong, and they were invited to comment and none of the comments made suggest the price had been known and discussed. The Claimants have confirmed that they do not allege misconduct on the part of any of the people who drafted that resolution or commented upon it.

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[575] Nop WS 1 [160]

[576] Anucha WS 1 [36] ; Parnu WS 1 [61] ; Wallaya WS 2 [37]; Sittiporn WS 1 [48]; Supalun WS 1 [41]; Kittipong WS 1 [17] ; Arthid WS 1 [54]

[577] Jittinun WS 1 [30]

[578] Day35/27:1-6

661. In cross-examination, Khun Nop confirmed that he did not tell anyone at the bank how much Dr Kasem had agreed to pay, including Khun Arthid:

> "*Q. So did you tell the bank how much Dr Kasem or Madam Boonyachinda had agreed to pay?*
>
> *A. No, I believe not.*
>
> *Q. But you told Khun Arthid, didn't you?*
>
> *A. I believe not.*
>
> *Q. And he never asked you?*
>
> *A. No.*"[579]

662. Khun Arthid explained in cross-examination that he considered the value of the shares could be very small given the uncertainty over the funding of Watabak and the Future Projects[580].

663. With regard to whether SCB should have asked to see a copy of the Ploenchit Report since this was stated as having been inspected in the Second WCP Opinion (see below), SCB submits that there is no reason why SCB should have sought to go behind the contents of a legal opinion prepared by a reputable law firm. Further, they say this would amount (if anything) to an unpleaded allegation of negligence (no allegations of negligence are pursued against SCB)[581]. Yet the Claimants said in a letter of 4 November 2022 that they are not alleging that SCB "*should have carried out certain steps by way of due diligence and that the fact that they did not do that establishes misconduct or wrongdoing or dishonesty*"[582].

664. I accept SCB's evidence and submissions on this topic.

Inspection of transfer documents

665. On 27 May 2016, Khun Nathapat of SCB emailed Khun Kanyarat of WEH copying Khun Kittipong requesting:

> "*Latest BOJ5 of WEH*

[579] Day18/95:2-8

[580] Day30/94:6-10

[581] SCB Closing [373.1]

[582] SCB Closing [373.2]

house registration and ID card of all directors and/or work permit and passport of foreign director

house registration and ID card of K Kasem"

666. In cross-examination, Khun Kittipong explained that this was for KYC reasons. Despite this, SCB has not identified any response to this email providing these documents[583].

667. In line with this, on 30 May 2016, Khun Kittipong of SCB emailed Khun Thun to request documents required for SCB's "*new shareholder KYC process*", specifically:

"1. Latest BOJ5 of WEH

2. House registration and ID card and/or work permit and passport of foreign director

3. House registration and ID card of K Kasem

4. Affidavit (1 month)".

668. Again, SCB has not identified any response to this email.

669. The email was forwarded to Khun Thidarat of KPN by Khun Thun on 9 June 2016 with the comment, "*Need point 3 (Dr Kasem info) for SCB krub*". Khun Kittipong explained in cross-examination that the affidavit is a registration document prepared by the government regarding a new shareholder.

670. Khun Kittipong explained, when asked if he received the documents in response to his request to Khun Thun, "*I don't recall whether we have all the documents, but I assumed that we have got everything, we have all the documents because the KYC had been complete, so I assume that we have received all the documents*"[584]. Khun Parnu[585] could not recall whether all of the documents were provided. SCB admits that no documentary record showing the receipt of the BOJ5 survives[586].

671. Khun Parnu also confirmed in cross-examination that SCB did not ask to see the share purchase agreement, did not ask what the price was, and did not ask whether the price had been paid. He said that "… *we rely on [the WCP] opinion together with our internal legal opinion, So we haven't asked any*

[583] Claimants' Written Closing [478]

[584] Day 24/134:16-135:9

[585] Day 27/76:11-77:7

[586] SCB Closing [339]

information further than that"[587]. Khun Kittipong sought to explain the absence of an inspection following the Kasem Transfer on the basis that: "*there's different ways of inspection, and for share transfer in the Kasem… we asked for documents from the government… we did not need to go for the – physically to go for the inspection*."[588] Khun Wallaya was also unable to explain the absence of due diligence, stating that the different approach was because (i) she became aware of the transfer after the shares had been transferred; (ii) SCB was not a party "*between the SPA, so we do not get involved with the transfers, and the shares are not security that we take for the loan."*[589] This is a very lax approach.

672. I find that there was:

a. No inspection by SCB of the share purchase agreement and the share transfer instruments;

b. No check by SCB of the share register book of WEH to check that REC no longer owned the Relevant WEH Shares and to check who now owned the Relevant WEH Shares;

c. No enquiry by SCB as to the purchase price (so that nowhere do SCB's records show clearly stated that the Relevant WEH Shares were transferred away for a purported consideration of US$68million, less than a tenth of the price for which Khun Nop had paid for them a year before) or as to whether or not that sum had even been paid and if so, to whom;

d. No confirmed check by SCB of the BOJ5 (and given that the share register was not updated at the time to record Dr Kasem's purported purchase of the shares, it is clear that the BOJ5 was either not obtained or gave rise to no investigation or enquiry within the bank).[590]

673. On any view this was negligent conduct on the part of SCB; however, there is insufficient evidence to show that it was dishonest. As I have already stated, the Claimants accepted in a letter of 4 November 2022 that they are not alleging that SCB "*should have carried out certain steps by way of due diligence and that the fact that they did not do that establishes misconduct or wrongdoing or dishonesty.*"

[587] Day 27/76:11-77:7

[588] Day 27/137:9-25.

[589] Day 29/55:22-25 – Day 29/57:1

[590] Claimants' Closing Submissions [484]

Second WCP Opinion

674. The amendment to the loan conditions effected as a result of ExCom's meeting of 25 May 2016 meant that a condition precedent to be fulfilled before drawdown was the provision of a further legal opinion from WEH's lawyers, WCP, on the validity and irrevocability of the transfer of the WEH shares from REC to Kasem. The Second WCP Opinion confirms the irrevocability of the Kasem Transfer.

675. Khun Sittiporn's evidence was that "*I have been told by SCB's solicitors that the Claimants in these proceedings allege that SCB asked WCP to produce the opinions because we knew that Khun Weerawong was part of a conspiracy alleged by the Claimants and that the WCP opinions would not identify that the transfer of WEH shares to Khun Kasem was unlawful. I confirm that this was no part of my thinking at any point; nor, as far as I was aware, was it the thinking of anybody else at SCB*."[591] This evidence was not challenged in cross-examination[592]. Further, no allegation of dishonesty is made against eight of the nine ExCom members who took the decision to require the Second WCP Opinion. Nor was this allegation put to any of SCB's witnesses.

676. On 20 June 2016, the first draft of the second WCP Opinion (adapted from the First WCP Opinion) was sent by Khun Pratumporn of WCP to Khun Thun, copying Khun Weerawong and Khun Phisit. On the same day, Khun Thun forwarded it to Khun Parnu and Khun Phisit of SCB, who in turn sent it to Khun Sittiporn, Khun Supalun and Khun Kittipong. Once again, as with the First WCP Opinion, the Second WCP Opinion was expressly addressed to SCB rather than WEH.

677. On 21 June 2016, the SCB legal team provided comments on the Opinion. The covering email from Khun Sittiporn of SCB sets out, "*At the request of SCB commercial team, please find attached SCB legal comments on WCP opinion …. We are circulating this to Khun Thun and SCB commercial team at the same time as this remains subject to their further comment*". The comments on the draft opinion include (i) a request that certain further documents be added to the list of documents reviewed by WCP, and (ii) confirmation that there was no way for NS to return as an indirect shareholder of WEH. Thus, SCB proposed the following additional wording: (i) "*The Board of Directors* [of REC] *considered that the sale price of WEH shares was reasonable as opined by Ploenchit Capital Limited, the financial advisor approved by the Office of the Securities and Exchange Commission*", (ii) the transfer to Kasem is "*in accordance with the Articles of Association of WEH, therefore, no consent from any other person was required*", (iii) the share transfer is "*final without any agreement to transfer back the shares or grant the right to repurchase such shares*", and (iv) "*[t]here is also no other way under the law for* [REC] *Former Shareholders to become shareholders of WEH*". Underneath

[591] Sittiporn WS 1 [47]

[592] SCB Closing Submissions [365]

the reference to the share transfer instrument between REC and Kasem, SCB added a note to WCP "*Please state the Share Purchase Agreement between* [REC] *and Mr. Kasem Narongdej (if any)*".

678. In paragraph 2 of the draft Second WCP Opinion, WCP claimed to have inspected (amongst others) the following documents:

> "*The articles of association of [KPNET]*
>
> *KPNET's certificate as of 10 May 2016*
>
> *Minutes of KPNET Board Meeting No.4/2559, held on 25th April 2016*
>
> *The opinion of [Ploenchit], dated 21st April 2016, regarding the appropriate price of WEH shares*
>
> *Share transfer document between KPNET and [Dr Kasem], dated 25th April 2016*"

679. However: (i) the Minutes of Meeting No. 4/2559 did not exist in final form at this time, as they continued to be in draft form in October and (ii) it was not until the next day, 21 June 2016, that Khun Thun requested that the Ploenchit report be dated 21 April 2016. Prior to that, no report bearing the date of 21 April 2016 existed.

680. None of the documents listed as inspected were appended to the Second WCP Opinion and SCB did not see any of them at the time. As Khun Sittiporn explains he "*did not doubt at all that WCP had seen and reviewed the documents identified and reached their conclusions in good faith"*[593]. There was no challenge to that evidence in cross-examination. Further, it has been alleged that a number of documents in the above list, including the Ploenchit Report itself, were backdated and were not in existence at the time of the Second WCP Opinion, and those of SCB's witnesses who gave supplemental statements have confirmed that they were not aware of this[594]. That evidence was also not challenged. Indeed, it was put to a number of the non-SCB Defendants that the Ploenchit report was backdated *for the purpose of deceiving SCB*.

681. The Second WCP Opinion concludes that "*The transfer of KPNET's shares in WEH to [Dr Kasem] was considered to be an honest transfer, the price paid was reasonable and KPNET's former shareholders did not have any supporting legal grounds on which to request a court to revoke the transfer of these shares.*"

682. All of SCB's witnesses confirm that they did not see and would not expect to have been provided with the Ploenchit Report and (as I have said) were not

[593] Sittiporn WS 1 [47]

[594] Wallaya WS 3 [5]; Jittinun WS 2 [21] ; Parnu WS 2 [9]; Supalun WS 2 [4]

aware of the price paid under the Kasem SPA[595]. Khun Jittinun, who had the closest involvement in the drawdown process as the lead for the CMD, states that she would not expect to have seen the Ploenchit Report or learned the price paid because *"this is a shareholder matter*"[596].

683. It was put to Khun Weerawong in cross-examination that "*both your opinions were deliberately misleading to the bank and based on material which you knew to be untrue, namely the dates of the transfers, the identity of the purchaser, and the date of the Ploenchit opinion*" but Khun Weerawong replied, "*That is totally untrue, based on the documents and based on the fact*"[597]. I do not consider that Khun Weerawong was truthful about this; his opinions were indeed deliberately misleading to the Bank.

Watabak share pledge waiver considered and granted

684. Between 8 and 13 June 2016 there were attempts to resolve a continuing difficulty relating to the share pledge conditions precedent to drawdown in the CTA. By then, the two minority shareholders in WEH, Somphote and Amorn, had refused to allow their 25% shareholding to be subject to a share pledge. Some discussions and email exchanges between WEH and SCB took place during that period in order to negotiate an acceptable solution. A final proposal appears to have been set out in a presentation by SCB's CMD on 16 June 2016, in advance of a Credit Committee meeting of the same day. The proposal was to grant a waiver, allowing pledges of 75% rather than 100% of the shares in Watabak, but with the following conditions: (i) that the shares in all the Future Projects be pledged as security for Watabak, and only released when needed to finance the Future Projects and (ii) that 100% of the Watabak shares be pledged within 180 days from Initial Drawdown. In the event that this was not possible, Watabak would need to increase its capital and repay amounts by way of mandatory prepayment, with further shares being pledged. If even that were not possible, SCB could call default, or start sweeping the cash flows of Watabak.

685. The issue of the share pledge requirement was considered by the Credit Committee on 16 June 2016, together with various other more technical issues where waivers and/or consents were required to allow drawdown. During the meeting, SCB's BRD is recorded as explaining that drawdown was necessary by June 2016, because "*if the project fails to make payment within current due date, the supplier may terminate the contract and the project may not be able to commence operations by the Commercial Operation date (COD) in accordance with the plan[n]ed schedule*". The CMD clarified that the

[595] Anucha WS 1 [36] ; Parnu WS 1 [61]; Wallaya WS 2 [37]; Sittiporn WS 1 [48] ; Supalun WS 1 [41]; Kittipong WS 1 [17]; Arthid WS 1 [54]

[596] Jittinun WS 1 [30]

[597] Day 32/137:13-19

shareholders had contributed all of the equity required, but the minority were refusing to pledge their shares.

686. The Credit Committee is recorded, under "*Summary of the opinion of the Credit Committee*" as having queried why, other than waiting for the sale of their shares, the minority shareholders were not cooperating in pledging their shares. However, the Credit Committee ultimately resolved to approve the proposal unanimously, and to refer the same to SCB's ExCom.

687. On 20 June 2016, ExCom considered and approved the waivers and modifications approved by the Credit Committee in relation to Watabak, thereby permitting drawdown. This was in circumstances where ExCom:

a. Had received the Second WCP Opinion only in draft form;

b. Knew that the US$85m was not yet in escrow and that indeed no proceeds of sale to Dr Kasem if there were any had been paid to Mr Suppipat or placed in escrow;

c. Had not seen or received:

i. KYC documents from Dr Kasem including the BOJ5;

ii. The Ploenchit Report or any opinion from a valuer that the purchase price was fair and for good value.

688. ExCom's approval of the proposal had a series of new conditions precedent and subsequent attached:

a. A new condition, whereby WEH would need to refinance the debt of both FKW and KR2 with SCB, within 180 days of drawdown.

b. A pledge of all the shares in the Future Projects as a condition to drawdown. However, these shares would be released upon the refinancing of the debt of FKW and KR2.

c. A suspension of WEH's drawdown under the WEH Facility for the purchase of the minority shareholding of Somphote and Amorn.

d. A conditional assignment of dividends from Aeolus as guarantor of the Watabak project debts within 180 days of the initial drawdown.

689. Thus, rather than refusing to permit drawdown, SCB sought to mitigate the additional risk caused by the share pledge issue by leveraging the value of the other projects of WEH (i.e. the Future Projects, and the operating projects), refinancing some of WEH's operating project loans with SCB and assigning dividends from another operating project. This once again demonstrates SCB's keenness to ensure that the Watabak project was not allowed to fail, come what may. Indeed, the fact that the sale of the shares had, apparently, been made to Dr Kasem, Khun Nop's close family member, did not lead SCB to refuse to allow Watabak to draw down under the SCB facility.

Drawdown on Watabak

690. On 24 June 2016, Watabak drew down 2,379,958,650 THB on the Watabak Facility. Drawdown on 24 June 2016 was important because the Letter of Undertaking (which GE had provided to SCB dated 31 May 2016) provided that GE would not terminate the TSA Agreement with Watabak provided that Watabak paid all overdue sums by "no later than" 24 June 2016.

(15) Circular payments under the Kasem SPA

691. REC's draft accounts record that the purchase price under the Kasem SPA was paid in ten instalments between 13 June 2016 and 20 December 2016. However, REC's bank statements show that amounts corresponding to 7 of the 10 instalments (totalling THB 971,986,401.88843 (around 40.5% of the purchase price) were not paid by Dr Kasem but were in fact paid by:

a. Khun Wichai Thongtang, a director of WEH (THB 250,000,100 on 13 June 2016);

b. Khun Itti Thongtang, a relative of Khun Wichai Thongtang (THB 150,000,100 on 13 June 2016);

c. Khun Phunkorn Boonyachinda, Khun Nop's brother-in-law (THB 150,993,100 on 17 November 2016);

d. Khun Poruethai Narongdej, Khun Nop's wife (150,993,101.88 on 17 November 2016);

e. KPN Land Co Ltd, a company in the KPN Group (THB 20,000,000 on 30 November 2016);

f. Khun Amonrat Mepiem, the drummer in Khun Nop's brother-in-law's band (THB 30,000,000 on 31 December 2016); and

g. Khun Tassapon

(collectively, "**the REC Payors**").

692. A further instalment (totalling THB c.650 million, c.27.1% of the purchase price) was received in seven payments on 20 December 2016, made by Khun Nop.

693. Moreover, this money essentially came from REC itself: REC's draft financial statements for the year ended 31 December 2016 record that in that year THB 2,273,133,258.348 (c USD $64.4m) (c.94.7% of the purchase price paid to REC) was lent by REC to KPN EH. Khun Nop in fact admits that REC lent KPN EH the funds which it then itself received.

694. Khun Nop and Khun Nuttawut have disclosed ten documents falsely purporting to be receipts evidencing payment by Dr Kasem in the amounts matching those made by the REC Payors.

695. However, letters disclosed by Khun Nop and Khun Nuttawut signed by each of the REC Payors (other than KPN Land Co Ltd and Khun Mepiem) state that they paid the funds on behalf of Madam Boonyachinda which Khun Nop and Madam Boonyachinda claim to be loans made to Madam Boonyachinda ("**REC Payor letters**").

696. Further, three Promissory Notes were disclosed as part of a PDF clip of documents by which Madam Boonyachinda promised to pay to KPN Energy (Thailand):

a. On 25 August 2016, a Principal Amount of THB 600,000,000 with interest at the rate of 7% per annum until the Principal Amount is fully paid;

b. On 25 November 2016, a Principal Amount of THB 198,013,798.12 with interest at the rate of 7% per annum until the Principal Amount is fully paid;

c. On 20 December 2016, a Principal Amount of THB 31,986,201.88 with interest at the rate of 7% per annum until the Principal Amount is fully paid.

697. Each of these Notes purports to be signed by Madam Boonyachinda. Additionally, each of them is accompanied by a certified copy of Madam Boonyachinda's Thai National ID Card which is similarly signed by her. The PDF clip of documents has, however, a "Created Datetime" of 15 July 2017 and a "Last Modified Datetime" of 1 June 2018. On the Claimants' case, Madam Boonyachinda's signature was added to the PDF between 31 May 2018 and 1 June 2018; Khun Nop and Khun Nuttawut contend, however, that the "Last Modified Datetime" provides no reliable evidence as to what modifications were made at that time, or other possible modifications. In the light of the false evidence to which I refer in this judgment concerning Madam Boonyachinda and Khun Nop, I consider that each of these Promissory Notes was, on balance of probabilities, created after the dates that they bear and that they are not genuine documents.

(16) Wichai/ Itti Loan Agreements

698. With regard to the payments by Khun Wichai and Khun Itti, loan agreements were purportedly entered into between each of them and Madam Boonyachinda, as recorded in loan documentation dated 8 June 2016 ("**Wichai/Itti Loan Documentation**").

699. Madam Boonyachinda claimed in cross-examination that she could not "*remember the details*" concerning when she signed these agreements. Further,

regarding the payments made by Khun Wichai and Khun Itti on 13 June 2016, it was Madam Boonyachinda's case that these payments were made on her behalf. However, she admitted she has never even met either Khun Itti or Khun Wichai. She also admitted that she was aware that both loans were due for repayment in 3 years, but that she had not repaid any capital or interest. She explained this on the basis that neither Khun Itti nor Khun Wichai had asked for repayment. When questioned further, she stated: "*they are well aware that I am the true owner of the shares, and they are aware that I am going through the court proceeding[s]*". Madam Boonyachinda confirmed that these alleged "loans" remain unpaid and that the purported "lenders" have never asked to be repaid. I consider that these agreements are false documents and that Madam Boonyachinda's evidence about these payments was entirely false.

700. On the Claimants' case, the Wichai/Itti Loan Documentation regarding the Itti/Wichai loans was created on 17 July 2018. However, Khun Nop and Khun Nuttawut submit that it was created on or *before* 17 July 2018.

701. No party has disclosed a version of either the Wichai or Itti Loan Documentation with "Created Datetime" metadata earlier than 17 July 2018. As such, the Claimants submit it is consistent with their case that the loan documentation was a sham created in 2018.

702. Khun Nop and Khun Nuttawut also highlight a version of the Wichai Loan Documentation which has Last Modified, File and Family Datetime metadata of 24 October 2018 and a version of the Itti Loan Documentation which has Last Modified, File and Family Datetime metadata of 10 August 2021. However, this does not go to proving that the Wichai/Itti Loan Documentation was created *before* 17 July 2018.

703. As such, there is no documentary evidence that the Loan Documentation existed before 17 July 2018. Accordingly, I find that, as the Claimants submit, that the Wichai/Itti Loan Documentation was created on 17 July 2018.

704. I find that the reality of the situation was that:

a. In June 2016, the Thongtangs had indeed agreed to purchase the WEH shares, and such payments were made on their own behalf;

b. Following Khun Nop's belated assertion in 2018 that Madam Boonyachinda was the true purchaser of the WEH shares in order to head off problems in Hong Kong with Dr Kasem, the fraudulent REC Payor letters were created in July 2018.

705. This is supported by the existence of documents such as the preliminary Petcharat Thongtang memorandum of 8 June 2016, by which Dr Kasem agreed to sell 9.25m WEH shares to Khun Thongtang which under cross-examination Madam Boonyachinda simply could not explain, and asserted she had never seen before.

706. Furthermore, in an additional memorandum of 26 July 2016, the investment conditions were altered such that Mrs Petcharat agreed to invest a reduced sum.

This memorandum was signed by Khun Nop and Khun Nuttawut. On Khun Nop's evidence, Dr Kasem was away in the United States and so they were signing on his behalf. Khun Nuttawut admitted that the Petcharat transaction was indeed anticipated as a genuine sale:

> *"There is agreement that Khun Nop come to me, asking about his father's transaction with Thongtang family because his father is away. So he asked whether I can sign a document to acknowledge on his father, yes. But it don't know the details then, how – what is the agree term between them….I believe it is a genuine sale. With Dr Kasem."*[598]

(17) The Orix Negotiations

707. Having secured 1.25% each of the WEH shares from Khun Nop, and having freed themselves of their contractual obligations to Mr Suppipat under the ASA and the KPN EH SHA, the WEH Managers were now keen to proceed with a market listing.

708. On 30 June 2016, Ms Collins emailed two members of Moore Stephens in an attempt to find new auditors to complete "*the 2015 Audit as soon as possible – early August so that we can prepare for a reverse listing*". She suggested that, "*[i]n May 2016, KPMG resigned as auditor of WEH and the five development SPVs although they audited and signed off three of the operating companies as well as one of the holding companies where the majority of the activity is. Officially this resignation relates to shareholder loans that were not well documented and the dramatic resignation letter of one of the finance staff. However the real reason was more political and linked to the former shareholder*." She stated that, "*[u]nfortunately the former shareholder and the new shareholder are now in dispute*". This implies that the "*new shareholder*" remains Khun Nop, rather than there having been a genuine sale to Dr Kasem, and that she knew that to be so.

709. In addition to pursuing a market listing, the WEH Managers led negotiations with Orix, a Japanese financial services company, for the lucrative purchase of 20% of WEH from Dr Kasem not long after the sale of shares to Dr Kasem took place merely at book value. Khun Weerawong was part of the WCP team which acted for WEH in connection with the proposed sale.

710. On 7 July 2016 Anne Bailey of Baringa emailed Ms Collins, copying in Mr Dheeraj Aggarwal, regarding "*Orix presentation and assumptions table*". The presentation set out a valuation of $1.79 billion (being well in excess of the purchase price under the Kasem SPA of US$68m). Ms Collins then forwarded this email to Mr Lakhaney. Mr Lakhaney responded with some "*small comments*" and specifically noted "*On valuation I don't think we need to*

[598] Day 20/106:13-20

present that now – could keep the slides in the back if needed". They express no surprise about the massively increased value of the WEH shares.

711. On 2 August 2016 Mr Lakhaney emailed Khun Nop and Khun Nuttawut, copying in Ms Collins and Khun Thun, saying "*We all like Orix as an investor*" and attaching slides on how to calculate the valuation of WEH based on different financial data. His email stated that, "*In terms of overall valuation we can push a $1.9 - $2 bn pre money valuation for WEH …"*. Consistently with this, in cross-examination, Khun Nop stated that the negotiations with Orix were led by the WEH Managers.

712. On 4 August 2016 Khun Dheeraj Aggrawal, a member of the WEH finance team, emailed "*Mike and the Orix team*" attaching presentation slides on WEH's valuation. Mr Mike Nikkel was the managing director of Orix at the time. The slides included the suggestion that WEH had a $1.9 – 2 bn valuation with "*significant valuation expansion potential*" and stated that WEH's pre-money valuation was 560 THB per shares (total 68 billion THB). This again suggests that the purchase price under the Kasem SPA was a gross undervalue, as the shares remained in Khun Nop's control: the presentation refers to KPN as majority shareholder. That was the truth of the matter, of course. Khun Nop tried to explain this away in cross-examination by saying that did not know who had prepared the presentation and "*I just assume when they see my father they just refer as KPN Group*".

713. On 8 August 2016, Mr Lakhaney emailed Ms Collins and Khun Thun informing them that:

> *"Just got a very excited call from Nuttawut:*
>
> *Meeting with the CEO of our favourite bank went very well*
>
> *They want KPN to just sell US$ 200 – 250 mn of shares straight*
>
> *If that happens, SCB will give us whatever equity bridging we need at WEH to go to financial close, etc. …".*

714. In cross-examination, Khun Arthid explained this on the basis that, "*I think we are the only bank who support them on the project finance*."

715. On 19 August 2016 Mr Lakhaney emailed Mr Nikkel saying that the KPN purchase price was 400 THB per share.

716. On 22 August 2016 Mr Lakhaney emailed Khun Nop and Khun Nuttawut, copying in Ms Collins and Khun Thun, with an update on the progression of the Orix deal and financial details about the proposed transaction. It is noteworthy that this email is written on the basis that everybody knows that KPN is the shareholder, rather than Madam Boonyachinda. Thus, he stated that, as part of the deal, "*shares [are] to be provided by KPN if WEH cash flows … are below a certain material threshold*".

717. On 25 August 2016 Mr Lakhaney emailed Khun Nop and Khun Nuttawut following a meeting with Orix that day. He informed them that he "*think[s] THB 450 / share is what will get this deal done*". Khun Nuttawut responded: "*Please try to push it to 450+ level for all of us*".

718. On 8 September 2016 Mr Nikkel emailed Mr Lakhaney a draft "*Letter of Intent to Purchase Shares*" (or Term Sheet) for the transaction between Orix and WEH. The *"Seller*" was stated to be "*Dr. Kasem Narongdej, holding valid title to 61,118,885 of WEH Shares*". Further, Mr Nikkel's email informed Mr Lakhaney of his intention to "*ask Khun Nuttawut for a dinner between Khun Nop, Khun Nuttawut, Takahashi, Nobuomi and me. Seems like a shareholder thing but flex here, let me know if you think otherwise*". Again, they all knew that Khun Nop is the real shareholder.

719. The same day, 8 September 2016, Mr Lakhaney emailed Khun Nop, Khun Nuttawut and the other WEH Managers and attached the draft "*Letter of Intent to Purchase Shares*". The draft incorporated Mr Lakhaney's mark-up and comments which amended the seller to: "*Dr. Kasem Narongdej and / or an special purpose vehicle set-up for the purposes of this transaction, holding valid title to 61,118,885 of WEH Shares*". Mr Lakhaney explained in the email that the Orix team are to come to Bangkok "*for meetings – going through financial model and [letter of intention]*". He also noted that Orix "*would like to meet SCB sometime Tuesday morning / early afternoon – ideally with K Arthid and senior team on the project financing and capital markets side (cover the company and potential IPO)*."

720. Mr Lakhaney's email addressed Khun Nop by name and informed him that Mr Nikkel would "*reach out … for lunch … to have the discussion on valuation*". Mr Lakhaney also specifically addressed both Khun Nop and Nuttawut saying that, "*[Mr Nikkel] will request a shareholder dinner for Monday evening with just the both of you, Mike, Takahashi and Nobu*". When this was raised with Khun Nop in cross-examination, he continued to deny that he was a shareholder and insisted that Madam Boonyachinda was the owner of the WEH shares. I reject his evidence, which is obviously untruthful.

721. The SCB witnesses have limited recollections of Orix during this period[599] and SCB submits that the documentary record shows at most only a tangential involvement by SCB, primarily in September 2016 where Orix were introduced to SCB. SCB claims to have had no involvement in the negotiations between Orix and KPN.[600] When Khun Arthid was asked in cross-examination about his involvement "in the discussions with Orix" he said: "*No, I couldn't – as I put that in my witness statement, I couldn't recall. I recall that there was a report about, but it could not be the formal report because it's a kind of discussion going on, but I couldn't recall the details and what exactly happening. But the*

[599] See Kittipong WS 1 [19], Parnu WS 1 [67]-[68] . See also Arthid WS 1 [55]

[600] SCB Written Closing [388]

name of Orix did happen during the time that the buyer trying to mobilise the fundings."[601]

722. Orix began due diligence on the proposed transaction using Allen & Overy (Thailand) Co. Ltd as their solicitors. On 9 September 2016 Mr Lakhaney emailed Mr Nikkel explaining that one due diligence session would be with Khun Weerawong as the "*senior partner who has been working with us on all the ring fencing*".

723. On 21 September 2016 Mr Nikkel emailed Khun Nop, Khun Nuttawut and Ms Collins, copying in Khun Thun, Mr Lakhaney and 4 employees from Orix, thanking them for dinner "*last week*", attaching an executed "*LOI*" and comments that he "*will shortly send a note of thanks to Khun [Arthid] and the SCB team for our meeting last week. .. it was heartening to learn how much a large financial institution like that supports you all and the WEH team*". Further, he attaches "*a listing of some information that Aman and the guys can help us with for building our internal investment committee paper*" as they "*intend to kick-off [their] full due diligence later [that] week ... with an aim to be in position to close in November if possible*".

724. At this time, an Orix "*Letter of Intent to Purchase Shares*" Term Sheet which is dated 20 September 2016 was signed by Dr Kasem (and not Madam Boonyachinda), Khun Nop, Ms Collins and Orix's Vice President, Mr Yukhi Nishigori. This set out the proposed purchase of 21,767,560 WEH shares from Dr Kasem at a proposed price of 420 THB per share (9 billion THB total), subject to a share price adjustment mechanism dependent on company performance and various conditions precedent. In cross-examination, when asked why Dr Kasem was described as the seller in this signed document, Khun Nop said it was because "*Dr Kasem [was] act[ing] on behalf of Madam Boonyachinda. She doesn't want to disclose her identity*". He also insisted that he informed Madam Boonyachinda, as the owner of the WEH shares, about important issues which arose in relation to her shareholding. Yet Khun Nop admitted that he did not inform her about Orix, suggesting that that was because the negotiations were just in their early stages. It was also Madam Boonyachinda's evidence that she was unaware of the potential sale to Orix.

725. The Claimants allege that SCB "*was aware of the Orix Term Sheet*" because it "*was involved in meetings with or regarding Orix in August and September 2016*" and would have appreciated from the figure for consideration set out in the Orix Term Sheet that the consideration payable under the Kasem SPA was at a considerable undervalue[602]; and that "*SCB's continued financial support was essential to the continued operation of WEH"*, and that it was a "*condition precedent to the Orix Term Sheet that SCB provide continued financing to*

[601] Day 35/36:24-37:14

[602] RAPOC [94.6(c)(iv)]

WEH in a form acceptable to Orix"[603]. I do not accept these allegations; indeed, they were not put to any of SCB's witnesses - not even to Khun Arthid.

726. By an email to Sunyaluck Chaikajornwat and Chris Burkett of Allen & Overy dated 23 September 2016 (and copied to a number of people including Mr Lakhaney), Mr Nikkel expressed concerns about whether the sale to Dr Kasem was a sale in good faith:

> "*As this whole arbitration, sale of shares from Seller to Buyer and on to Dr. K and the Seller's background is such a large issue for us and any firm attempting the transaction, we would appreciate very much if you could provide documents, expedite the analysis and get thru an initial draft of a report as quickly as possible … as you can imagine its not about arguments on winning or losing the arbitration itself, its more about maintenance of the shares in ORIX and KPN's hands*."

727. A resolution of SCB's ExCom on 11 October 2016 recorded that ExCom had noted the Credit Committee's continued unease about the source of funds for the USD 85m which Khun Nop's Companies were required to place in escrow by November 2016, and acknowledged the potential sale to Orix. The "*President and Chief Executive Officer*" (i.e. Khun Arthid) is recorded as saying, inter alia, "*The shareholder is however negotiating the sale of a portion of shares to a Japanese investor. If the negotiation is successful, partial payment is expected to equate to approximately half of the total amount that the shareholder requires in order to settle the dispute; the remaining funds will be from loan. If the Company can settle the dispute relating to the payment of shares between the former shareholder and the current shareholder, the Bank may consider granting a credit facility for project financing to the Company in future according to the feasibility of each project*." This demonstrates SCB's concern to ensure, in good faith, that Mr Suppipat's companies got paid under the REC SPAs.

728. Khun Nop conceded that at this time, October 2016, he still did not know where the money was going to come from to make payment under the REC SPAs and that *"Fullerton [were] still struggling to raise the money*"[604].

729. On 17 October 2016, having begun its due diligence process as anticipated, Orix chased WCP for the documents relevant to the Kasem Tranfer which it had requested, namely *"list of directors at [REC], [REC] resolution and board pack, SPA and share transfer instrument*".

730. On 19 October 2016, a Senior Associate at Allen & Overy emailed a partner at WCP with a number of requests including the provision of certain documents and "*a brief analysis of Ploenchit Capital's fairness opinion*".

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[603] RAPOC [99B]

[604] Day 18/55:4-13

731. On 20 October 2016 Mr Nikkel of Orix emailed Mr Lakhaney: *"…If you run across some correspondence that it was in the contemplation of Nick and Nop that REC was going to sell shares (maybe not via IPO), that would be helpful. Chris, our GC, is going to ask you guys and WCP to patch up holes in the legal opinions, just FYI, and I think that should not be a problem*."

732. On 21 October 2016 Mr Nikkel emailed Mr Lakhaney with regard to the documents required by Allen & Overy. Mr Lakhaney forwarded this email to Ms Collins, Khun Thun, Khun Nop and Khun Nuttawut and anxiously stated that "*We're out of time and they have basically stopped work until they get documents from WCP so A&O can finish their opinion.…*".

733. Accordingly, on 23 October 2016, Khun Thun emailed asking Ploenchit to "*add clarification*" to the Report's "*Executive Summary*", specifically that "*Based on our key assumptions … , the sale by KPNET of all of its shares in WEH at 37.08 THB/Share to third party, as contemplated by the board of directors of KPNET, is deemed a fair price for an arm's length third party transaction*".

734. This was, of course, much more than mere clarification. In cross-examination, Khun Thun said he asked for this to be added as "*in my mind it was relating back to the date of the report*"[605]. Khun Nuttawut claimed he could no longer remember why this wording was necessary "*but Khun Thun may have spoke[n] to WCP and there might be some reason that Khun Thun would like to amend the wording*."[606]

735. Ploenchit responded to Khun Thun's email, stating that they could "*say that 37.08 THB/share is the price which is in the valuation price range and is the agreed price by both seller and buyer*". On 24 October 2016 Khun Thun confirmed that this wording was acceptable and the following day, Ploenchit issued a modified report which now stated in the executive summary that "*The Board of KPNET has approved to sell all of its shareholding in WEH to the third party at 37.08 THB/share. This price is the valuation price range and is the agreed price by both the seller and the buyer*."

736. On 25 October 2016 Mr Nikkel of Orix emailed Mr Lakhaney, noting "*We are moving pretty well on this arbitration analysis and getting the legal opinion in order. Think we can cut it out as soon as we get docs in order, hopefully right away. One think of immediate value is the April 2016 [REC] minutes of the board meetings and resolutions approving the sale of the shares to Dr Kasem including, hopefully, an actual fairness opinion signed by Ploenchit Capital and not just the power point presentation to the directors of [REC] Do you have the books of [REC] that you can pull this for us today?*".

737. Mr Lakhaney responded: "…*let me chase everyone on the below, will come back shortly. I think there is a more updated version of the presentation from*

[605] Day 24/11:14-24

[606] Day 20/77:1-3

Ploenchit Capital which talks about fairness of a valuation range which I will get and also send across."

738. On the same day, 25 October 2016, Mr Lakhaney sent an email to each of Ms Collins, Khun Thun, Khun Nop and Khun Nuttawut. His anxiety about the Orix requests is now palpable:

> "[Mr Nikkel] *just called:*
>
> *They are still waiting for the valuation presentation / letter and board resolution for KPNET on the WEH share transfer. A&O is putting together their own legal opinion and the only thing that would void the opinion is a fraudulent transfer of shares which is why these are so important.*
>
> *I am out of excuses for them and this is getting embarrassing at this stage (we are closing in on a month to get documents) as they are assuming that since we transferred shares in April 2015 all of this is in place already…*
>
> *Emma – Mike will most likely not be able to come Thursday as he is also working on an Indonesia renewable deal. He will call you tomorrow, he thinks it is about schedule, etc. I didn't mention new SCB structure*". (emphasis added)

739. This is a very important email which I find demonstrates that the WEH Managers knew that there was no genuine sale to Kasem in April 2016 and no documents to support it, and that instead they had now to manufacture documents in order falsely to pretend that there had been such a sale.

Ploenchit Cover Letter

740. An example of such a document is the Ploenchit cover letter. On 25 October 2016, Mr Lakhaney emailed Khun Thun a draft letter dated 21 April 2016, purporting to be from Ploenchit to the KPN ET Board of Directors. Mr Lakhaney writes that it, "*[n]eeds to be signed by someone at Ploenchit*". The letter states that,

> "*The Board of Directors has requested Ploenchit Capital Limited to conduct a fair value analysis and to opine as to whether in our opinion the Offer Price constitutes fair value for the respective WEH shares owned by the seller. …. Ploenchit Capital Limited can say that the THB 37.08 per WEH share transaction price falls within the valuation price range as conducted by Ploenchit Capital Limited and is the agreed price by both Seller and Purchaser*".

741. Mr Lakhaney frankly accepted that this was a deliberately backdated letter.[607] It dishonestly sought to pretend that the KPN ET Board of Directors

[607] Day 26/19:1-21

had requested Ploenchit to value the shares before approving the Kasem SPA. He said that although at the time of the Ploenchit Report, he thought the report was purely for tax purposes, he understood towards the end of October that it had another purpose. I consider the suggestion that Mr Lakhaney thought this letter was required for tax purposes to be another lie.

742. According to Khun Thun, Khun Weerawong seems to have been involved in creating and backdating the Ploenchit Cover Letter as well:

> "*we got request from WCP and Khun Weerawong who said: we need to have a cover letter to make, to formalise the opinion of the –of Ploenchit, right. Then so okay, with certain wording, and then I pass it on to Ploenchit. And I asked Khun Weerawong: why do we need a cover letter? He said: this is to formalise the documentation for Orix*."[608]

743. On 25 October 2016, Khun Thun emailed Ploenchit, asking for a "*Fairness Opinion .. in a letter form*". He later explained, in response to a question from Ploenchit, that, "*This is to formalize the opinion to KPNET board*". Khun Thun admitted in cross examination that this was a lie, albeit he dishonestly pretended that he lied for reasons of confidentiality, which I reject:

> "*For this one I admitted that I didn't tell Ploenchit that it was for Orix. So I sort of used another reason to explain to them why I need that, because I couldn't tell them that it was the Orix transaction going on….I didn't tell Ploenchit the truth that it was required in October, because of KPNET board; it was required there because there was a due diligence from Orix going on, my Lord. But I couldn't tell Ploenchit because of confidentiality. So I tried to find other explanations for them*."[609]

744. On 26 October 2016, Ploenchit sent the cover letter (dated 21 April 2016) as requested to Khun Thun, copying Khun Nuttawut and Mr Lakhaney. This is unsigned.

745. On 27 October 2016, Ploenchit provided Khun Thun (copying in Mr Lakhaney amongst others) with the "*scan file of the cover letter and share valuation report*". This version of the cover letter is signed. The cover letter states that the board "*has approved the selling price at 37.08 THB per WEH share for its entire shareholding in WEH to a potential buyer*" and the Report says that the board "*has approved to sell all of its shareholding in Ploenchit also produced another covering letter dated 21 April 2016* (emphasis added) .

746. I emphasise the tense because, for these documents to be convincing to Allen & Overy and Orix, the Ploenchit Cover Letter and Report had to *pre-date* the REC Board Meeting Minutes and Kasem SPA. Thus, on 27 October 2016,

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[608] Day 24/14:5-11

[609] Day 24/12:21-13:2.

Khun Thun responded to Ploenchit, asking them to modify both the wording of the cover letter and the report itself:

> "*We have issue with wording due to timing of report krub. 1. The Board of KPNET didn't approved / hasn't approved the transaction on or before April 21st 2016* [the date of the Ploenchit Cover Letter]. *So, we cannot say it is approved in both your letter and presentation.*" (emphasis added)

747. Khun Thun explained Khun Weerawong's involvement in this required modification of the wording:

> "*Okay, I think this email is based on my conversation with Khun Weerawong, he commented that he need to, sort of, I can't remember the exact words, but sort of tidy up the wording in the report, so it is completed*."

748. Khun Weerawong did not deny he suggested the wording change but rather hopelessly suggested:

> "*I don't recall, but it it's so, I don't see any ill intention in doing that.*"

The ill intention is manifest.

749. On 28 October 2016, Ploenchit produced a further draft of its Cover Letter and Report. The sentences quoted above are altered in both the Cover Letter and Report to now say that the KPN ET board "*is currently contemplating the sale of all of it shares in WEH at 37.08 THB/share to potential third party buyer.*" (emphasis added) This was a lie.

750. In his evidence to this court, Khun Weerawong implausibly sought to suggest that this was a cosmetic change only. Khun Thun equally implausibly claimed that he considered these requests to be "*legal wording*" and did not apply his mind to why these changes were being made[610]. I do not accept their evidence. At least Mr Lakhaney fairly accepted in cross-examination "*that this was a deliberate intention to pretend that the board of directors were properly advised as to the fair value of the sale price*". It was accordingly a deliberate lie.

751. The Claimants maintain that the Ploenchit Cover Letter was created on 28 October 2016 whilst Khun Nop and Nuttawut, relying on document metadata, say it was created on or before 27 October 2016. I do not have sufficient evidence to find the exact date it was created. All that is necessary for present purposes is my finding that the Ploenchit Cover Letter dated 21 April was produced only *after* Orix begun its due diligence process in October 2016. This was done dishonestly in order to create a false paper trail so as to suggest, falsely, that the REC Board had determined, with the benefit of the Ploenchit valuation report, to accept a purchase price of 37 THB per share in respect of the Kasem Transfer. Mr Lakhaney, Khun Thun and Khun Weerawong were

[610] Day 24/8:21-11:24; Day 22/13:19-14:10

central to the creation of this false paper trail. Ms Collins was either sent or copied into a number of the key emails I have cited above and below and I find that she too was aware of and was a willing participant in the dishonest backdating. I find that each of these defendants knew that the sale to Dr Kasem was not a genuine sale at an arm's length price.

Negotiations collapse

752. Despite their dishonest efforts, not all of the documents Orix requested were satisfactorily produced by Khun Nop, Nuttawut or the WEH Managers. Orix continued to press for them and on 27 October 2016 (13:05 ICT) Mr Lakhaney emailed Mr Nikkel, dishonestly pretending that this was merely an administrative hold-up, stating:

> "*Just spoke to Nop / Nuttawut / WCP on urgency – this all seems to be bureaucracy (which I don't get) – Weerawong has been out of town and they haven't been sending things out until he comes back – he is back tonight and everything will be sent out tomorrow*."

753. The same day (13:48 ICT), Mr Lakhaney forwarded his 27 October response to Mr Nikkel to Ms Collins and Khun Thun with the comment that:

> "*This is my story to Mike on why they haven't gotten the rest of the documents and leaving it at that. Nuttawut tells me everything will be approved tonight, signed tomorrow by Dr Kasem…*". (emphasis added)

754. This demonstrates that each of the WEH Managers knew that false documents were being prepared at that time in order to give the false impression that the Kasem SPA was a genuine transaction, entered into in April 2016.

755. When asked which documents Dr Kasem was to sign, it was Mr Lakhaney's evidence that "*if I recall the big item missing – there was a bunch of documents around arbitration, etc, but I think the big document missing was the SPA*". Further, he denied that he was speaking to Khun Nop about this – rather he said: *"I was talking to Khun Nuttawut".* Mr Lakhaney then accepted that, in regard to Khun Nuttawut, "*this is getting him to sign the backdated documents*".[611] In cross-examination, Khun Nop insisted, "*I don't know what they are saying. What the document they are referring to … I don't recall Mr Lakhaney spoke to me about this*". However, I find that Khun Nop undoubtedly knew that these documents were being falsely prepared and back-dated.

756. On 5 November 2016, in a WhatsApp message to Mr Lakhaney, Mr Nikkel explained that Orix had finally had enough: "*hadn't realized Kasem payment was structured and not fully paid till Thursday evening after last batch from WCP with SPA. … Freaked out legal and Inoue-san, one more indicia for a fraudulent conveyance claim, which is really the only way Nop loses his shares*

[611] Day 26/66:4-24

(and us!). … Takahashi-san and I will come across mid-week after we assess internal debris and figure out what we can do."

757. On 2 December 2016, Mr Suppipat sent a letter to Mr Nikkel, stating that the ownership of WEH was subject to an ongoing dispute, and requesting that Orix cease and desist from purchasing any shares. In his Witness Statement, Khun Nop had asserted that he "*believe[d] that the September 2016 deal with Orix fell through because Mr Suppipat caused another threatening letter to be sent from Symphony to Orix*". It can be seen from the foregoing that that was obviously untrue: it had already fallen through.

758. On 5 December 2016, Mr Lakhaney emailed Khun Nop, Khun Nuttawut, Ms Collins and Khun Thun. He accepted that the deal was dead, noting that Orix were now on notice of the claims in the arbitration further to his recent discussions with Mr Nikkel. Mr Lakhaney admitted: "*I was more worried that they would respond and reveal that there were discussions with Dr Kasem that have been terminated but they are going to stay silent*." In cross-examination, Mr Lakhaney admitted that this email demonstrated he was concerned that either Orix or A&O would contact Mr Suppipat and reveal that Orix had been negotiating to acquire the shares from Dr Kasem[612]. Mr Lakhaney tacitly accepted that this demonstrated his awareness that steps were being taken by the WEH Managers with Khun Nop and Khun Nuttawut to conceal the transfer from Mr Suppipat: "*I know that they were not wanting to leak information…."*[613]. This has nothing to do with "ring-fencing" the shares. Rather, it is blatant asset-stripping and each of these defendants knew that that was what was intended.

759. Mr Lakhaney accepted that he knew that the materials were being backdated to 21 April 2016[614] and that this was being done so that it looked like the Ploenchit opinion together with the fairness letters produced in October had actually been before the Board of Directors when the shares were sold[615]. He further accepted that this was deliberately deceiving Orix and A&O. It was, of course, also deceiving Mr Suppipat.

(18) Further Gunkul negotiations

760. In December 2016, unbeknown to Mr Suppipat, Khun Nop and Khun Nuttawut entered into further discussions with Gunkul. These concerned the proposed sale of the entirety of the shareholding in WEH. As such, on 26 December 2016, a Memorandum of Understanding ("**Gunkul MoU**") was

[612] Day 26/16:15-19

[613] Day 26/16:25-17:6

[614] Day 26/13:18-21

[615] Day 26/13:22-14:2

entered into between Gunkul and *"K.N. and Associates Company Limited"* for the purchase of 64,717,411 ordinary shares in WEH for 10 billion THB. It was a condition precedent in the Gunkul MoU to any transaction proceeding that there be a settlement with Mr Suppipat.

761. Notably, on 3 January 2017, Baker & McKenzie advised Gunkul that the price at which REC agreed to sell Dr Kasem the WEH shares was "*as much as 10 times lower"* than their fair value (based on the fact that it was less than 10% of the purchase price of $700 million agreed under the REC SPAs) and that Gunkul should not proceed with the transaction on that basis.

762. On 26 January 2017, Symphony wrote to Gunkul seeking to dissuade it from purchasing WEH.

763. On 30 January 2017, Khun Nuttawut wrote to Gunkul terminating the Memorandum of Understanding due to "*differences from the terms agreed in the MOU*" such that he does not think "*it would be of benefit for either K.N. or Gunkul to continue the obligations under the MOU*".

Further transfers of Relevant WEH Shares; arbitrations under REC SPA

(1) SPV SPAs

764. Pursuant to share purchase agreements dated 17 January 2017 ("**SPV SPAs**"), the WEH Managers then set about transferring half of their 1.25% WEH shares as follows:

a. Ms Collins agreed to transfer 680,234 WEH shares to Keleston (owned by Khun Thun) and 680,233 WEH shares to Brascot (owned by Mr Lakhaney);

b. Mr Lakhaney agreed to transfer 680,233 WEH shares to Keleston (owned by Khun Thun) and 680,234 WEH shares to Colome (owned by Ms Collins);

c. Khun Thun agreed to transfer 680,234 WEH shares to Brascot (owned by Mr Lakhaney) and 680,233 WEH shares to Colome (owned by Ms Collins).

765. This arrangement essentially consisted of the WEH Managers splitting their stakes and transferring 50% to each of their fellow managers' companies.

766. In accordance with the SPV SPAs, the WEH shares were transferred to Colome, Keleston and Brascot on 30 January 2017; and from Brascot to ALKBS on 13 November 2017, purportedly for the price of THB 6,802,340. It is known that the sole shareholder of each of Colome and Keleston is Marlon Limited, a Belize company which holds the shares on trust for Ms Collins and Khun Thun. Once again, the BOJ5 was not updated.

767. Although SPAs and loan agreements were entered into, no consideration passed between the WEH Managers. What was the purpose of these transfers? In his affidavit of 19 July 2018 in BVI proceedings, Khun Thun claimed that the WEH Managers entered into the SPV SPAs pursuant to Thai tax advice and Ms Collins similarly suggested that the arrangement was effected for tax purposes.[616]

768. Ms Collins claimed that the purported "*Thai tax advice*" was provided by someone called Mr Harash Pal Sethi of Cornelius Barton & Co, a sole practitioner based in Holborn, London, with whom Ms Collins said she had a business relationship by virtue of their directorships in Blenheim Windfarms LLP[617]. However, the purported tax advice has not been disclosed by the WEH Managers initially on the basis that it was privileged; and subsequently on the basis that it was provided "orally" but there has also been no disclosure of any correspondence with Cornelius Barton & Co.

769. Given the lack of documentary evidence on this purported tax advice and in light of all the other circumstances to which I have referred in this judgment, I do not accept the WEH Managers' explanation of the SPV SPAs. Rather, in line with the 1.25% incentive and their role in facilitating the ring-fencing scheme (in particular by terminating the KPN EH SHA and the ASA, and producing backdated documents to create a false paper trail), I find that the SPV SPAs were yet another attempt to distance the Relevant WEH Shares from Mr Suppipat, so as to prevent his enforcing any award in his favour in the Arbitrations. This was all part of the 7 April 2016 White Board plan.

770. On the same date as the transfers from the WEH Managers to the WEH Managers' own companies, Dr Kasem purportedly transferred 1,000,000 WEH shares to Khun Nuttawut. Khun Nuttawut's evidence was that he *"temporarily*" owned these shares from 30 January 2017 until 17 October 2017, to allow the shares to be pledged to secure the repayment of bills of exchange issued by KPN to Max Metals. That again seems to me to be an implausible explanation.

(2) Failure to satisfy Escrow Condition

771. As described above, SCB was concerned about Mr Suppipat's potential return to WEH, so it required Watabak to pay the First Instalment under the REC SPAs into escrow by November 2016 before permitting drawdown under the Facility (the so-called Escrow Condition). However, Watabak faced difficulty raising the money.

772. Between 2016 and 2017, SCB granted numerous extensions for compliance with the Escrow Condition. In total Watabak requested and they granted four

[616] Day 22/42:9-45:11

[617] Day 22/46:25-47:11

extensions to 31 December 2016, 31 January 2017, 28 February 2017 and 30 June 2017.

773. At this stage, the continued failure to comply with the Escrow Condition imposed on Watabak was causing difficulties for WEH. As a result, Khun Nop sought SCB's assistance in relaxing the condition, and that necessitated the involvement of Khun Arthid.

774. In April and May 2017, KPN requested that the conditions imposed by SCB be restructured. On 2 April 2017, Khun Thun wrote to Khun Parnu and Khun Jittinun, copying Khun Nop and Khun Nuttawut, setting out "*story lines*", "*as discussed earlier*", which he said could be used "*as rationale and proposed mechanic for restructuring the terms of financing re Cash Deposit and Ongoing obligations to pay*". He proposed a restructuring of the cash placement and ongoing obligations to pay Mr Suppipat's Companies.

775. On 4 April 2017, Khun Thun emailed Ms Collins and Khun Kanyarat Kanaprach of WEH with an update, saying of the "*'escrow' / 'sponsor'*" issue: "*K Nop has discussed this point w SCB super seniors as well*".

776. On 4 May 2017, Mr Lakhaney wrote to Khun Nop and Khun Nuttawut (copying in Ms Collins and Khun Thun). He had become concerned that, as was the case, the WEH Managers had agreed to the Escrow Condition without Watabak or WEH board approval:

> "*We agreed to these terms with SCB with no Watabak board approval or WEH board approval…We as managers honestly cannot afford to get caught up lawsuits related to our fiduciary duties to WEH and Watabak…Civil / criminal lawsuits related to being on these boards would come up in every background check and make us unemployable – we literally cannot afford for that to happen*"

777. Mr Lakhaney's email also reveals that SCB wished to preserve the Escrow Condition:

> "*After 2 meetings with Peter & team from SCB, it is clear they cannot / do not want to remove the Watabak conditions unless there is a global solution where SCB can ensure the funds are in place to pay Nick (stated very clearly today)*.".

778. On 5 May 2017, Khun Nuttawut responded to Mr Lakhaney, copying Khun Nop, Ms Collins and Khun Thun, acknowledging Mr Lakhaney's concerns and noting: "*K. Nop is speaking to the senior level of SCB to seek their help. If my understanding is right, they will meet next Wednesday*."

779. Consistent with Khun Nuttawut's email, according to the calendars, Khun Arthid met with Khun Nop a week later on 12 May 2017 and then again with Khun Nop and Khun Wasin on 17 May 2017. Khun Nop accepted in cross-examination the reality that: "*I have a lot of meeting with Khun Arthid*."

780. However, Khun Arthid sought to deny the level of influence in relation to the Escrow Condition that he would have had within SCB. When asked about the waivers he commented:

> "*… I want to remind you that in our process the business team always work with the clients, and many times the business team will bring legal team who will bring business team to work to meet with the customer. But it's just a conversation of how we think about the problem. But at the end, the body who approved whatever condition it has to go to the credit committee and then go to the ExCom. None of the management or the person has the authority to help or to approve this type of condition by themselves*."

781. Nonetheless following the meetings with Khun Arthid, Ms Collins' email of 1 June 2017 to the WEH board (later forwarded by Khun Thun to Mr Lakhaney, Khun Nop and Khun Nuttawut) noted that a positive meeting with SCB had taken place that day and:

> "*The waiver has been approved at the SCB Credit Committee to remove default and extend the due date for the WEH shareholder obligations around the US$87.5m until 28 February, 2018. The SCB ExCom is on 7 June 2017 following which the waiver letter will be issued. The shareholders are entering into a separate commitment regarding the escrow of their shares. The future obligations have not been removed. The discussion on 'cleaning' documentation is ongoing and SCB will try and help. ...*"

782. As anticipated by Ms Collins' email, on 16 June 2017 SCB granted Watabak a further extension for compliance with the escrow condition until February 2018. An ExCom resolution dated 7 June 2017 refers to a request to further extend the deadline for the cash placement to 28 February 2018 because of Dr Kasem's plan to sell approximately 10-20% WEH shares in order to fulfil the cash placement.

783. On 13 July 2017, the Credit Committee resolved to approve Watabak's request for waivers (i) under the Watabak ECA to allow Dr Kasem to sell WEH shares as a way of funding the cash placement; and (ii) changing the terms of the cash placement condition to enable the cash to be placed with SCB instead of a court.

784. A resolution of the ExCom on 18 July 2017 refers to Dr Kasem's plans to sell some of his WEH shares to Pradej in order to fund the cash placement. By this stage it had been agreed that the cash could be deposited with SCB into an account for which KPN had agreed to restrict its right to make a withdrawal "*in order to reserve the fund for making payment for shares purchase price at an amount of approximately USD 85.75 million, which is under dispute between the former shareholders and the current shareholders of the Company*".

785. Khun Nop eventually satisfied the Escrow Condition through the selling of WEH shares to Golden Music and Khun Pradej (see below).

786. As I have said, given that I have accepted that SCB's purpose in imposing the Escrow Condition was to ensure that Mr Suppipat would get paid under the REC SPAs so as to prevent his return to WEH, it is understandable that SCB was willing to agree to extensions of the deadline for the fulfilment of the condition. Although his evidence was at times unhelpfully evasive and defensive, I accept Khun Arthid's (and Khun Wallaya's) explanation that the Escrow Condition was a negotiated compromise between WEH and SCB.

(3) Golden Music SPA

787. Golden Music was the next recipient of the Relevant WEH Shares under the asset stripping scheme.

788. In or around November 2016, WCP directed Premier Fiduciary Limited (**Premier**), a Hong Kong based company providing corporate secretarial services, to acquire Golden Music, another Hong Kong company. The defendants say that Golden Music was used to hold the WEH shares acquired by Dr Kasem as Madam Boonyachinda's agent. I reject that suggestion.

789. A share purchase agreement dated 1 July 2017 records Dr Kasem's agreement to transfer 55,709,642 WEH shares to Golden Music for a total purchase price of THB 2,065,992,073.57 (**the Golden Music SPA**). This was paid for by way of an allotment of shares: Golden Music increased its share capital and resolved to issue 459,109,350 of its shares to Dr Kasem. Dr Kasem transferred the WEH shares to Golden Music pursuant to the Golden Music SPA in two tranches in July and August 2017. The defendants say Dr Kasem held the 459,109,350 Golden Music shares on behalf of Madam Boonyachinda under the Agency Agreement. Dr Kasem later consented to transfer those same shares back to Madam Boonyachinda.

790. Khun Weerawong says that his colleague Khun Pratumporn was assigned to deal with this issue and he sought Khun Weerawong's view on the "share swap" structure.[618] Khun Weerawong confirmed that he believed such a structure was "*appropriate*" and designed to achieve "*payment in kind'*.

791. Khun Nop, who claimed to be acting for Madam Boonyachinda, alleged that the transfer of shares to Golden Music had been "*suggest[ed] by the lawyer*",[619] whom he later confirmed was "*Khun Weerawong*".[620] He alleged that this was for reasons relating to retaining it as a Thai company and that Khun Weerawong had advised him to set up an offshore company for Madam Boonyachinda. I reject this evidence.

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[618] Weerawong WS 1, [104]-[105]; confirmed at Day 32/132:10–18.

[619] Day 18/114:3–7

[620] Day 18/114:17–18.

792. The claimants say that the Golden Music SPA was but another part of Khun Nop's ring-fencing scheme to put the WEH shares beyond the reach of Mr Suppipat and his Companies. I agree. They say, and I accept, that Golden Music was in reality a vehicle owned and controlled by Khun Nop. This is evidenced by SCB contemporaneous documents which describe Golden Music as *"a special legal entity (Special Purpose Vehicle) registered in Hong Kong with all shares held by Mr Nop Narongdej. This legal entity is considered to be a subsidiary of KPN Group*." Further, a due diligence form prepared by Premier Fiduciary, Golden Music's corporate services provider, identifies Khun Nop as the company's UBO, and a presentation regarding WEH prepared by SCB for the Thailand SEC, described Golden Music as a *"company associated with Mr Nop Narongdej*".

(4) Pradej SPA

793. A further share purchase agreement records that Khun Ramphai Singhara Na Ayudhaya would procure the sale and transfer of 14,390,244 WEH shares held by Golden Music to Khun Pradej (**Pradej SPA**). However, for reasons which remain unclear, the Pradej SPA is dated 14 June 2017 and accordingly predates the Golden Music SPA.

794. The Defendants say that Golden Music was a company which was owned by Madam Boonyachinda and that Khun Ramphai was here acting as an agent for her. In her Fourth Witness Statement, Madam Boonyachinda said, *"[she] trusted Ms Ramphai to conduct negotiation on [her] behalf and [she] thought Ms Ramphai would be a better negotiator than Kasem. Accordingly, [she] asked Ms Ramphai to negotiate the terms of the Pradej SPA with the help of Nop*"[621] Khun Nop alleged that he was not involved in giving instructions to Ms Ramphai regarding this sale and "*most of the negotiations and everything its by Khun Ramphai*".

795. Under the Pradej SPA, the total purchase price of THB 5,900,000,000 was to be paid in tranches as follows:

a. Deposit of THB 100m by 16 June 2017 (clause 2.2);

b. Second payment of THB 2.85bn at closing (clause 2.3). The Purchaser (Khun Pradej) was obligated to pay this in escrow into an account at SCB, pending the Seller (Khun Ramphai) procuring that SCB enter into Facility Agreements for the Five Future Projects. The SCB bank account stipulated was Khun Nop's.

c. Third payment of THB 2.95bn in instalments on dates to be determined by the commercial operation dates of certain projects (clause 2.4).

796. By a resolution of 8 August 2017, Golden Music resolved:

[621] Boonyachinda WS 4, [116]

a. To dispose of 14,390,244 WEH shares to Khun Pradej at a purchase price of THB 410 per share;

b. To approve the acceptance of the pledge of 7,195,1222 ordinary shares from Khun Pradej in favour of Golden Music to secure Khun Pradej's payment obligations;

c. That Khun Ramphai was appointed as an authorized person on behalf of Golden Music to negotiate and approve all agreements related to the disposal of shares to Khun Pradej.

797. A novation agreement dated 8 August 2017 recorded that Khun Ramphai and Khun Pradej had entered into an SPA for the sale of WEH shares dated 14 June 2017 and that Khun Ramphai wished to assign her rights and transfer/novate her obligations and liabilities under the SPA to Golden Music.

798. The Claimants say that the WEH shares were being sold to Khun Pradej at an undervalue.

799. When Madam Boonyachinda was asked in cross-examination why Khun Ramphai was documented as the seller of the shares, she replied, "*Ramphai is my close person to me. I trust her very much, I trust her on everything. She had been helping me on the property investment*".

800. The cl 2.2 and 2.3 payments under the Pradej SPA were eventually received by Khun Nop. In relation to the deposit, a payment receipt dated 16 June 2017 records the payment of THB 100 million from Khun Pradej to Khun Ramphai under the Pradej SPA. Khun Ramphai made payment in full to Khun Nop by payments dated 25 June 2017 (THB 20m); 26 June 2017 (THB 20m); 1 August 2017 (THB 51m); and 8 August 2017 (THB 9m). In relation to the THB 2.85bn, on 8 August 2017, Khun Ramphai on behalf of Golden Music wrote to Khun Pradej, instructing payment of this sum into Khun Nop's bank account at SCB:

> "[Golden Music] *hereby agrees that upon Mr Pradej depositing the Payment sum to the account referred to above* [Khun Nop's SCB account], *the payment obligation of Mr Pradej with regard to the second payment under Clause 2.3 of the Share Purchase Agreement would be fully and finally discharged and settled.*"

801. This represented an amount approximately equivalent to the US$85.75m First Instalment which Khun Nop needed in order to satisfy the Escrow Condition.

802. The claimants say, and I accept, that the Golden Music and Pradej SPAs were in reality part of Khun Nop's ring-fencing scheme and that Khun Nop was the ultimate beneficial owner of Golden Music.

803. Khun Nop claims that the monies transferred to him by Khun Pradej at Khun Ramphai's instruction were loans from Golden Music. Two letters dated 9 August 2017 from Khun Nop record that Khun Nop owes Golden Music THB 100m and THB 2.85bn respectively (**the GML-NN Debt Letters**). Khun Nop

maintains that these "loans" to Khun Nop from Golden Music were then used to pay Symphony the First Instalment owed to it under the Fullerton SPA - this position was reiterated by Khun Nop in his oral evidence. I consider this evidence to be false and I do not accept as true the contents of the two letters. Accordingly, I reject the Defendants' case that these were loans to Khun Nop.

804. The Claimants also contend that SCB was closely involved in the Pradej SPA (and therefore the ring-fencing scheme). They point to the fact that it was a condition precedent under the Pradej SPA that SCB signed off on WEH's five Future Projects Facilities. On 9 August, they did so (and also signed off on a WEH Equity Loan Agreement).

805. In cross-examination Khun Arthid said he was unable to recall his involvement in the Pradej SPA arrangements:

> "***Q. Well, the SPA I've shown you requires a condition precedent that SCB enters into the five project facility agreements...***
>
> ***…I suggest that you were closely involved in that arrangement and in organizing the share sale as the only way in which Khun Nop could provide the money to go into escrow long after it was required.***
>
> *A. First of all, the bank got involved and the bank go after that money because, as I said, there was a process that the bank work with the client to make sure that the money that came from the sale of the share will need to be in the escrow account. I think I can confirm that, that's the spirit of the bank. But the process of how to get it done by the bank working team and the customer, I think I could not recall of how it's happening*."[622]

806. Whilst Khun Arthid's evidence was again somewhat evasive and less than satisfactory on this topic, I do not consider that the Claimants have adduced sufficient evidence to establish that he/SCB was dishonestly involved in the ring-fencing scheme through the Golden Music and Pradej SPAs.

(5) First Partial Awards in the Arbitrations and the IPO

807. On 22 September 2017, the First Partial Awards were handed down in connection with the First Instalments under the Fullerton and KPN EH SPAs. The Tribunals found, inter alia, that:

a. The Fullerton First Instalment was due by 30 December 2015, and by failing to pay on that date, Fullerton breached the Fullerton SPA as of 30 December 2015;

[622] Day 35/50:21-52:13

b. The rescission right provided for under Article 387 TCCC could not be considered to have been excluded by the provisions of Article 12.2 of the Fullerton SPA;

c. Symphony was not entitled to rescind the SPA for the reason that neither the 9 December 2015 letter, nor the 8 January 2016 letter technically qualified as valid rescission notices under Art 387 CCC;

d. Under Article 391 CCC, restitution of the REC shares would have been the immediate consequence of a valid rescission;

e. Symphony's alternative claim for payment of the First Instalment was granted;

f. An interest rate of 15% per annum was applicable to the First Instalment under the Fullerton Agreement from 23 October 2015;

g. Such interest must be compounded on a yearly basis from 30 December 2016, as Fullerton had been considered to be in default of its payment obligation from 30 December 2015;

h. Symphony's request to order Fullerton/KPN EH not to dispose of the REC Shares or the WEH shares was justified and the WEH shares in possession of REC and ultimately Fullerton/KPN EH must not be disposed in any manner until the Global Purchase Price was paid to Symphony, NGI and DLV, subject to the Arbitral Tribunal's findings in the second phase of the arbitration;

i. NGI's and DLV's claims for the payment of shortfalls in relation to the KPN First Instalment were dismissed, and they were granted interest only from 25 September 2015;

j. The question of liability in respect of NS's Companies' claims for further sums under the REC SPAs, as well as NN's Companies' set-off and Counterclaims to Phase II of the Arbitrations, should be deferred.

(6) Preparations for the IPO and WEH Managers' 1.25% stakes

808. Next, all three WEH Managers were admittedly party to creating a whole series of false documents for the purposes of creating and maintaining a dishonest paper trail in connection with their 1.25% incentive[623]. That came about as follows.

[623] Walter Scott's words in *Marmion* come to mind: "Oh what a tangled web we weave/When first we practice to deceive."

809. At this point in time, and notwithstanding the findings made against Khun Nop's Companies in the arbitrations, an IPO of WEH was still being pursued. Ms Collins explained:

> "*We – in September 2017…Mr Narongdej had placed the money in escrow for the arbitration. He had done that through the sale to Pradej. SCB had lent 100% for the pipeline projects, so over a billion of financing, 1.5 billion of financing for the pipeline projects, funding the equity portion of $250 million that was due to be repaid at IPO, and the plan now, after the failed Orix attempt at sale and the Gunkul sale had collapsed, the plan now was to IPO.*"[624]

810. Grant Thornton was charged with preparing WEH's accounts for filing with the SEC[625]. Grant Thornton identified that the 1.25% of WEH shares that each of the WEH Managers had received in 2016 needed to be expensed at fair value in WEH's income statement. As Ms Collins explained: "*Grant Thornton realised that the incentive shares would potentially have to go through the balance sheet, which would create a negative balance sheet, and effectively halt [the] ambitions to do the IPO*". Management incentives are treated as an expense. If the shares were properly accounted for as an expense, this would have wiped out WEH's profit[626]. Given that a company is required to show three consecutive years of profitability and positive accumulated profits to be able to list[627] the IPO was in jeopardy. Therefore, "*the solution [adopted by the WEH Managers] was ultimately to reclassify them as shareholder shares in lieu of services*". According to Ms Collins, the share reclassification was carried out *"[b]y creating documents that would create a story around the shareholder sale*". She accepted that what she meant was "*falsified, backdated share purchase agreements"*[628]. These were used to give the false impression that Dr Kasem (as a shareholder) had sold the 1.25% WEH shares to each of the WEH Managers.

811. This was, once again, wholly dishonest behaviour.

812. On 29 September 2017, Mr Lakhaney emailed Khun Thun and Ms Collins, attaching two fictitious documents:

a. an "Executive Stock Purchase Agreement" purporting to be for his (Mr Lakhaney's) purchase of 64,717,411 WEH shares from Dr Kasem, at a total purchase price of THB 28,433,760 and

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[624] Day 21/82:8-17

[625] Lakhaney WS 1 [157]

[626] Lakhaney WS 1 [158]

[627] Lakhaney WS 1 [158]

[628] Day 21/84:15-85:8

b. a "Loan Agreement" for THB 28,433,760 purporting to be between himself and Dr Kasem.

813. In his covering email, Mr Lakhaney explained: "*Drafted in 2016 when we got shares so Noel will know when she looks at the meta data this isn't something we came up with recently. Ideally 1 copy of each we keep ourselves but will need Dr Kasem to sign both*."

814. In cross-examination, Mr Lakhaney admitted that this "*was all part of the steps [the WEH Managers] were taking to rewrite the history about [their] 1.25% incentives*". Again, this was dishonest: it was designed, at least in part, to distance themselves from their complicity in the asset stripping exercise.

815. Khun Thun's recorded responses to Mr Lakhaney's email reveals his complicity in this dishonest scheme.

a. Khun Thun: "*Can we have someone as accountant (and not GT) look into this and structure this around?*"

b. Mr Lakhaney: "*I don't know anyone who would do and keep quiet unless anyone else does / Presumably if we purchased shares this should be straightforward with GT*"

c. Khun Thun: "*A bit worried about the fair value thing*"

d. Mr Lakhaney (copying in Ms Collins): "*We have the Ploenchit capital report which came out at the same time, should cover us?*"

816. On 8 November 2017, Mr Lakhaney (copying in Ms Collins and Khun Thun) emailed Khun Supaporn copies of the fake WEH Manager SPAs between Dr Kasem and each of Ms Collins, Khun Thun and Mr Lakhaney. These are dated 27 May 2016 and purport to record the purchase of 1,360,367 (c.1.25%) WEH shares from Dr Kasem ("**WEH Manager SPAs**"). Purported consideration receipts ("**Consideration Receipts**") were also attached to the email. In the covering email Mr Lakhaney notes: "*As discussed – please find the final 3 SPAs and payment receipts to be signed by Dr. Kasem. I understand from Thun, K. Nop will arrange for this tomorrow*."

817. This arrangement is evidenced by a KPN Energy Memorandum from Khun Supaporn to Dr Kasem dated 9 November 2017. This was disclosed by Khun Nop. It states (among other things) *"please kindly consider and sign enclosed the Share Purchase Agreements as follows: 1. 1,360,467 shares at THB 37.08 per share to Khun Thun 2. 1,360,467 shares at THB 37.08 per share to Khun Aman 3. 1,360,467 shares at THB 37.08 per share to Khun Emma*".

818. On 9 November 2017, having had sight of the WEH Management SPAs, Noel Ashpole of Grant Thornton informed the WEH Managers that the valuation of THB 38 per share was too low and that the accounting fair value was higher:

> *"For the purpose of evaluating the impact of any share based payment we have to determine the fair value. I have the Ploenchit report you provided me from April 2016, however from looking at the PPT you send to Ko yesterday and also the business plan provided to us yesterday by Emma it would seem that the price fair value is higher."*

819. On 10 November 2017 Mr Ashpole further explained to Mr Lakhaney, copying Ms Collins: "*Given that transactions before and after the Ploenchit Valuation are at a higher value, it is difficult to justify that that the acquisition by Dr Kasem meets this definition [of fair value/orderly transaction]. This will be raised by the SEC."*

820. Mr Ashpole noted that Grant Thornton *"will speak to SCB to explain*."

821. Upon being forwarded this email exchange, Khun Thun's reaction on 10 November 2017 was "*Might be a good idea as then we can try to persuade others (SCB and WCP) to help push GT*."

822. Khun Thun later updated Mr Lakhaney: "*…just talked to Emma…GT talked to SCB and the issue is the "orderly transaction" definition…SCB took our side so GT needed to back down and proposed to park this issue for now and conclude when they go for SEC consultation. We need to kill it (with SCB and WCP support) before then*."

823. On the same day, Khun Thun provided a further update to Mr Lakhaney and Ms Collins, following a conversation he had had with SCB (and which he had relayed to Ms Collins): "*Talked to SCB again as informed Emma 1) GT want to qualify the account if they have to sign [2) Privileged] 3) Solution is we continue w Audit Comm / GT to present to Audit Comm BUT saying that all good except the pending issue of "share based compensation" which will need further study and consultation w SEC.*"

824. Ms Collins suggested that the WEH Managers were being put under pressure by SCB to resolve this issue:

> "*…it was a very challenging time, we needed to raise money, and, you know, we were under a lot of pressure to create a way of having these shares reclassified*."[629]

825. And later:

> ***"MR FENWICK: Under huge pressure from whom?***
>
> *A. The Board, the shareholders, the banks.*
>
> ***Q. Banks, what banks?***

[629] Day 21/125:16-126:11

A. SCB.

Q. SCB, and what was the pressure from SCB?

A. We needed to be able to IPO, the plan was to IPO.

Q. Why?

A. Because that was one way that we could raise money to pay Nick.

Q. Are you saying that the concern which was putting you under pressure was the need to pay Mr Suppipat rather than anything else?

A. I mean, yes, because the growth was – no, we also had to repay the corporate loan, but it was about creating a liquid stock that could be borrowed against so that Mr Suppipat could be paid.

Q. I mean, the bank had a mandate for the IPO, didn't they, SCB? For which they were going to get very large fees?

A. Yes.[630]

826. Mr Lakhaney's oral evidence was to a similar effect.

827. The WEH Managers subsequently brought in Mazars for their opinion on the management shares issue. They said that there was an accounting angle by which it might be said that the shares were for services to its major shareholder rather than share-based payments for work done for the company. This was also consistent with the fact that the 1.25% came from Khun Nop rather than WEH. This supports the conclusion, as I have found, this was indeed the true nature of the 1.25% incentive.

828. On 10 January 2018, Mr Lakhaney emailed Khun Thun and Ms Collins attaching a draft letter "*Re: Compensation for the Advisory Services Agreement between yourself and Next Global Investments Limited*". The letter is dated 2 May 2016 and purports to be from Dr Kasem, offering each of the WEH Managers a 1.25% stake in WEH in lieu of the $10 million payable under the ASA. In his email, Mr Lakhaney explains the WEH Managers will each have one of these letters and states that, "*Since Dr Kasem sold us the shares I think the letter has to be from him otherwise we are implying that Nop's sale to Dr Kasem wasn't "real*"" – which, of course, they knew that it was not.

829. The WEH Managers admit that this letter was backdated and instead drafted on/around 10 January 2018 in connection with WEH's proposed IPO. Mr Lakhaney accepted that contrary to what was set out in this letter, NGI was not in default of the ASA; the truth was that they had negotiated the 1.25% deal on

[630] Day 21/125:16-126:11

17 March 2016 with Khun Nop and Khun Nuttawut; and he had never had any discussion with Dr Kasem. [631]

830. Mr Lakhaney accepts that at this stage in January 2018 he created two further false documents "*for the purposes of liaising with Mazars on the issue*"[632] namely the meeting minutes dated 7 April 2016 and a document called "*WEH Share Discussions Document*" which he emailed to Mazars on 19 January 2018.

831. The former document apparently records a meeting which took place on 7 April 2016 at the WCP offices and was attended by Khun Nop, Khun Nuttawut, the WEH Managers, Khun Weerawong and Khun Phisit. The content of the minute:

a. Records that Khun Weerawong presented the ring-fencing scheme to the meeting.

b. Reiterates the necessity for the ring-fencing scheme is "*NS ... seeking to re-enter the equity structure*" and SCB would refuse to lend to WEH while that was even a remote possibility.

c. Highlights the critical risk to WEH if that block to the financing of Watabak was not urgently removed.

832. The latter document stated "*The BOD of KPNET commissioned an independent 3rd party valuation of WEH from Ploenchit Capital, an SEC approved valuer and a fair valuation report was issued on 21st April 2016*".

833. Ms Collins frankly admitted in cross examination that these documents were also false and created purely for the purpose of deceiving Mazars:

"***MR JUSTICE CALVER: I'm just asking – all I'm asking is that you said that that was a trail that was created, and I just wanted to understand who it was intended to mislead by that trail because what's stated there is misleading, is it not?***

A. It is misleading, yes.

MR JUSTICE CALVER: So I'm trying to understand who –

A. Mazars would be able to write a report saying that it was share-based payment – that it was not share-based payments, that it was shareholders.

MR JUSTICE CALVER: So it was intended to mislead Mazars, was it?

[631] Day 26/27:18-28:4

[632] Lakhaney WS 1 [171]

A. It was intended to – I think – yes, it was intended to mislead Mazars."[633]

834. Mazars then probed for more documents regarding the WEH Managers' SPAs. On 26 February 2018, Jonathan Fryer of Mazars asked Mr Lakhaney "*Can you confirm how the shares purchased from Dr Kasem were settled? Which documents are in place to support this?*" to which Mr Lakhaney responded "*Yes – the last page of the scans has a receipt of funds signed by Dr Kasem*". Mr Fryer then requested "*Do you have evidence of payment?*" which prompted Mr Lakhaney to forward the exchange to Ms Collins and Khun Thun, anxiously stating:

> "*So same issue – asking for evidence of fund transfer from us to Dr Kasem? How do you think we should handle – nothing or loan agreement?"*

835. On the same day, Mr Lakhaney sent to Ms Collins and Khun Thun false draft loan agreements and later, as an alternative, false draft promissory agreements.

836. Notably, Mr Lakhaney had seen this coming, having provided a draft loan agreement to Ms Collins and Khun Thun on 31 March 2016, which he attached to a covering email stating:

> *"Given the restructuring and our friend's potential reaction I think we need to make sure that we have everything documented properly and the shares we have documented properly and funded properly through a loan. I've drafted a loan agreement and we can fill in the details at the appropriate time. ...*" (emphasis added)

837. In cross-examination, Mr Lakhaney said that "*[t]his was about the 1.25% we got as our fourth incentive scheme"* as they *"were given the shares ... for no consideration. This was being made to show that some consideration had been paid for tax purposes*" [634]. He frankly accepted that the loan agreement was "*a fictional document*"[635] and conceded: "*So we reacted badly and just tried to put stuff in to create a paper trail*"[636].

838. However, it is noteworthy that Khun Thun (on his own behalf and on behalf of Ms Collins) falsely claimed on oath in an affidavit in BVI proceedings that these were bona fide agreements for the provision of services to Dr Kasem in exchange for the WEH shares received, with no mention of their being required for tax purposes:

> *"41. The WEH Shares were acquired by the Respondents as follows:*

[633] Day 21/95:7-96:11

[634] Day 25/80:2-4

[635] Day 25/80:11-14

[636] Day 25/80:17-18

> *41.1 Dr Kasem approached myself, Ms Collins and Mr Aman Lakhaney (the Kasem Advisors) in April / May 2016 and proposed that we provide advisory services to him, which would be additional and separate to our management role in WEH.*
>
> *41.2 In exchange for these advisory services, Dr Kasem afforded the Kasem Advisors the opportunity to acquire 1.25% shares in WEH in consideration for (i) the advisory services to be provided; and (ii) entry into Share Purchase Agreements providing for additional consideration (the "Kasem Advisory Proposal")*
>
> *41.3 It was determined that the Kasem Advisory proposal did not pose any conflict with their duties to act in WEH's best interests. The Kasem Advisors accepted the terms. This was not documented in a formal agreement but the terms were agreed orally between the parties.…*
>
> *42 This acquisition by the Respondents was an arm's length transaction for fair value and therefore there can be no suggestion that the Substantive Defendants have any interest in these shares*."

839. As their own admissions in these proceedings make clear, this was entirely dishonest. In cross examination, Ms Collins euphemistically accepted that Khun Thun's affidavit contained "*inaccuracies*"[637] and in relation to the substantive claims in the document somewhat reluctantly conceded that *"I can see that some of them are false.*"[638]

840. On 27 February 2018, Mazars advised on the accounting treatment of the transfer of WEH shares to the WEH Managers, concluding that "*in our view, the share transfer should not be considered a share-based payment by WEH*."

841. In short, it is clear that the WEH Managers engaged in an elaborate and fraudulent course of conduct in order to disguise the fact that they paid no consideration for the 1.25% of the WEH shares they each received from Khun Nop as a bribe for switching sides from Mr Suppipat to Khun Nop. This was not a "fourth incentive scheme" at all: it was simply an illegitimate financial reward for assisting Khun Nop with his dishonest asset stripping scheme (to ensure that Mr Suppipat did not get paid).

842. I would add, however, that there is insufficient evidence to support the Claimants' allegation that Dr Kasem's signature was forged.

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[637] Day 22/54:2-10

[638] Day 22/54:2-10

(7) Janyaluck SPA

843. Further attempts were made in 2018 as part of the ring-fencing scheme to distance the WEH shares from Mr Suppipat and his companies, pending the final outcome in the 2016 Arbitrations. A "Share Transfer Document" and share purchase agreement, both dated 22 March 2018, record the transfer of 3,926,368 WEH shares from Dr Kasem to Khun Janyaluck Sawataree at a price of THB 10 per share (equating to a total agreed transfer price of THB 39,263,680) (**Janyaluck SPA**). This sale was obviously at a substantial undervalue.

844. Khun Nuttawut sought to distance himself from this transfer "*I am not aware of this. I am not involved in this….I learn about it later, way later, but not at the time*"[639] as did Khun Thun: "*I knew later, not on the date*."[640] I reject this evidence and I consider it highly likely that they knew of it at the time.

845. In any event Khun Thun denied that this was a nominee arrangement and alleged that "*When individual persons in Thailand transfer shares amongst themselves, or even sell and if you look at other share transfer instrument, it pretty common that they state 10 baht per share. … to manage their tax exposure*"[641]. This beggars belief, as Khun Thun himself admitted: "*in March 2018 no person in their right mind would sell shares in WEH at 10 baht per share to a third party*"[642].

846. Madam Boonyachinda said that Khun Janyaluck "*had been good to us and she helped [Nop] before, so he asked if I could sell the shares to her a bit cheaper*" and she suggested that they actually sold the shares for $145 million, not 10THB per share. However, there is not a single document which evidences this 'side-deal' and I consider this to be obviously untruthful evidence. This was simply more of the same asset stripping.

(8) Cornwallis SPA

847. Cornwallis was incorporated in Belize on 1 February 2017; Madam Boonyachinda says this was on her instructions, at the suggestion of Khun Nop for tax protection[643]. On 31 August 2017, Madam Boonyachinda appointed Khun Kraivin Srikraivin as principal of Cornwallis. Khun Kraivin was an

[639] Day 20/128:25 – 129:1

[640] Day 24/53:17-54:11

[641] Day 24/55:23-56:4

[642] Day 24/55:18-21

[643] Boonyachinda WS 4, [90]-[91] and Day 34/60:3-6, Day 34/60:16-25

acquaintance of Khun Nop.[644] Subsequently, on 22 November 2017, a declaration of trust was entered into between Emerald Bay Limited Belize (as sole shareholder of Cornwallis) and Khun Arj Seriniyom, with Premier Fiduciary (as service provider) identifying Khun Arj as the UBO of Cornwallis, and a letter of instruction recorded that Khun Kraivin would cease to act as principal in favour of Khun Arj.

848. Madam Boonyachinda's evidence was that this change took place on the recommendation of Khun Nop, who admits knowing Khun Arj, because Khun Arj had better availability to act as director than Khun Kraivin.[645] The terms of Khun Arj's appointment to act on behalf of Madam Boonyachinda are reflected in an Agency Agreement ("**the Seriniyom Agency Agreement**"). It is dated 19 February 2018. It is in materially identical terms to the Kasem Agency Agreement and is very suspicious. The Claimants maintain that it is backdated and that it was instead created on 17 July 2018 to defend against the bribery allegations made against Khun Arthid.

849. By a share purchase agreement dated 22 March 2018, which was signed by Khun Kraivin (not Khun Arj) on behalf of Cornwallis, Dr Kasem agreed to sell to Cornwallis 1,000,000 WEH shares for the price of THB 37,085,000. By a share transfer instrument of the same date, Dr Kasem transferred the shares to Cornwallis. Madam Boonyachinda confirmed that Cornwallis paid no consideration for those shares.

850. Khun Arj is a close friend of Khun Arthid[646]. Khun Op's evidence was that Khun Arj was Khun Arthid's nominee[647]. However, Khun Arthid denied this. In cross-examination he stated: "*I never have the professional arrangement. I never talked and deal with him on this kind of thing"*. He also denied that Khun Nop arranged for the transfer of these 1 million shares as a "*reward*" (bribe) for his *"support*" and alleged that he "*never get involved with or [he] never come to awareness of the Cornwallis until [he] got the letter from [Mr. Suppipat]*"[648] dated 5 July 2018, which referred to one "*troublesome aspect of SCB's role*" as "*aris[ing] from Mr. Arthid Nanthawithaya[*'*s] possible involvement in the matter*".

851. In that letter dated 5 July 2018, Mr Suppipat said this:

> "*We have obtained a freezing order over the WEH shares owned by Cornwallis Limited, a Belize company who likewise appears to have acquired 800,000 WEH shares in unexplained circumstances; the declared beneficial owner of Cornwallis is a Thai individual, Mr Arj Seriniyom, who*

[644] Day 17/69:4-8

[645] Boonyachinda WS 4, [94]

[646] Arthid WS 1, [65]

[647] Srisant WS 1, [27]

[648] Day 35/60:3-24

> *is a close and longstanding personal friend of the SCB Chief Executive Officer, Mr Arthid Nanthawithaya…The longstanding relationship of trust and friendship between Mr Arj Seriniyom and Mr Arthid Nanthawithaya is consistent with Mr Seriniyom agreeing to act on behalf of Mr Nanthawithaya…".*

852. Khun Arthid admitted that he spoke to Khun Nop about Mr Suppipat's allegations on 5 July 2018:

> "*I did, I did. I think I call him and asked him what happened … I said you need to provide the information and explanation about this one, because I need to provide this information to my bank and to – I think that's I'm not referring to my bank, but I'm referring to the bank regulator, because Wallaya also came to me with the request that the person, the person in charge of SCB account request for the explanation from the bank and from myself. So that's what I did*."

853. When asked what Khun Nop said or did in response, Khun Arthid said he "*couldn't recall, but I asked him to provide explanation in formal letter, in the formal format because I couldn't just took his explanation verbally to explain to the Bank of Thailand*."[649]

854. On 17 July 2018 Khun Nop wrote to the Bank of Thailand alleging that Khun Arj acted as nominee for Madam Boonyachinda in respect of the Cornwallis share transfer (and did not mention Khun Arthid):

> "*Since Khun Ying Kokeow Boonyachinda did not wish to disclose to others that she is the shares owner or the true beneficial owner of Cornwallis Limited, I, therefore, recommended Mr Arj Seriniyom who has good connection with me and is a person whom I trust to be the beneficial owner of Cornwallis Limited on behalf of Khun Ying Kokeow Boonyachinda. Mr Arj Seriniyom and Khun Ying Kokeow Boonyachinda entered into the agency agreement dated 19 February 2018, details as attached. Nevertheless, Mr Arj Seriniyom has no benefit and interest in Cornwallis Limited and Wind Energy Holding Limited in any way*."

855. Consistently with Khun Arthid's evidence, Madam Boonyachinda gave evidence that Khun Arj was her agent and that the change to Khun Arj was recommended by Khun Nop, because Khun Arj had better availability than Khun Kraivin. Khun Arthid was not involved.

856. When it was put to Khun Arthid that he knew that the Seriniyom Agency Agreement "*was a fabrication by Khun Nop deliberately to conceal your involvement by pretending that there was an earlier agreement between Mr*

[649] Day 35/64:1-17

Seriniyom and Madam Boonyachinda", Khun Arthid responded: *"No, I refute. I never involved, I never aware of all this thing*."[650]

857. In short, I do not consider that the documentary and witness evidence adduced by the Claimants is sufficient to establish that (i) Khun Arj was acting as Khun Arthid's agent; (ii) Khun Arthid was involved in or knew of the creation of the Seriniyom Agency Agreement which was falsely backdated; (iii) Khun Arthid was the UBO of Cornwallis and (iv) the Cornwallis SPA was a reward for Khun Arthid's services in dishonestly facilitating the ring-fencing scheme.

858. As to why the 1,000,000 WEH shares were transferred to a further offshore company, Khun Nop relied on vague unidentified legal advice: "*I think I get the advice from someone, from some lawyer, that don't put all egg in one basket, and I suggest that to Madam Boonyachinda….I don't remember exactly why. It's in Belize. It is just a concept that –it is just suggest by lawyer*."[651] Khun Nop said that the advice came not from Khun Weerawong but from "*Thai counsel*"[652] identified only as "*Apiwut*"[653], albeit that WCP were instructed to make the arrangements for the transfer[654].

859. When pressed further for the reasons for the transfers, Khun Nop was unable to offer any sensible explanation – he said he "*asked the lawyer questions*" and that "[*t]he answer from my Thai counsel, he mentioned that don't put it into one jurisdiction, but in a few jurisdictions, for some risk averse which I don't understand. …*". When asked why he didn't question the reason for the shares being put in companies in different jurisdiction, Khun Nop replied that the lawyer "*said all his client doing that, so I didn't ask the real reason why …"*.[655] This was wholly unpersuasive evidence.

860. Madam Boonyachinda claimed that the transfer was for the familiar unidentified tax purposes: "*it was recommended by lawyers that it should be the overseas company to avoid tax"*[656]*.* As to which lawyers she said "*I can't remember. There are so many lawyers*."[657] No tax advice relevant to the transfer to Cornwallis has been disclosed by either Khun Nop or Madam Boonyachinda. I find that this is another lie.

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[650] Day 35/67:19-25

[651] Day 18/119:5-18

[652] Day 18/119:12-14

[653] Day 17/122:15-20

[654] Day 17/119:19-21

[655] Day 18/121:17-123:8

[656] Day 34/60:23-25

[657] Day 34/61:1-2

861. If this were truly an attempt to mitigate a risk of some sort, whether tax or otherwise, then it could be expected that more than 1,000,000 out of 40,000,000 shares would be transferred to another SPV in another jurisdiction. Madam Boonyachinda and Khun Nop's explanation for the Cornwallis SPA lacks any credibility and I find that it was a further attempt to dishonestly distance the Relevant WEH Shares from Mr Suppipat and his companies.

862. On Khun Nop's evidence, Khun Thun, Khun Nuttawut and Mr Lakhaney were also involved in the Cornwallis share transfer: "*I believe Khun Thun knows about that; Aman knows about that; Khun Supaporn knows about that; and Khun Nuttawut also knows about that*."[658] I accept that evidence as I consider that Khun Nop would have no reason to lie about this point, at least.

863. In cross-examination, Khun Weerawong admitted that his "*colleague*" was involved in "*part o*f" the Cornwallis transfer but insisted that he "*was not aware of the Cornwallis share*". Further he said, "*I only recorded a small amount of shares. I don't know the commercial purpose of it.*"

864. I reject this evidence. Khun Weerawong was centrally involved in the onward share transfers under the share stripping scheme and I find that it is very likely that he was involved in the Cornwallis transaction as well.

(9) Belize injunction against Cornwallis

865. Mr Suppipat's Companies obtained an injunction against Cornwallis in Belize on 18 June 2018 requiring information regarding the proceeds of sale of the WEH shares pursuant to the share purchase agreement dated 22 March 2018 (**the Belize Injunction**). In particular, the Belize Injunction required that Cornwallis inform the Claimants of:

> "*(i) the circumstances surrounding the purchase of the WEH Shares and the persons or entities currently exercising control over the WEH shares; and (ii) any information relating to any dividends paid to the Defendant by WEH or any other person or entity or any proceeds of sale paid by the Defendant to any other person or entity in respect of the purchase of the WEH shares*."

866. With the obtaining of the injunctions in Hong Kong and Belize, it became apparent to the defendants that Mr Suppipat was closing in on them, so they needed to dissipate the Relevant WEH Shares even further. The following text message exchange between Khun Thun and Khun Nuttawut on 20 June 2018 is particularly revealing:

> Khun Thun*: "shares under k Junyaluck still safe so we should transfer out now … to May be few people … need the persons krub*"

[658] Day 18/120:11-13

Khun Nuttawut: "*Good krub*"

Khun Thun: "*Need new names urgently na krub so we can move now*"

Khun Nuttawut: "*Noted krub*"

867. Khun Thun had no credible explanation for this in cross-examination:

"***Q. That was you telling Khun Nuttawut that the shares held by this nominee should be moved to a number of people in order to make sure they weren't caught by the injunction. That is what you were doing, isn't it?***

A. That was my thinking, but it's not the nominee I focused at, because if you recall that email, I group Khun Janyaluck, which I learned from I think Khun Nop or someone, that I group them as sort of related parties, and when the injunctions came out, I said: okay, this one is not included, so just to be safe, maybe there is a risk to her shares. So I asked Khun Nuttawut to consider it, but I'm not sure what happened afterwards.

Q. Why was it going to be transferred out "to May be few people" and "need the persons" Wasn't it a matter for Ms Janyaluck, if she was a genuine purchaser as opposed to a housekeeper nominee, to decide what she wanted to do with her shares?

A. Yes, my understanding was I believe that they are sort of, they are a group of people. I don't know whether – no, not "don't know". I don't think she is a nominee in the nominee sense, but she act as the same group of persons. And I never met her, to be clear. That's why I suggest that, okay, maybe just to help her to be saved from any legal dispute, so I just suggested that. But I had no idea back then who to transfer to or what to actually do."[659]

(10) Cornwallis-Opus Share Transfer; Srun-Nop Loan Agreement

868. A resolution by Cornwallis dated 29 March 2018 (i.e. pre-dating the Belize Injunction) documents the disposal of 200,000 WEH shares to Opus for a purchase price of THB 37.085 per share (the **Opus Share Transfer**). Opus is a company registered in the BVI, owned by a friend of Khun Arthid, Khun Bandit Pitaksit, and his brother Khun Srun Pitaksit. Again, Khun Kraivin was appointed as authorized person on behalf of Cornwallis to effect the share disposal. The consideration was paid to Khun Nop. The Defendants once again say that this was a loan from Cornwallis.

[659] Day 24/60:6-62:15

869. Inexplicably, there also exists an unsigned share transfer instrument, also dated 29 March 2018, which records the same transfer but at a price of THB 10 per share.

870. Khun Nop has consistently said that he understood Cornwallis to be owned by Khun Arthid and that the Opus Share Transfer was a sale of the shares from Khun Arthid to Khun Bandit. The Claimants contend that both the WEH shares transferred to and held by Cornwallis and the proceeds of the sale of shares to Opus by Cornwallis were intended to function as some sort of 'bribe' of Khun Arthid or reward for his involvement.

871. However, Khun Arthid insisted in cross-examination that "*I never ... get involved with the 200,000 shares ... I never aware of that*"[660]. For what it is worth, on 10 September 2022 Khun Bandit signed a letter confirming that Khun Arthid had never been involved with Opus.

872. Khun Nop had various explanations for the Opus Share Transfer. Initially in his original first and supplemental witness statements for trial he said that the transaction was a sale of shares from Cornwallis to Opus; the purchase price received by Cornwallis was THB 100,000,000; Cornwallis transferred the purchase price of THB 100,000,000 to Khun Nop as a loan; and whilst Khun Nop had on occasion received a loan from Khun Bandit, such loan was not related to the sale of shares from Cornwallis to Opus [661] (although his Defence records that he was "*not privy to the exact circumstances*" in which Opus acquired the WEH shares from Cornwallis).

873. Madam Boonyachinda's trial witness statement was consistent with Khun Nop's original evidence:

> "*I understand from Nop that Opus had contacted him directly expressing interest in buying the shares. Nop then asked me if I wanted to sell the shares and if I was happy with the proposed sale price. I confirmed that I was content for the shares to be sold. The sale price for the shares was subsequently loaned to Nop*."[662]

874. However, Khun Nop provided the court with a different story just days before the trial began on 24 September 2022. He now says that that the transfer of 200,000 WEH shares from Cornwallis to Opus was not a sale but was in fact a transfer made in partial repayment of a debt owned by Khun Nop to Khun Srun under a loan agreement dated 11 September 2017. For the first time, various transaction documentation said to be related to the loan was produced.

875. Similarly, on 11 October 2022 Khun Arthid and Khun Weerawong disclosed a letter from Khun Bandit detailing the alleged relationship between

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[660] Day 35/60:3-24

[661] Nop WS 1 [201]; Nop WS 2 [57]

[662] Boonyachinda WS 1 [108]

the transfer of 200,000 WEH shares to Opus and the loan agreement between Khun Nop and Khun Srun of 11 September 2017. The letter stated:

a. By a loan agreement of 11 September 2017, Khun Srun loaned Khun Nop THB 250,000,000 which (i) granted Khun Srun the right, at the time the obligation became due, to choose whether the debt is repaid by cash or by 500,000 WEH shares; (ii) entitled Khun Srun to choose a partial repayment before or within March 2018 by up to 200,000 WEH shares, which required serving a demand letter to Nop at least 30 days before the end of March 2018 (**Srun-Nop Loan Agreement**). A receipt for the loan, dated 13 September 2017 and addressed to Khun Srun, is signed by Khun Nop (**Letter of Receipt to Khun Srun**). A cashier's cheque recording the drawdown of THB 212,500,000 million on the loan is also dated 13 September 2017;

b. On 26 October 2017, Khun Bandit and Khun Srun established Opus;

c. On 26 February 2018, Khun Srun exercised the right to partial repayment by serving a demand letter to Khun Nop, thereby demanding 200,000 WEH shares as partial repayment of the debt in accordance with the Loan Agreement and transfer of the 200,000 shares to Opus (**Khun Srun Demand Letter**);

d. On 29 March 2018, Khun Nop notified Khun Srun that he had arranged for the transfer of 200,000 shares in WEH (**Notice to Khun Srun**);

e. A share transfer instrument dated 29 March 2022 was prepared by Cornwallis for execution with Opus (unsigned);

f. WEH issued a new share certificate on 17 April 2018 showing that Opus was a shareholder holding 200,000 shares in WEH.

876. On 21 October 2022 Khun Nop belatedly served a further witness statement, confirming his new story:

a. The transfer of shares from Cornwallis to Opus was not a sale but was a transfer in partial repayment of the loan received from Khun Srun;

b. His prior statement that the THB 100,000,000 purchase price for the WEH shares was paid to him as a loan was incorrect;

c. His prior statement in his Defence that he was not privy to the exact circumstances in which Opus acquired its WEH shares was also incorrect[663].

877. In cross-examination, Khun Nop's explanation for this change in his evidence was "*I'm totally forgot about this, so I tried to the best of my recollection, and now I realise that that is not the way that I – at that time when*

[663] Nop WS 4 [16]-[17], [20] and [23]

I wrote this…Mr Fenwick there is a lot of things going on, and I have totally forgot at that time."[664] Khun Nop explained the content of his first witness statement simply by stating: "*I got mixed up*"[665]. As to why the loan agreement of 11 September 2017 and letter of demand of 29 March 2018 had been disclosed only by Khun Arthid/Khun Weerawong rather than by Khun Nop, Khun Nop's explanation was: *"I believe it is with Khun Supaporn, but she couldn't find it….A lot of document is just missing.*"[666]

878. The Claimants accept that Khun Srun and Khun Wisit Pitaksit each advanced loans to Khun Nop in September 2017 of THB 250m (less interest of THB 35.7m deducted upfront). These were secured by:

a. Share purchase right agreements (or call options) granting Khun Srun and Khun Wisit each the right to 500,000 WEH Shares in full repayment of the loans;

b. Dr Kasem pledging 1,000,000 WEH Shares in favour of Khun Wisit by a pledge notification letter as recorded in WEH's internal shareholders' register.

879. They do not accept that the parties agreed the loans could be partially repaid by a transfer of 200,000 WEH Shares by March 2018. Instead, they maintain that the Opus Share Transfer must be seen as yet another step to ring-fence the Relevant WEH Shares in light of the Belize Injunction. They say that the belated explanation by the defendants linking the Opus Share Transfer to the Srun-Nop Loan Agreement was in response to the Belize Injunction which required information regarding the proceeds of sale.

880. I accept this analysis for the following reasons.

881. Firstly, on 24 June 2018 Khun Thun emailed Khun Sakoona, a member of the Pitaksit family, a "*revised loan agreement and notice to be repaid by 200,000 shares krub*" (emphasis added). He attached versions of the Srun-Nop and Wisit-Nop Loan Agreements (Khun Wisit was another member of the Pitaksit family) and the Khun-Srun Demand Letter. This is suspicious given that the Loan Agreements were made in 2017. Khun Thun had no credible explanation for this:

"***Q. ….What were you doing helping on 24 June 2018 to amend an agreement which had allegedly been made on 11 September 2017?***

A. If I recall correctly it is the same transaction.

[664] Day 18/128:6-24.

[665] Day 18/125:8

[666] Day 18/132:8-11.

Q. I don't understand.

A. It is on sort of, it is amendment of this agreement.

Q. So it is backdating an amendment?

A. No, no, it's not backdating. This loan, I can't remember the date itself, but there was a borrowing from Khun Nop from Pitaksit family and then there was some sort of amendment afterwards.

Q. Which you prepared?

A. Not prepared, I facilitate . I am not the lawyer.

Q. You sent it, so did you prepare it or did somebody else prepare it ? I don't know what facilitated means.

A. I didn't like amend it myself, I couldn't recall who did it , but because I dealt with Khun Sakoona, so I send, receive and send documents.[667]

….

Q. …..What were you doing on 24 June sending a notice to be repaid dated 26 February 2018, Khun Thun?

A. Sorry, I didn't read it when I sent.

Q. I beg your pardon?

A. I didn't read, I didn't see this when I sent. I didn't go through all of the documents.

Q. We don't have the email where you are sent it?

A. Did I send it?

Q. Who drafted it?

A. I have no idea."[668]

882. Another exchange in Khun Thun's cross-examination is revealing:

"***Q. …These are the words that you had added in 2018, and they are being presented as if they were part of the original document dated 2017. You knew all of that, didn't you?***

[667] Day 24/75-76

[668] Day 24/80– 81

A. No, I thought it was an amendment.

Q. What?

A. My understanding, it was an amendment to the original agreement.

Q. It doesn't say "amended" anywhere?

A. I know.

Q. It has just been re-signed as if it was made in 2017?

A. Okay.

Q. That is backdating in order to conceal the fact that it has been changed, isn't it ? It is backdating the document to make it appear that it was signed in this form in 2017, when that was not true. Do you understand?

A. I understand what you are saying, but ...

Q. Do you agree?

A. My understanding was this amendment occurred in 2018. I am sorry, I didn't follow through in terms of what, sort of, whether it replaced which agreement and things like that. My understanding was it was some amendment of the original loan agreement.

Q. I suggest this is another example of you being dishonestly involved in the fabrication of backdated documents?

A. I co-ordinate sending back and forth the loan agreements and that's what I did."[669]

883. Secondly, Khun Srun and Khun Wisit received their 1,000,000 WEH shares subsequent to March 2018. But had the purported exercise of the early right to repayment as set out in Khun Bandit's letter been genuine, only 800,000 shares would have been transferred. On 17 August 2018 Khun Thun emailed Khun Nop with the subject line: "*Contract Khun Nop and Khun Wisit and Khun Saran*". He comments that, "*Not sure whether you have already discussed this with p Pom or not krub ? In essence, it seems they wanted to get the 1,000,000 shares and return 200,000 shares that got from Cornwallis. Net position is the same but the 200k shares will only come back after injunction is lifted*". In cross-examination, Khun Thun was unable to provide an explanation about this:

[669] Day 24/84- 85

"***Q. … the 200,000 shares which were transferred from Cornwallis to Opus Energy had nothing to do with this loan at all, did it?***

A. That I had no idea why it has got paid 200,000 share first, and that is the reason why I asked in that email that, you know, the Pitaksit brother ask for a million shares.

Q. If this was genuine, they would only have got 800,000, wouldn't they?

A. That's the reason that I asked.

Q. Did you ever get an answer?

A. I don't think so. I can't remember."[670]

884. Thirdly, despite Khun Nop's change of evidence as to the nature of the transfer of shares from Cornwallis to Opus, Madam Boonyachinda confirmed that her evidence (quoted above) was true[671]. Indeed, she elaborated on the sale from Cornwallis to Opus further:

"*I'm not sure of the figures but I was aware that I would make some profit. That's why I decided to sell 200,000 shares but not sure of the figures, but I thought to myself that if I was going to make profit, why not?*"[672].

885. In sum, therefore, I find that the Opus Share Transfer was yet another dishonest attempt, engaged in by Khun Nop and Khun Thun, to distance the Relevant WEH Shares from Mr Suppipat and his Companies. It was not related to repayment under any loan agreements made with Khun Srun or otherwise. There is, however, insufficient documentary and witness evidence to implicate Khun Arthid in this dishonesty.

(11) Letter of indemnity

886. According to a Letter of Indemnity dated 23 January 2019 between Khun Nop, Khun Nuttawut and the WEH Managers, WEH indemnified each of Ms Collins, Mr Lakhaney, Khun Thun, Ms Siddique, Colome, Keleston and ALKBS against all liabilities arising out of or in connection with these proceedings including their own adverse costs, and liability under the substantive claim for fraud ("**Indemnity Agreement**"). Specifically, the indemnity is stated to apply whether or not the indemnified parties have been negligent or at fault. It remains valid even if allegations of fraud are proved at

[670] Day 24/90:6-91:8

[671] Day 34/59:12-20

[672] Day 34/59:24-60:2

trial. Notably, Colome, Keleston, ALKBS and Ms Siddique were never WEH employees.

887. With regard to the reason for the indemnity for fraud, Khun Nuttawut's evidence was "*I do not remember now what I read at the time … Maybe I missed some part … I read it, but maybe my understanding is not like that. My understanding that I protecting my, the management of the company*." He further explained, "*Maybe because of my English or something, I didn't found it fraud like that. So I didn't aware that this is something like taking care of them, even if there are a fraud or something*".[673] I reject this evidence: no sensible reason has been put forward as to why WEH would agree to provide the WEH Managers with such an extraordinarily wide-ranging indemnity (even in the case of fraud), particularly in the light of their involvement in the relevant events set out in this judgment, which was well known to Khun Nop and Khun Nuttawut amongst others. The strong suspicion is that Khun Nop agreed to have WEH give this indemnity to the WEH Managers in exchange for their support of his defence in these proceedings and also to further deplete the assets available for enforcement by Mr Suppipat's companies. However, I do not need formally to make this finding.

(12) "Loan Agreements" Between Khun Nop and Khun Pradej

888. On 3 December 2018 Khun Surat had signed an undertaking in these proceedings on behalf of Golden Music and Khun Nop had personally signed an undertaking which included an undertaking "*without first giving the Claimants' solicitors seven business days' written notice, not in any way to dispose of any consideration paid or to be paid to the Defendant in respect of any disposal or transfer of the Shares, or of [Golden Music's] interest in the shares*."

889. Between January and November 2019 Khun Pradej paid amounts totalling THB 528.5m to Khun Nop purportedly pursuant to three loan agreements, dated 28 January 2019 for THB 30m; 2 April 2019 for THB 198,500,000; and 30 April 2019 for THB 300m ("**Pradej-NN Loan Agreements**"), which the Claimants contend, and I accept, were in fact consideration for the WEH shares transferred from Golden Music to Khun Pradej. Sham loan agreements were created to give the false impression that the money paid to Khun Nop was not consideration for the WEH Shares and not subject to the undertakings given by Khun Nop and Golden Music and thereby to circumvent those undertakings.

890. On 25 December 2019, Khun Pradej's daughter Khun Nantinda exchanged the following messages with Khun Supaporn Wonganan:

[673] Day 20/127:24-128:5

> Khun Nantinda: "*My dad would like to have Golden Music's receipt for payment. He said that as we owe Golden Music, it would be better to have the receipt from it…*"
>
> Khun Supaporn: "*Oh. Okay. Straight-forward transaction could not be effectuated as there would be an issue in the English proceedings. Therefore, we should do as previously did. Loan Agreement. Then Khun Ying accepts the assignment of debt*."

891. To avoid the "issue" of the undertakings in these proceedings, on 26 December 2019 notice was given of an assignment agreement by which Khun Pradej assigned the monies due under the Pradej-Nop Loan Agreements to Madam Boonyachinda ("**Pradej-Nop Notice of Assignment**"), and Madam Boonyachinda accepted that assignment in discharge of THB 528.5m due to Golden Music under the Pradej SPA ("**Pradej-KKB Assignment Agreement**"). This was dishonest behaviour which was once again designed to harm Mr Suppipat and his companies.

(13) Second Partial Awards under 2016 Arbitrations

892. Following Phase II of the Arbitration, the Tribunal issued the Second Partial Awards on 5 June 2019, in which it:

a. Ordered payment to Mr Suppipat's Companies of sums that had by then fallen due under the REC SPAs following the achievement of the CODs of Watabak and the five Future Projects after 25 April 2016 ("**the Remaining Amounts**"). None of those payments were due as at 25 April 2016;

b. Dismissed Symphony's renewed claim for rescission and for payment of accelerated sums under the Fullerton SPA;

c. Dismissed Mr Suppipat's Companies' claims for declaratory relief, fraudulent inducement, incidental fraud, abuse of right, frustration of payments and breach of covenants under the REC SPAs; and

d. Dismissed Khun Nop's Companies' claims for a set-off and counterclaims.

893. On 18 June 2019 the sum of (approximately) $85.754 million paid into escrow was paid to Mr Suppipat's Companies but without interest, given that SCB had relaxed this requirement.

894. On 21 June 2021 Khun Nop's Companies successfully applied to the Court of Appeal of Singapore to set aside in part the Second Partial Awards insofar as they ordered payment of the Remaining Amounts, and in full the award on costs and interest. The Court held that the Tribunal had no jurisdiction to rule on the claims to the Remaining Amounts.

895. On 27 July 2021 Mr Suppipat's Companies issued a new Request for Arbitration against Khun Nop's Companies, seeking orders for payment of the

Remaining Amounts under the REC SPAs in respect of Watabak and the Future Projects which had, in the intervening period, met their relevant CODs. Khun Nop's Companies are defending that arbitration, which has been birfurcated; the first phase commenced in October 2022 and the second is scheduled for the last quarter of 2024.

896. In Phase I, the Tribunal was asked to decide whether the principal sums, and interest thereon are due; in Phase II, the Tribunal was asked to decide whether interest should run from the COD dates set out in Schedule 5 of the REC SPAs, or 25 April 2016, i.e. the "WEH Share Disposal Date". Khun Nop's Companies contest that any sums are due, raising predominantly the same arguments as in the ALRO Arbitration. Phase I Hearings took place in late October 2022. The parties exchanged two rounds of post-hearings briefs in December 2022 – January 2023.

897. The Tribunal has now issued its Partial Award on Merits dated 17 March 2023. The Tribunal has ordered the Respondents (Fullerton and KPN EH) to pay a total of USD 525,000,000 in respect of the Remaining Amounts due under the REC SPAs, plus 15% simple interest from each relevant milestone payment date (i.e. COD date).

898. The Tribunal noted:

> "*… the Remaining Amounts should have been paid by the Respondents [to the arbitration] several years ago, and that due to Respondents' unwillingness to honour their side of the SPAs, Claimants have been forced to initiate, inter alia, the 2016 ICC Arbitrations and defend themselves from Respondents' claims in the ALRO Arbitration. As concluded in paragraph 218 above, Respondents' defences in this arbitration had already been decided in the ALRO Final Award, and thus there was no reason for Respondents to resist payment, particularly after that award was issued*."

LEGAL ANALYSIS – PRELIMINARY REMARKS

The contemporaneous documentary evidence

899. In the light of my factual findings above, I turn next to the application of the law thereto. In a case such as this, it is important to keep firmly in mind the approach of Leggatt J (as he then was) in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), which was approved by Lord Kerr (in a dissenting judgment) in *R (on the application of Bancoult No 3) v Secretary of State for Foreign and Commonwealth Affairs* [2018] UKSC 3 at [103] as follows:

> "*Although said in relation to commercial litigation, I consider that the observations of Leggatt J in Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm), paras 15-22 have much to commend them. In particular, his statement at para 22 appears to me to be especially apt*:

> "*… the best approach for a judge to adopt … is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth*."

900. There is one caveat to this approach which is that as has been seen from the foregoing, in pursuit of the dishonest share stripping scheme a number of key documents were fabricated by Khun Nop and his co-conspirator defendants, being manufactured after the relevant event and then back-dated to make it seem as though they were contemporaneous. It is obviously important to distinguish between genuine, contemporaneous documents and fictitious documents which have been falsely created after the event. I have therefore been alive throughout to the fact in certain cases the documentary record is an unreliable indicator as to where the truth lies.

The burden of proof concerning allegations of fraud

901. The Claimants' case is that the defendants were all parties to a dishonest conspiracy to deprive them of their REC Shares and then payment for them. As I stated in *ED&F Man v Come Harvest and others* [2022] EWHC 229 (Comm), I bear in mind at all times that where fraud is alleged, cogent evidence is required by a claimant to prove it.

902. In *Foodco UK LLP v Henry Boot Developments Ltd* [2010] EWHC 358 (Ch), at [3] Lewison J stated that:

> "*The burden of proof lies on the* [claimants] *… Although the standard of proof is the same in every civil case, where fraud is alleged cogent evidence is needed to prove it, because the evidence must overcome the inherent improbability that people act dishonestly rather than carelessly. On the other hand inherent improbabilities must be assessed in the light of the actual circumstances of the case*."

903. In other words, the cogency of the evidence relied upon must be commensurate with the seriousness of the allegation: *JSC BTA Bank v Ablyazov* [2013] EWHC 510 (Comm) per Teare J at [76]. See also *Bank of St Petersburg PJSC v Arkhangelsky* [2020] EWCA Civ 408 at [44]-[47] per Vos C and [117] per Males LJ.

904. I also bear in mind that as to inferring fraud or dishonest conduct generally:

a. It is not open to the Court to infer dishonesty from facts which are consistent with honesty or negligence, there must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved: *Three Rivers District Council v Bank of England* [2001] UKHL 16; [2003] 2 AC 1, [55]-[56] per Lord Hope and [184]-[186] per Lord Millett.

b. The requirement for a claimant in proving fraud is that the primary facts proved give rise to an inference of dishonesty or fraud which is more probable than one of innocence or negligence: *JSC Bank of Moscow v Kekhman* [2015] EWHC 3073 (Comm) at [20] per Bryan J; *Surkis & Ors v Poroshenko & Anr* [2021] EWHC 2512 (Comm) at [169(iv)] per Calver J.

c. Although not strictly a requirement for such a claim, motive "*is a vital ingredient of any rational assessment*" of dishonesty: *Bank of Toyo-Mitsubishi UFJ Ltd v Baskan Sanayi Ve Pazarlama AS* [2009] EWHC 1276 (Ch) at [858] per Briggs J. By and large dishonest people are dishonest for a reason; while establishing a motive for conspiracy is not a legal requirement, the less likely the motive, the less likely the intention to conspire unlawfully: *Group Seven Ltd v Nasir* [2017] EWHC 2466 (Ch) at [440] per Morgan J.

d. Assessing a party's motive to participate in a fraud also requires taking into account the disincentives to participation in the fraud; this includes the disinclination to behave immorally or dishonestly, but also the damage to reputation (both for the individual and, where applicable, the business) and the potential risk to the "*liberty of the individuals involved*" in case they are found out: *Bank of Tokyo-Mitsubishi UFJ Ltd v Baskan Sanayi Ve Pazarlama AS* [2009] EWHC 1276 (Ch) at [858], [865] per Briggs J.

I apply these principles in reaching my conclusions below.

The factual witnesses

905. There is a particular need in the present case to rely upon the (genuine) documentary record in making key factual findings, because it is clear that several witnesses (for the Defendants) from whom I heard evidence were lying extensively to the Court and accordingly their evidence was wholly unreliable. The nature and extent of their lies was at times breathtaking, as was their relaxed attitude to the production of false documents in order to deceive and mislead others. It is plain that truth has become an alien concept to some of these defendants. This is, I find, especially true of Khun Nop (who seemed unable to give honest evidence about almost anything and who will say whatever he thinks will best promote his interests, regardless of its falsity); Khun Nuttawut (who in his loyalty to Khun Nop was willing to lie about anything which he perceived was of importance to Khun Nop's case); Khun Weerawong (who was firmly in Khun Nop's camp and drafted a whole range of false documents in his role as a lawyer); Khun Surat; Khun Thun and Mr

Lakhaney (who were both heavily involved in Khun Nop's dishonest scheme); Ms Collins (who was also involved in Khun Nop's dishonest scheme, albeit she took a somewhat less active role than Khun Thun and Mr Lakaney); and Madam Boonyachinda (who saw her role as being to act as the stooge of her son-in-law, Khun Nop, and to give any evidence required to support his case, regardless of its falsity).

906. Whilst Mr Suppipat occasionally gave less than straightforward evidence, I consider that that was, by and large, borne out of an understandable sense of grievance that he felt towards those Defendants whom he trusted but who had so thoroughly betrayed him. Overall I found him to be an honest witness.

Expert evidence on Thai Law

907. I heard a great quantity of expert evidence on Thai law from three expert witnesses who also served expert reports, namely Dr Munin Pongsapan for the Claimants; Professor Suchart Thammapitagkul for the Defendants other than D10; and Khun Anurak Niyamaveja for D10. I considered that each of these expert witnesses did his best to assist the court although I consider that Dr Munin and Professor Suchart were more impressive witnesses when giving evidence than Khun Anurak in terms of their knowledge of Thai law.

908. The proper approach to expert evidence of foreign law has been helpfully summarised recently in see *Deutsche Bank AG London v Comune di Busto Arsizio* [2021] EWHC 2706 (Comm) at [104]-[108] (Cockerill J) and *Banca Intesa Sanpaolo SpA v Comune di Venezia* [2022] EWHC 2586 (Comm) at [120]-[127] (Foxton J). Extracting some of the key principles derived from those authorities, I bear in mind and apply throughout this judgment the following principles in particular:

a. The Court is not entitled to construe a foreign code itself; it is the function of the expert witness to interpret its legal effect.

b. The task for the English court is to evaluate the expert evidence of foreign law and to predict the likely decision of the highest court in the relevant foreign system of law, rather than imposing his/her personal views as to what the foreign law should be, or allowing the expert to press upon the English judge his personal views of what the foreign law might be.

c. This Court may decide what conclusion a foreign court would reach on a developing area of law but it is not, however, seeking to make findings which go beyond the present state of foreign law and to anticipate a rational development of it.

d. The more senior the court which gives the relevant court decision, or the greater the number of foreign court decisions to a particular effect, the more difficult it will be for the English court to conclude that, nonetheless, those decisions do not reflect the law of the relevant jurisdiction.

e. If there is a clear decision of the highest foreign court on the issue of foreign law, other evidence will carry little weight against it. That is generally so even if the decisions are unworkable in commercial practice or their reasoning illogical or inconsistent. When it falls to an English court to ascertain the content of foreign law, that means the law with whatever imperfections, policy-orientated determinations and impracticalities it manifests.

909. The Claimants' claim can be usefully divided into two parts. Part I concerns the alleged misrepresentations of Khun Nop and Khun Nuttawut; Part II concerns the subsequent asset stripping of REC (what the Defendants euphemistically term "ring-fencing") by a number of the Defendants. I shall deal with the application of the law to each Part in turn.

MISREPRESENTATION CLAIMS

The pleaded misrepresentations

910. In summary, the Claimants allege that three categories of misrepresentation were made in the period May to November 2015, as follows:

a. by Khun Nop and Nuttawut in negotiating the REC SPAs, to the effect that they were intending to give effect to the 'global transaction' (the "**Global Transaction Misrepresentations**", defined in paragraphs 36–48 of the RAPOC);

b. by Ms Collins, allegedly both on her own behalf and also on behalf of Khun Nop (but not Khun Nuttawut) to induce Mr Suppipat's companies to transfer their shares in accordance with the terms of the REC SPAs (the "**Watabak Representations**", defined in paragraph 53 of the RAPOC); and

c. By Khun Nop and Khun Nuttawut, to prevent the Claimants from attempting to rescind the REC SPAs (the "**First Payment Representation**" and "**Second Payment Representation**", collectively the "**Payment Representations**", defined in paragraphs 64 and 67 of the RAPOC).

The Global Transaction Representations

911. In the analysis which follows concerning the Global Transaction Misrepresentations, I set out why I find that:

a. The Claimants have sufficiently pleaded a case that Khun Nop and Khun Nuttawut committed an offence under section 341 (a "compoundable" offence) and section 357 of the Thai Penal Code ("**TPC**") (a "non-compoundable" offence);

b. On the facts, Khun Nop and Khun Nuttawut committed an offence under section 341 of the Penal Code, which gives rise to a civil claim under section 420 TCCC; but not an offence under section 357 of the Penal Code, such that in that respect the Claimant has no civil claim under section 420 TCCC;

c. However, the claim under section 341 of the Penal Code is time-barred. Had the claim under section 357 had merit, it would not have been time-barred;

d. Finally, no section 421 offence has been committed and therefore the claimants have no civil claim under section 420 in that respect.

912. For reasons which shall become apparent, it is convenient to begin first with the limitation analysis in (c) above. Then I shall explain why I find that the Claimants have sufficiently pleaded their case on (a), followed by an analysis of the merits of the case that there has been a breach of section 341 and/or 357 of the Penal Code. Last, I address briefly section 421 TCCC.

(1) Limitation

913. The Defendants contend, regardless of their merits, that the Global Transaction Representation (and the Watabak Representation) claims are time-barred as a matter of Thai law. Accordingly, I deal with this issue first.

914. Thai law, as the applicable law of the misrepresentation claims, applies to their limitation or prescription, pursuant to Article 15(h) of Rome II:

> "*The law applicable to non-contractual obligations under this Regulation shall govern in particular: … the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation.*"

915. It is common ground that the general (civil) limitation period in Thai law is one year, see s.448(1) CCC which provides as follows:

> *"[1] The claim for damages arising from wrongful act is barred by prescription after one year from the day when the wrongful act and the person bound to make compensation became known to the injured person, or ten years from the day when the wrongful act was committed.*

916. However, section 448(2) goes on to provide: *"[2] However if the damages are claimed on account of an act punishable under the criminal law for which a longer prescription is provided such longer prescription shall apply."*

917. The two elements for time to start running under section 448 TCCC are that (i) the injured person knows of the wrongful act; and (ii) the injured person knows of the person who is bound to make compensation.[674]

918. The Claimants' pleaded case as to date of knowledge is contained in its Re-Re-Re-Re-Amended Particulars of Claim (**RAPOC**), paragraph 164B, which reads:

> "*The Claimants gained the requisite knowledge in respect of the claims and the fact that they were actionable as a matter of Thai law no earlier than one year before they were commenced. The Claimants gained the requisite knowledge in respect of the Conspiracy, of which all of the wrongdoing set out herein formed part, no earlier than 7 May 2018, when NS's Companies first obtained the updated 2018 WEH Register. Alternatively, they gained the requisite knowledge of:*
>
> *164B.1 the claims in respect of the Global Transaction Representations made by NN in respect of his intentions, upon NN's testimony in the Arbitrations on 9 February 2017;*
>
> *164B.2 the claims in respect of the Global Transaction Representations made by Mr Phowborom, upon Mr Phowborom's witness statement in the Arbitrations on 25 November 2016;*
>
> *164B.3 the claims in respect of the Watabak Representations, upon Mr Reansuwan's witness statement in the Arbitrations on 25 November 2016; alternatively in January 2016; …*
>
> *164C. The claim form was issued on 7 August 2018. Any and all new claims added or substituted by way of amendment to these Particulars of Claim arise out of the same facts or substantially the same facts as a claim in respect of which the Claimants (or one or more of them) had already claimed a remedy in these proceedings, and are deemed (including for the purposes of any limitation defence) to have been commenced on 7 August 2018*."

919. The relevant Defendants in fact allege that the relevant knowledge was gained earlier – by the time of the Second Paris Meeting on 26 September 2015. They rely upon the following features of the evidence:

a. Mr Suppipat's evidence was that the reason for convening the meeting was "*I want the company back, because he misrepresented to me that he wanted to be my nominee*".[675]

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674 Munin Expert Report (**Munin 1**), [375]-[376]; Suchart Export Report (**Suchart 1**), [516].

675 Day 8/98:3–4.

b. The outcome of the meeting was, according to Mr Suppipat, that he knew that Khun Nop had "*defrauded*" him:[676]

> *"Q: You consider at this moment in time that Khun Nop had cheated you, didn't you?*
>
> *A: Absolutely. It was so obvious that he has defrauded me, he got my company.*

c. That evidence in cross-examination they say is consistent with a near-contemporaneous statement by Mr Suppipat in an email dated 8 January 2016 to Khun Nop and Khun Nuttawut, in which Mr Suppipat referred to the Second Paris Meeting and said he understood that "*you had tricked me and … you did not want to work together and act as my nominee*", and reported that "*I have thought long and hard about whether to sue you for fraud at the way you cheated me on the call options*".

d. That is further corroborated by a number of arbitration documents produced on behalf of Mr Suppipat's Companies in the first quarter of 2016, alleging the falsity of the Global Transaction Representations, and dishonesty and bad faith on the part of Khun Nop (Symphony's Request for Arbitration (26 January 2016), [59], [63] and [74]; Symphony's Application for Emergency Measures (26 January 2016), [37]).

920. This argument is advanced in particular by Khun Nop and Khun Nuttawut (**the HP Defendants**). I accept their submissions. It is clear in my judgment from the foregoing that, so far as the Global Transaction Representations are concerned, Mr Suppipat had knowledge both of the wrongful act (Khun Nop never had any intention to enter into Part B) and of the person who was bound to make compensation (Khun Nop) by the time of the Second Paris Meeting on 26 September 2015.

921. I also consider that so far as the first part of the alleged Watabak Representations is concerned, alleging that "*SCB was prepared immediately to sign the Watabak Facility and to permit Watabak to draw down on that facility*", and the risk of irreparable harm "*unless Watabak immediately drew down on the Watabak Facility*", Mr Suppipat had the requisite knowledge by 26 January 2016, in particular by reason of the fact that Arbitration documents from the first quarter of 2016 also indicate contemporaneous knowledge on his part by virtue of the Watabak Facility not being drawn on in accordance with the alleged misrepresentation. I refer in particular to NGI's letter to the WEH Managers of 30 March 2016, reciting "*conversations between Nick and Emma … in which you represented that the financing for the Watabak project was ready to be closed and that the transfer of the REC Shares was the only*

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[676] Day 8/101:8–11 (emphasis added). See also Day 8/113/12–15: "*Q: You have told this court that at this meeting you considered yourself having been cheated by Khun Nop … ? A: Yes, yes.*"

remaining impediment", and then noting that the facility was not in fact drawn down thereafter.

922. I do not consider, however, that Mr Suppipat had the requisite knowledge to bring the second limb of the Watabak Representation claims earlier than the pleaded date of 25 November 2016. The statements relied upon in the HP Defendants' closing submissions at paragraphs 395.4 and 395.5 are too general to establish the requisite knowledge.

923. But even on the Claimants' own case, it follows that, so far as the Global Transaction Representations and (the two limbs of the) Watabak Representations are concerned, the requisite knowledge was obtained more than a year prior to the commencement of these proceedings on 7 August 2018 (assuming that that date (and not 4 August 2020) interrupted limitation for the purposes of section 193(14) TCCC).

924. This raises two questions. First, what, if any, criminal offences do the Claimants allege in their pleaded case were committed by reason of the making of the misrepresentations; and second, if the Claimants do allege a criminal offence, can the Claimants take advantage of an extended limitation period under s. 448(2) TCCC on account of an act punishable under the criminal law, so as to avoid the claim becoming time barred?

925. So far as the first question is concerned, the Claimants' various misrepresentation claims are based on s. 420 TCCC which provides that:

> "*A person who, wilfully or negligently, unlawfully injures the life, body, health, liberty, property or any right of another person, is said to commit a wrongful act and is bound to make compensation therefor.*"

926. However, the Claimants also allege that two criminal offences were committed which constitutes the "*wrongful act*" in s. 420:

a. So far as the Global Transaction Representations are concerned, the Claimants rely as against Khun Nop, and Khun Nuttawut upon section 341 and 357 of the Penal Code.

b. So far as the Watabak Representations are concerned, the Claimants rely as against Khun Nop and Ms Collins upon section 341 and 357 of the Penal Code[677].

927. Those sections of the Penal Code provide as follows:

a. Section 341: "*Whoever, dishonestly deceives a person with the assertion of a falsehood or the concealment of the facts which should be revealed, and, by such deception, obtains a property from the person so deceived or a third person, or causes the person so deceived or a third person to*

[677] The other cases of action pleaded in the RAPOC are not acts punishable in Thai criminal law such that the ordinary 1 year limitation period applies, namely sections 5, 421 and 159 TCCC.

execute, revoke or destroy a document of right, is said to commit the offence of cheating and fraud, and shall be punished with imprisonment not exceeding three years or fined not exceeding six thousand Baht, or both."

It is common ground that Section 341 is a "*compoundable offence*". A compoundable offence is one in which (i) the victim and accused person "*can enter into a compromise and agree to have the charges dropped against the accused*"[678] and (ii) can only be investigated by an inquiry official if the injured person has made a "*complaint*"[679,680]. I address this further below.

b. Section 357: "*Whoever, assists in concealing, disposing of, making away with, purchases, receives in pledge or otherwise any property obtained through the commission of an offence, and such offence being theft, snatching, extortion, blackmail, robbery, gang-robbery, cheating and fraud, misappropriation or misappropriation by an official, is said to receive stolen property, and shall be punished with imprisonment not exceeding five years or fined not exceeding ten thousand Baht, or both. If the offence of receiving stolen property be committed for profit or against the property obtained by theft under Section 335 (10), robbery or gang-robbery, the offender shall be punished with imprisonment of six months to ten years and a fine of one thousand to twenty thousand Baht. If such offence of receiving stolen property is committed against the property obtained by theft according to Section 335 bis, by the robbery according to Section 339 bis, or by the gang-robbery according to Section 340 bis, the offender shall be punished with imprisonment of five to fifteen years and fined of ten thousand to thirty thousand Baht.*"

It is common ground that Section 357 is not a compoundable offence.

928. So far as the second question is concerned, it is first necessary to consider the expert evidence concerning extended limitation periods.

(a) Availability of longer limitation period in case of compoundable and non-compoundable criminal offences

929. The limitation analysis concerns four Thai law provisions in particular, namely section 448 TCCC; sections 95 and 96 of the Penal Code; and section 51 of the Criminal Procedure Code.

930. The starting point is section 448(1) TCCC which provides as follows:

[678] Munin 1 [30]

[679] Munin 1 [31]

[680] D's Thai Law Closing Submissions, [153]

> "*The claim for damages arising from [a] wrongful act is barred by prescription after one year from the day when the wrongful act and the person bound to make compensation became known to the injured person, or ten years from the day when the wrongful act was committed*."

931. Section 448(2) then provides:

> "*However if the damages are claimed on account of an act punishable under the criminal law for which a longer prescription is provided such longer prescription shall apply*." (emphasis added)

932. Thus, where a tortious claim is based on an act which is also punishable under the criminal law, a claimant may rely on the longer limitation period available under the criminal law. These periods are set out in ss. 95 and 96 of the Penal Code. Section 95 provides that:

> "*In a criminal case, if the offender is not prosecuted and brought to the Court within the following specified period of time as from the date of the commission of the offence, the prosecution shall [b]e precluded by prescription .... (3) Ten years in cases of offences punishable with imprisonment of over one year up to seven years*"

933. However, in the case of a <u>compoundable</u> offence section 96 provides as follows:

> "*Subject to Section 95, in case of [a] compoundable offence, if the injured person does not lodge a complaint within three months as from the date of the offence and offender to be known by the injured person, the criminal prosecution is precluded by prescription."*

934. Finally, section 51 of the Criminal Procedure Code provides that:

> "*Where no prosecution has been brought against any offence, the victim's right to enter <u>a civil action</u> on the basis of such offence shall be extinguished when the period of prescription fixed by the [Penal Code] for such prosecution does lapse*."

935. Mr Penny KC, for the HP Defendants, relies upon s. 96 of the Penal Code to make a distinction between the circumstances in which the 10-year prescription period is available in regard to non-compoundable offences, as compared to compoundable offences such as ss. 341 and 350 Penal Code.

936. He submits that, with regard to compoundable offences, the injured party must (under section 96 of the Penal Code) lodge a criminal complaint within 3 months of the date of the offence in order to be able to rely on the longer prescription period under s. 448(2) TCCC and s. 95 of the Penal Code for their civil action[681]. If they fail to do so, the longer prescription period does not apply (as "*the criminal prosecution is precluded by prescription*") and instead the

[681] D1 & D17 Written Closings [400.1], Suchart Second Expert Report (**Suchart 2**), [76]

original un-extended 1 year period under section 448(1) only applies. This accords with the view of Professor Suchart.

937. However, Professor Suchart acknowledges that there are two schools of thought on the matter. The first school of thought is that "*when a criminal offence was committed, it has become an offence and the longer period of the criminal prescription is applicable ... regardless of the reason of a failure to commence the criminal action*"[682]. The second school of thought is that "… *even though s. 96 states that it is subject to s. 95, this is because s. 95 is the general provision governing criminal prescription periods. For a compoundable offence, once s. 96 starts to run, because the injured person knows of the offence and the person who committed it, s. 96 will no longer be subject to s. 95 and instead operates as an exception to it. If no action is taken by the injured person within 3 months from his knowing of the offence and who committed it, the criminal action will be barred by prescription for the purposes of section 96. This in turn means that the injured person can no longer rely on the general provision of section 95 to extend the prescription for the purposes of a civil action*."[683]

938. In support of the first view, Professor Suchart refers to Supreme Court Decision No. 4076/2533. The judgment states as follows:

> *"The Plaintiff, as the injured party in a compoundable criminal offense, failed to file a complaint within 3-month statutory period, rendering the criminal case time-barred as per Section 96 of the Criminal Code. However, this does not render the civil case in relation to the criminal case to become time-barred as per the First Paragraph of Section 51 of the Criminal Procedure Code, as* ***the filing of complaint is a step to be made upon filing criminal case, and is not related to the filing of civil case in relation to the criminal case****."* (emphasis added)

939. Unless the court intended by this merely to refer to the fact that the civil action still benefited from a 1 year limitation period (which it may have done), I consider the reasoning in this case to be problematic. Section 51 provides that: "*where no prosecution has been brought against any offence, the victim's right to enter a civil action on the basis of such offence shall be extinguished when the period of prescription fixed by the [Penal Code] for such prosecution does lapse"* (emphasis added). The failure to file a complaint in this case within the three month period surely meant that the period of prescription fixed by the penal code for the compoundable offence lapsed after 3 months.

940. In support of the second view, Professor Suchart cites the Commentaries of the late Professor Police Major General Sa-nga Duang-amporn and Professor Prachak Buddhisombat[684]. Professor Prachak in particular puts the point succinctly. He considers that section 51, paragraph 1, of the Criminal Procedure

[682] Suchart 1 [77]

[683] Suchart 1 [78]

[684] Suchart 2 [78]

Code "*is likely translated that the civil lawsuit relating to criminal lawsuit in respect of a compoundable offence shall have a prescription period of merely 3 months, provided that no complaint is filed*", although since this is shorter than the normal prescription period for a civil claim under s. 448(1), he concludes that the prescription period applicable to the civil claim for a compoundable offence should be one year as provided in s. 448(1). That makes logical sense.

941. Most significantly, this second view is strongly supported by another, more persuasive, Supreme Court Decision relied upon by Professor Suchart, namely SCD No 3032/2533. As he explains in paragraph 83 of his second report, in that case the Court dismissed a (compoundable) criminal case because it was barred by prescription under s. 96. The plaintiff brought a civil claim against the defendant claiming damage for defamation. Prior to bringing this civil claim, the plaintiff joined as a co-plaintiff the public prosecutor in a criminal case against the defendant for the same offence. The criminal case was dismissed during the trial of the civil action, owing to the fact that the plaintiff failed to lodge a petition with the police within 3 months from the date he knew of the offence and of the person who committed it. It was held that the criminal case was duly barred by prescription pursuant to s. 96 of the Penal Code. Consistently with Professor Prachak's analysis, the Court held that this meant that the applicable prescription for the civil claim was 1 year from the date the injured person knew of the wrongful act and of the person who was to make compensation as provided in s. 448(1).

942. Further, the HP Defendants rightly point out that the second view, and Professor Suchart's support for it, was not challenged by the Claimants.

943. The HP Defendants also submit that Dr Munin does not address this issue in his Reports. Whilst it is true that Dr Munin does not specifically acknowledge the debate regarding the circumstances in which compoundable offences can benefit from the longer prescription period under s. 448(2) in his evidence[685], he does opine that "[*s]ection 51 paragraph 1 is consistent with s.448 paragraph 2 in providing that, despite the absence of criminal proceedings, the injured person who only seeks damages in tort (and does not bring a criminal complaint) can still benefit from the longer limitation period determined by s. 95 of the Penal Code*"[686]. Accordingly, it appears that Dr Munin is of the first school of thought set out above, and I therefore have to choose between Professor Suchart's view and Dr Munin's view.

944. I consider that Professor Suchart's interpretation (and the second view) is much more persuasive on this issue. I consider that his interpretation is consistent with section 448(2) of the TCCC in that if a complaint is not lodged within three months, since the criminal prosecution is precluded by prescription, the damages cannot be said to be "*claimed on account of an act punishable under the criminal law for which a longer prescription is provided*".

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[685] Footnote 484 of joint Thai Law Propositions Document

[686] Munin 1 [385]

It follows that the un-extended 1 year limitation period applies. This conclusion is also consistent with the experts' agreement that where criminal proceedings are instituted but subsequently dismissed, the prescription period reverts to the one year period in s. 448(1).[687] Most importantly, Professor Suchart has the weight of Supreme Court Decision No. 3032/2533 behind his opinion (as well as Thai academic opinion which I consider to be persuasive).

945. It follows that the Claimants' civil s. 420 TCCC cases, based upon s. 341 of the Penal Code, fail. It is a compoundable criminal offence and no complaint was made within 3 months. No criminal complaint was lodged by the Claimants in relation to alleged offending against s. 341 by way of the Global Transaction Representations and Watabak Representations.

946. However, the s. 357 claim does not fail for limitation as it is a non-compoundable offence with the benefit of the ten-year limitation extension (although as will be seen I go on to find that it is not made out on the merits).

947. Although I have found that the alleged offence under section 341 claim is time barred (but the section 357 claim is not), for completeness I address next the nature of the relevant offence under both (i) section 341 and (ii) 357 of the TCCC and the merits of the Claimants' case that a criminal offence has been committed under each section.

(2) Is the Section 341 offence sufficiently pleaded?

(a) Section 341: elements of the offence

948. It is common ground that to hold a person criminally liable for fraud under s. 341, the following elements must be proved:

a. a person dishonestly deceives another person;

b. with the assertion of a falsehood or by the concealment of facts which should be revealed;

c. to obtain property from the person deceived or a third party, or to cause the person deceived or a third party to execute, revoke or destroy a document of right.

949. So far as (a) is concerned ("*a person dishonestly deceives another person*"), if the deception is said to have taken place by a positive misrepresentation (i.e. "*with the assertion of a falsehood*"), then that must be a misstatement of fact.[688] As explained by Professor Suchart and accepted by Dr Munin, that excludes a

[687] Paragraph 187 of List of Agreed Thai law propositions.

[688] Suchart 1 [254]: "*must assert a falsehood of the facts*".

representation about the future, *though the representor's present intention may be a 'fact' for these purposes*.[689]

950. It is therefore common ground that a statement of present intention, or an assertion or promise that the defendant will do something in the future, will not be contrary to s. 341 unless the defendant, at the time of making the statement, assertion or promise, had no intention to do what he said he would do.[690]

951. It also follows that a true statement cannot fall within s. 341, even if the maker of that statement believes it to be false.[691]

952. The deception must have been done "*dishonestly*". The expression "*to commit an act dishonestly*" is defined in s. 1(1) of the Penal Code as follows: '*to acquire any advantages for himself or for other persons, to which he is not entitled by law.*'[692] Dr Munin accepted that this meant that the defendant "*needs to set out consciously to acquire the advantages for himself or for other persons to which he's not entitled*".[693]

953. One aspect of this is that the defendant must have had an intention to deceive the victim.[694] The defendant must have had that intention prior to or at the time of making the false statement (or concealment) for there to be an offence contrary to s. 341.[695]

954. So far as (b) is concerned ("*with the assertion of a falsehood or by the concealment of facts which should be revealed*"), a s. 341 offence may be based on non-disclosure ("*concealment of the facts which should be revealed*"), but only where the defendant has a positive duty to reveal the relevant facts. It is common ground that such duty can be derived from a legal duty, a contractual duty and prior acts, but not from a mere moral duty.[696] Thus, where concealment is relied upon it is required to be shown that the defendant had a duty to disclose to the relevant victim the specific fact, the non-disclosure of which is relied upon.

955. So far as (c) is concerned ("*to obtain property from the person deceived or a third party, or to cause the person deceived or a third party to execute, revoke or destroy a document of right*"), the first part of this element requires a transfer of ownership or title of property (whether from the victim or from a third party) to the person who has carried out the deception. For these purposes, 'property'

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[689] Suchart 1 [254], [257] (not challenged); Munin 2 [106]; Thai Law Propositions, [55]; Munin XX {Day 37/140:18} – {Day 37/141:3}.

[690] List of Agreed and Disputed Thai Law Propositions (**TLP**) [55]; Munin 2 [106]; Suchart 1 [254], [257]

[691] Suchart 1 [259]

[692] Suchart 1 [268]; accepted by Dr Munin {Day 37/139:20-24}.

[693] Day 37/140:1-5

[694] Suchart 1 [268]; Munin 2 [110]; Munin XX {Day 37/140:5}: "*there must be an intention*".

[695] TLP [59]; Suchart 1 [269]; Munin 2 [110]; Munin XX {Day 37/140:24}-{Day 37/141:3}.

[696] TLP [58]; Suchart 1 [265]-[267]; Munin XX {Day 37/141:8-24}.

can include tangible or intangible property (the word "*Sab sin*" is used).[697] This is agreed between the experts: "*Commentaries generally agree that the obtaining of property for the purposes of s.341 means transfer of ownership or title of the property from the victim to the doer*".[698]

956. It is common ground that 'but-for' causation must be shown, in that the obtaining of property (or execution, revocation or destruction of a document of right) must be the direct result of the dishonest assertion of false facts or concealment of facts which should have been revealed.[699]

(b) The pleaded case

957. With those elements of the offence in mind, the HP Defendants contend that the Claimants have not properly pleaded and proved their case under section 341 in any event in order to take advantage of an alleged extended period of limitation, and a dispute arises concerning the level of specificity required in the plaint.

958. Dr Munin's opinion is that, so long as a civil claim is pleaded which has facts that "*could constitute criminal liability*"[700], it is "*not necessary … to plead expressly the facts that give rise to a criminal offence in a civil claim or specify a criminal offence that the defendant was alleged to commit*"[701]. He cited Supreme Court Decision No. 8722/2561 in support of this proposition[702] ("*the criminal offence described by the Plaintiff in the plaint was a single act that contravened more than one law*…").

959. However, the HP Defendants submit that it is necessary that a claimant shows that its plaint alleges (with proper particularity) the commission of a criminal offence[703]. Professor Suchart states that there is a need to have expressly pleaded the facts which give rise to the relevant criminal offence and that these facts need to be described "*in detail*"[704]. According to the procedural requirements of s. 172 CPC[705], an effective "*plaint*" should include an appraisal of the nature of the claim, the allegations on which the claims are based (including the acts or omissions giving rise to the liability in question, which must include the core criminal allegations) and the nature of any relief sought.[706] However, Professor Suchart accepted in cross-examination that "*if*

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[697] Munin 1 [196(3)]; Suchart 1 [262]

[698] Suchart 1 [261]; Munin 2 [108]

[699] Suchart 1 [260]; Munin 2 [107]

[700] Day 38/132:19-133:10 and in response to the Court at Day 38/134:4-16 .

[701] Munin 1 [381] and paraphrased in Claimants' Written Closings [1089]

[702] Munin 1 §381 F3/1/138

[703] HP Defendants' Thai law Closing Submissions [316]

[704] Suchart 1 [534]

[705] "*The plaint shall set forth clearly the nature of the plaintiff's claims of the relief applied for, as well as the allegations on which such claims are based*."

[706] Suchart 3 [22]; [24]–[29]

everything is sufficiently described so that the court understands what it is [i.e. that it is a criminal offence], *that is sufficient*." [707]

960. The HP Defendants admit that there is no Supreme Court case law directly on the point of the need to allege with proper particularity the criminal offence's commission. However, they submit that Professor Suchart's evidence should be preferred for four reasons:

a. Firstly, by reason of Professor Suchart's greater practical litigation experience.

b. Secondly, SCD 8722/2561 does not in fact support Dr Munin's view; as Professor Suchart explained in his first report, in that case the plaintiff had in fact set out the relevant criminal acts clearly such that the Court identified the relevant criminal charges under the Penal Code, namely trespass and mischief[708].

c. Thirdly, it is difficult to see how the requirement under s. 448(2) that damages are "*claimed*" on account of an "*act punishable under criminal law*" could be satisfied when there has not been a pleading of an "*act*" which satisfies the element of the relevant offence.

d. Fourthly, it is "*intuitively correct*" that a party should not benefit from s. 448(2) if they cannot set out the facts required to constitute a criminal offence.[709]

961. In my judgment, as a matter of Thai law it is necessary and sufficient to set out in the plaint the facts which give rise to the commission of criminal offences, but it is not necessary to specify the actual criminal offences committed. I consider that this finding is consistent with SCD No. 8722/2561.

962. I further consider that the Claimants have sufficiently pleaded the facts which give rise to a criminal offence under section 341 of the Penal Code in paragraphs 36, 37 48, 49 and 50 and 152.6(b) of the RAPOC (see further below). Indeed, in their written closing the HP Defendants accepted that the Claimants' "*RAPOC pleads …that* [Khun Nop] *obtained the shares by deceit (i.e. offended against s.341)* …".[710] The same is true of Khun Nuttawut.

963. Thus, I accept that the s. 341 (and indeed s. 357) offence was sufficiently pleaded so as to allow the claimants to take advantage (in principle) of an extended limitation period.

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[707] Day 41/32:14

[708] Suchart 1 [534] 2

[709] HP Defendants' Thai law Closing Submissions [317]

[710] RAPOC, [152.6(b)]. Khun Nuttawut and Emma Collins are said to be liable as accessories: see [152.6(e)].

(3) The merits of the s. 341 offence

964. The Claimants' case in respect of the Global Transaction Representations is that Khun Nop, and Khun Nuttawut are guilty of fraudulent misrepresentations, causing the Claimants to lose their interest in REC and/or WEH or its value.

965. By the RAPOC the Claimants plead as follows:

"*36… NS* [Mr Suppipat] *and the WEH Managers therefore commenced negotiations with NN* [Khun Nop] *and Mr Phowborom* [Khun Nuttawut] *for an arrangement under which:*

36.1 NN (together with Mr Phowborom) would acquire indirect legal and beneficial ownership of 100% of REC from NS and the WEH Managers ("Part A");

36.2 following successful completion of the IPO (by which further WEH shares would be issued, but without diluting REC's stake in WEH below a majority), NN (together with Ms Collins and Mr Reansuwan) would cause 100% of the legal and beneficial ownership in REC to be sold back to entities owned by NS ("Part B").

37. Part A and Part B were inseparable elements which together constituted the "Global Transaction". As set out at paragraph 46 below, Parts A and B of the Global Transaction were each recorded with developing granularity in a "Deal Structure" presentation, a "Deal Structure Spreadsheet", a "Sale Structure" presentation, drafts of the call option agreements (the "COAs"), a "Steps Plan", and a draft Memorandum of Understanding between NN, NS, Mr Phowborom, Fullerton and Symphony (the "MOU") (together the "Transaction Documentation")….

48. In the course of the discussions set out at paragraph 46 above, NN and Mr Phowborom represented to the Claimants that NN and/or Mr Phowborom (and through them NN's Companies) were intending to give effect to the Global Transaction, and in particular to Part B as well as Part A (the "Global Transaction Representations"). The Global Transaction Representations were made:

48.1 by NN and Mr Phowborom, in the course of the Preliminary Discussions and at the First Paris Meeting;

48.2 by Mr Phowborom, at the Bangkok Meeting;

48.3 by NN and Mr Phowborom, by failing to correct the assumption that Part B formed part of the Global Transaction during those meetings and discussions and/or on receiving the Transaction Documentation as set out above.

49. The Global Transaction Representations:

49.1 where made to persons other than NS, were made to persons acting as his agent and/or intending and expecting that the persons to whom they were made would pass them on to NS, and were so passed on;

49.2 were made by NN and Mr Phowborom on their own behalf and on behalf of NN's Companies, and by Mr Phowborom on behalf of NN;

49.3 were continuing representations in that they had continuing effect up until NN subsequently reneged on Part B …

50. The Global Transaction Representations were false when made and NN and/or Mr Phowborom knew them to be false, or alternatively Mr Phowborom was reckless as to their truth or falsity. The true position was that NN and/or Mr Phowborom (and through them NN's Companies) always (alternatively by 27 July 2015 or by 24 August 2015) intended that REC be acquired for NN's or their own benefit, as should be inferred from the following…"

966. The HP Defendants make two initial attacks on the Claimants' Global Transaction misrepresentation case. First, they observe that the alleged representation is that there was an intention to give effect to "the Global Transaction". That is a defined term, defined by the Claimants as an "arrangement" which included, as an "inseparable" Part B, a post-IPO sale of "*100% of the legal and beneficial ownership in REC to be sold back to entities owned by [Mr Suppipat]*".[711] Notably, the HP Defendants submit, the Claimants do not attempt to identify within that definition any of the alleged terms of that sale, because they cannot — the terms of such a sale were never articulated in a clear and definitive fashion at any of the occasions on which it is claimed that the alleged representation was made. Therefore, it cannot realistically be said that Khun Nop and Nuttawut represented that they and through them Khun Nop's Companies, namely Fullerton and KPN EH, intended to enter a sale to entities owned by Mr Suppipat, come what may and on any terms.

967. I do not accept this submission. True it is that the terms of the post-IPO sale were never finalised. But that does not mean that the alleged representation - that Khun Nop and/or Khun Nuttawut (and through them Khun Nop's Companies) were intending, following successful completion of the IPO, to cause 100% of the legal and beneficial ownership in REC to be sold back to entities owned by Mr Suppipat - could not have been and was not made. The fact (if proven) that they represented that they intended to give effect to Part B could in principle have induced the Claimants to enter into the REC SPAs, even if the precise terms of part B of the transaction had not yet been agreed.

968. Second, the HP Defendants contend that the Claimants' witness evidence makes clear that their case is not that such a representation was ever *expressly* made by Khun Nop and/ or Khun Nuttawut. Rather they say that what was instead alleged was an implied representation (i) said to have been made on three specific occasions and (ii) said to arise from a failure to correct an alleged

711 RAPOC, [36]-[37]

assumption, as set out in RAPOC, paragraph 48. Accordingly, the HP Defendants allege, the Global Transaction Representations reduce to an allegation that there was an (i) implicit (ii) collateral representation (iii) made orally or by silence of (iv) an intention to enter into an arrangement (v) the terms of which were to be agreed.

969. I do not accept this. Paragraph 48 of the Claimants' RAPOC, coupled with Mr Suppipat's evidence to the court (set out above) was clear: the Global Transaction Representations were expressly made by Khun Nop and Khun Nuttawut and he was thereby misled. Three separate events are relied upon by the Claimants in their pleaded case concerning when the representations were alleged to have been made, namely (i) the preliminary discussions (by Skype) on or around 17 May 2015; (ii) the First Paris Meeting on 29 June 2015; and (iii) the Bangkok Meeting on 16 July 2015. The REC SPAs were entered into on 19 June 2015 and were Amended and Re-Stated on 3 July 2015.

970. I find that Khun Nop and Nuttawut did commit an offence contrary to s. 341.

971. With regards to the requirement of a misrepresentation, I have set out above in the factual narrative my reasons for accepting the evidence of Mr Suppipat that Khun Nop and Khun Nuttawut orally represented to him that their intention was to give effect to the Global Transaction, in particular to Part B, when – as their actions after they so represented make clear - in fact they held no such intention. In falsely representing their intention to enter into Part B when they had no such intention, they intended to deceive Mr Suppipat into causing his companies to enter into the REC SPAs which they would not otherwise have done; they did deceive him, and Khun Nop thereby obtained the REC shares from Mr Suppipat. It follows that the obtaining of the REC shares by Khun Nop was the direct result of the dishonest assertion of false facts by Khun Nop and Nuttawut.

972. The necessary elements of section 341 are accordingly satisfied in that I find that Khun Nop and Khun Nuttawut:

a. Dishonestly represented, during the Preliminary Discussions in May 2015 and the First Paris Meeting on 29 June 2015, that Khun Nop intended to give effect to the Global Transaction (i.e. Part B as well as Part A).

b. Failed to correct those representations, or Mr Suppipat's understanding that Part B formed part of the Global Transaction, both during meetings and discussions and on receipt of the transaction documentation between May and August 2015.

c. Knew that such representations were false, in that Khun Nop (and Nuttawut) always intended that REC would be acquired for Khun Nop's own benefit.

d. By acting as they did and with such knowledge, Khun Nop and Khun Nuttawut intended that Mr Suppipat would be deceived into relying –

and Mr Suppipat did so rely – on such representations, by his companies entering into the REC SPAs and the Amended and Re-Stated REC SPAs and transferring the REC shares to Khun Nop's Companies despite the fact that the COAs were not yet in place.

e. Khun Nop accordingly received, through his companies, the REC shares, being property obtained through the commission of an offence contrary to s. 341 Criminal Code. Moreover Khun Nuttawut also received REC shares under the Amended and Restated REC SPAs - see Condition Precedent 4.1.4 thereof - having joined in the misleading of Mr Suppipat so far as the Global Transaction Misrepresentation is concerned. Moreover, the person deceived (Mr Suppipat) was caused to execute a document of right, which is defined by s. 1(9) of the Penal Code as being "*a document evidencing the creation, modification, transfer, reservation or extinction of a right*". Professor Suchart confirmed that that would include a contract which transfers rights to property (including shares), money or future performance[712]. The REC SPAs as originally concluded and as Amended and Restated are such contracts for the purposes of section 341.

973. I add that the fact that the REC SPAs also contained terms excluding reliance by Mr Suppipat's Companies on prior representations,[713] and were assented to by Mr Suppipat in reliance on legal advice, does not help the HP Defendants because clause 12.2.4 provides that "*Nothing in this clause 12.2 excludes or limits any liability for fraud*."

974. In the circumstances I find that the constituent elements of section 341 are pleaded and proved by the Claimants so far as each of Khun Nop and Khun Nuttawut is concerned. It follows that had the claim not been time barred as a matter of Thai law, the claim would have succeeded, subject to proof of the other elements of section 420 TCCC which I turn to next.

(4) The requirements of s. 420 TCCC

975. The Claimants rely upon the breach of section 341 as an unlawful act alleged to have injured them for the purposes of section 420 TCC. In order to consider whether this reliance was well founded had the claim not been time barred, it would have been necessary next to consider the constituent elements of section 420 and what the Claimants are required to prove in that respect.

976. Section 420 TCCC provides as follows:

[712] Day 40/106:4-12

[713] See clauses 12.2.1 and 12.2.2.

> "*A person who, wilfully or negligently, unlawfully injures the life, body, health, liberty, property or any right of another person, is said to commit a wrongful act and is bound to make compensation therefore [sic]*."

977. The elements of s. 420 TCCC are agreed to be: (i) a person committed an act; (ii) they did so wilfully or negligently; (iii) the act was unlawful; (iv) the act injured one of the specified interests ("*life, body, health, liberty, property or any right of another person*"); and (v) the establishment of the necessary causal link between the injury and the damage.

978. So far as the Global Transaction Misrepresentations are concerned, I find as a fact that each of elements (i), (ii), (iii) and (v) are satisfied. Whether element (iv) is satisfied is highly contentious for the reasons which follow.

979. Element (i) is satisfied – Khun Nop and Khun Nuttawut acted by making the Global Transaction misrepresentation.

980. Element (ii) is satisfied - it is common ground between the experts that "*For an act to be committed 'wilfully', the actor must be conscious that his act might cause damage of some nature when he/she committed it.*[714] *For that purpose, it is sufficient that the defendant knows that theoretically there might be adverse consequences from his act.*[715] *In other words, the actor must be conscious of the potential negative consequences of his/her conduct on the claimant.*[716] *It is not necessary for the actor to intend or know the specific consequences or the gravity of the consequences.*[717]" Applying this test, there is no doubt that Khun Nop and Khun Nuttawut committed the act wilfully and they wilfully committed an unlawful injury to the Claimants.

981. Element (iii) is satisfied – the act is specifically proscribed by Thai law (section 341).

982. Element (v) is satisfied – the Claimants' right (to the shares) was injured as a direct result of the wrongful act on which the section 420 claim was based.

983. So far as element (iv) is concerned, it is common ground between the experts that no cause of action arises under s. 420 TCCC unless there has been damage or injury to a "*right of the injured person that is recognised by law.*" This requirement follows from the text of s. 420 TCCC: "*... injures the life, body, health, liberty, property or any right of another person*".

984. Thus, the claimant must (i) identify a right, (ii) show that it has been injured, and (iii) show that it comes within the class of rights that Thai law regards as being "*recognised by law*". Further, the Defendants maintain that the right must be a right "*of the injured person*" (not the right of a third party).

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[714] Munin 1 [44]; Suchart 1 [34]

[715] Munin 1 [46]-[48], [50]; Suchart 1 [37]

[716] Anurak Expert Report (**Anurak 1**) [58].

[717] Anurak 1 [58]; Munin 1 [46]; Suchart 1 [37].

985. There is a dispute between the parties as to whether the injury must be to a so-called "absolute" right or whether injury to a "relative" right suffices. However, whilst this dispute becomes relevant in the context of the asset stripping claims of the Claimants (and I deal with it in that context below), for the purposes of the Global Transaction Representation claims, even assuming that the Defendants are correct in contending that the injury must be to absolute rights, an absolute right of the Claimants was unlawfully injured, namely their property right (to the shares) by reason of the fraud committed under section 341.

986. Therefore, I would therefore have found that the Claimants had proved their claim in damages against Khun Nop and Nuttawut under sections 420 (based on s. 341 Penal Code) in respect of the Global Transaction Representation (subject to this claim not being an abuse of process, which I address below), had it not been time-barred as explained above.

(5) The merits of the s. 357 offence

987. Although the claim under section 357 of the Penal Code is not time barred, there is, in any event, a short answer to that claim on the merits.

988. Section 357 is concerned with the *receipt of property*. The first issue to address is what is meant by 'property' in this context. The HP Defendants submit that this is a reference to the acquisition of physical possession of *tangible or corporeal property*, relying upon Professor Suchart's opinion. His evidence was that the Thai word in s. 357 translated as "*property*" in English is "*Sab*", which means only corporeal property; and that the offence should be strictly interpreted and not extended to receipt of incorporeal property.[718] If this is right, then the s. 357 claim must fail because the relevant "property" in this case consisted of shares which are incorporeal property.

989. Dr Munin accepted that the Thai word used in s. 357 ordinarily means *corporeal* property.[719] However, he pointed out – citing academic commentary from Professor Jitti[720] – that, as s. 357 is associated with, and refers to, various criminal offences – including "*cheating and fraud*" under s. 341 TPC, which does cover <u>both</u> corporeal <u>and</u> incorporeal property – s. 357 can also apply to incorporeal property obtained through fraud.[721]

990. Moreover, in the recent Supreme Court Decision No. 1184-1187/2565, acts relating to <u>incorporeal</u> property were held to constitute criminal offences under

[718] Suchart 1, [302].

[719] Munin 2, [104]

[720] *Commentary on the Penal Code Part 1* (9th edn, 1993), p. 1028. According to Munin 1, [209], Professor Jitti states: "*the object of crime is property acquired through crime. The term 'property' must be understood in accordance with each related offence referred to by section 357. For example, it could mean electricity for theft and <u>incorporeal property</u> for criminal fraud …*" (emphasis added).

[721] Munin 1, [207]-[209]; Munin 2, [104]-[105]; Day 37/147:17-151:20; Day 39/68:10-70:3.

(*inter alia*) s. 335 TPC, despite that provision (like s. 357) using only the word "*Sab*". Professor Suchart's only answer to this, in cross-examination, was that the Supreme Court was wrong: Day 40/97:20-98:2. I do not accept that.

991. Moreover, the fact that each of the five s. 357 Penal Code cases in evidence involve the receipt of tangible property does not lead to the conclusion that it *cannot* apply to incorporeal property.

992. In my judgment, there is no reason to limit s. 357 in the way suggested by Professor Suchart and Dr Munin's evidence on this issue is to be preferred.

993. However, the real problem with the Claimants' section 357 claim is that section 357 concerns an offence of dealing with "*property obtained through the commission of an offence*" by parties other than the offender in relation to that property. The relevant property here is the REC shares which the Claimants claim (and I accept) was obtained through the various misrepresentations, contrary to s. 341 TPC.

994. The Thai law experts agree that the offender under s. 357 must be different from the person who committed the offence in obtaining the relevant property:

a. "*The doer must not be the person who has already committed any of the offence[s] provided in s. 357. In other words, the person who commits a theft of any property cannot commit the offence of receiving the stolen property"* (Suchart 1 [300])

b. "*The Defendant can be liable under s.357 Penal Code where he or she has not committed an original offence stated in s.357*" (Munin 2 [125]).

c. Dr Munin confirmed this was the case in cross-examination,[722] and Professor Suchart's evidence on this point was not challenged.

995. The fundamental problem with the Claimants' claim under section 357 therefore – which was only added by way of a later amendment at paragraph 152.6(c1) of the RAPOC - is that they allege that Khun Nop both made the representations and received the REC Shares under the REC SPAs, allegedly contrary to section 357. But the offender under s. 357 must be different from the person who committed the offence in obtaining the relevant property in order for an offence to be committed. Khun Nuttawut did not receive any property under the REC SPAs. In the circumstances, despite the fact that this claim was not time-barred, the section 357 claim must fail on the merits against both Khun Nop and Khun Nuttawut and so, therefore, must the section 420 civil claim.

[722] Day37/145:23 – 146: 14

(6) s. 421 TCCC: Abusing Cs' rights

996. Finally so far as the Global Transaction misrepresentations are concerned, the Claimants also plead in paragraph 152.6(a) of the RAPOC that Khun Nop and Khun Nuttawut are in breach of section 421 of the TCCC in that they had the purpose of causing injury to the Claimants.

997. Section 421 TCCC provides that:

> "*The exercise of a right which can only have the purpose of causing injury to another person is unlawful*."

998. However, since section 421 is concerned with liability for otherwise lawful conduct, I consider that it is of no application in this case, as the Global Transaction Misrepresentation, which was dishonestly made, was an unlawful act for the purposes of section 420. Either the misrepresentation was unlawfully made (as I have found, in which case it falls within sections 341 and 420) or it was not.

999. In any event, I do not find that the conditions of a section 421 claim are satisfied in this case for the following reasons.

1000. In his first expert report, Dr Munin's evidence was that s. 421 will be engaged where a defendant exercises his right with the *sole or primary* intention to cause harm to another person. He says this also encompasses a situation where the defendant exercises his right with the intention to benefit himself despite knowing that the corollary of his action is harm or damage to another person.[723] Dr Munin also says that it is not fatal to a s. 421 claim if the defendant has exercised a right for a lawful purpose, has acted reasonably in all the circumstances or honestly believed he was entitled to do what he did.[724]

1001. In his supplemental expert report, however, Dr Munin clarified his position. He reaffirmed that s. 421 applied in two scenarios: firstly, where the wrongdoer exercises their right with the sole intention to cause harm to another person; secondly, where the wrongdoer exercises their right with the intention to benefit themselves but the corollary of such action is unreasonable or excessive harm or damage to another person. His emphasis slightly changed insofar as he now focused, in the second scenario, on the fact that the harm has to be unreasonable or excessive.[725]

1002. Khun Anurak essentially agreed with Dr Munin. His evidence was that s. 421 is engaged where a defendant's act (i) has been undertaken with the *sole or dominant purpose* of causing injury to another person and (ii) causes that

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723 Munin 1 [86]-[88]

724 Munin 2 [68]-[71].

725 Munin 2 [64], [67]-[71].

other person a greater injury than would naturally or reasonably be anticipated by the normal exercise of that lawful right.[726]

1003. Professor Suchart maintained, by way of contrary argument, that s. 421 is engaged only in the first scenario where the defendant acts with the *sole intention* of causing injury to another person, citing Supreme Court Decision No. 1992/2538.[727] However, that decision does not in fact support his opinion, because the court simply found in that case that the act was not committed with the intention of damaging the claimant. Moreover, Professor Suchart's oral evidence on the difference between 'dominant' and 'sole' lacked sense – he sought to suggest that dominant meant sole in order to explain the inconsistency between his oral evidence and his written report. This was unconvincing.[728]

1004. Thus Professor Suchart finally accepted that the Court has in many instances considered s. 421 to be engaged even where it is found that a defendant obtained benefits from their action, but which were disproportionately small as compared with the damage/injury caused to another person; but he suggested that this was only where the detriment to the claimant is *out of all proportion to* the benefit obtained by the defendant.[729]

1005. Therefore, whilst there are only, perhaps, subtle differences in the approaches of the experts, I prefer Dr Munin's (and Khun Anurak's) formulation of the test, namely where the defendant exercises his right with the intention of benefiting himself despite knowing that the corollary of his action is unreasonable or excessive harm or damage to another person, section 421 will indeed be engaged.[730] This formulation was supported by a number of Supreme Court decisions, as well as the commentary of the Office of Judicial Affairs at the end of Supreme Court Decision 3815/2540, which referred to previous Supreme Court Decisions which "*follow the line of reasoning that where the defendant's conduct causes the plaintiff to suffer undue or unreasonably expected damage, that constitutes a wrongful act which gives the plaintiff standing to sue under 421*". Indeed, it was put to Dr Munin in cross-examination that this was a correct summary of this second test under section 421.[731]

1006. Applying these legal principles to the present case, I find as follows:

a. In making the dishonest Global Transaction Representations, Khun Nop stood to benefit by obtaining the REC shares.

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726 Anurak 1 [142].

727 Suchart 1 [161]-[162].

728 Day 41/55:21-57:21

729 Suchart [163].

730 Munin [86(b)]; Munin 2 [64].

731 Day 37/80:17-25. I add for completeness that Section 5 CCC provides that "*Every person must, in the exercise of his rights and in the performance of his obligations, act in good faith*." Good faith is not a source of obligation in its own right, in the sense that one cannot make an independent freestanding claim based on s.5 alone.

b. The corollary of this benefit was, necessarily, harm to Mr Suppipat and his companies in that Mr Suppipat would not have transferred the shares at all had he known that Khun Nop never intended to enter into the Global Transaction. However, as the Defendants submitted, I do not consider that it can be said that the corollary of Khun Nop and Khun Nuttawut's action was *unreasonable/unreasonably expected harm or damage or excessive* harm or damage to Mr Suppipat and his companies. The harm to them was simply the natural consequence of the relevant defendants seeking to benefit themselves financially.

c. Nor can it be said to have been the relevant defendants' sole or dominant intention, in making the Global Transaction Representation, to cause injury to Mr Suppipat and his companies. Their dominant intention was to enrich themselves (contrast this with the later transfer to Khun Kasem and onwards to the WEH Managers and their companies, where the dominant intention was to ensure that the arbitration awards could not be enforced by Mr Suppipat and his companies such that Mr Suppipat's companies would not receive payment under the REC SPAs).

1007. The requisite elements of section 421 are accordingly not established by the Claimants.

1008. In any event, s. 421 TCCC does not rely on a criminal offence; does not have the benefit of the ten year extended limitation period; and is accordingly time-barred.

The Watabak Representations

1009. In respect of the Watabak Representations, the Claimants' case is that Ms Collins and, through her, Khun Nop, are guilty of fraudulent misrepresentations which caused Symphony to lose its interest in REC and/or WEH or its value. The Claimants rely in their pleaded case upon section 420 TCCC and, once again, section 341 of the Penal Code.

(1) Merits

1010. The Watabak Representations are alleged to have been made by Ms Collins on a phone call with Mr Suppipat on 24 August 2015, "*on [Ms Collins'] own behalf and on behalf of NN*".

1011. The alleged representations are in two parts:

a. The substance of the first limb is that Symphony's minority interest in REC needed to be transferred so that the Watabak Facility could be concluded and drawn upon "*immediately*" to avoid "*irreparable harm*":

> "*[Ms Collins] expressly or impliedly represented … that: the Watabak project was at risk of irreparable harm which could be avoided only by the REC shares held by Symphony being transferred to Fullerton immediately (and in particular, earlier than the scheduled transfer of those shares on 31 August 2014 and before the COAs could be put in place), because (i) if but only if the shares were so transferred, SCB was prepared immediately to sign the Watabak Facility and to permit Watabak to draw down on that facility; and (ii) unless Watabak immediately drew down on the Watabak Facility, the Watabak project would be at risk of irreparable harm due to lack of financing*" (RAPOC, [53.1])

b. The second limb is as follows:

> "*[Ms Collins] expressly or impliedly represented … that: NS and Symphony's interests were protected by her and [Khun Thun], and thereby … that she knew of no reason why the contemplated Part B transaction would not go ahead.*" (RAPOC, [53.2])

1012. As a matter of Thai law, liability on the part of a putative principal for a representation alleged to have been made by an agent requires the representation to have been made "*with the approval or authorisation, or at the direction of*" the principal.[732]

1013. As against Khun Nop, the Watabak Representations claim is not sustainable as there is no documentary or witness evidence that any representation by Ms Collins was made "*on behalf of*" Khun Nop. Indeed, the Claimants did not put that allegation to either Ms Collins or Khun Nop in cross-examination. The Claimants do not plead that any representation by Ms Collins was approved or authorised by or made at the direction of Khun Nop and both Ms Collins and Khun Nop deny the alleged agency.[733] Mr Suppipat's own witness statement suggests that he understood Ms Collins *not* to be acting on behalf of Khun Nop,[734] and Mr Suppipat confirmed in his oral evidence that Ms Collins was not working for Khun Nop.[735]

1014. It follows that this alleged misrepresentation can only succeed, if at all, against Ms Collins.

1015. The Claimants' case is set out in paragraphs 177-187 of their closing submissions. The difficulty with that case is that on 24 August 2015, Khun Lek

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732 Suchart 1, [439], which was not challenged in cross-examination. Indeed, this proposition of law appears to be accepted by Dr Munin: see Munin 2, [176]; Day 39/28:13–21.

733 Khun Nop WS 1 [54]; Collins WS 1 [190]–[193].

734 Suppipat WS 4, [63]: "*I believed Emma as she had worked for me and we had a relationship of trust, and she was the CEO of WEH and Emma said that they (her and Thun) would protect Symphony's interests.*

735 Day 12/46:9–11: "*Q: And she was not working for Nop either, was she? A: No, no, she was not … .*"

(Ms Pongpitak), Mr Suppipat's PA, emailed the WEH Managers explaining that:

"*Once Emma talks to [Mr Suppipat] this afternoon, who will give me a greenlight to expedite the Share Transfer Document. I have coordinated with Link[later]s on the paper, heads up to Symphony and Fullerton already*

I am going to advise K. Lakkanasiri to provide Nune REC Shareholders book[736] *and this will be updated right after the signing*".

1016. In cross-examination, Mr Suppipat insisted that whilst he "*may have been considering*" the decision to transfer the REC shares from Symphony to Fullerton, there was "*no certainty that [he] will make the decision until [he] spoke to [Ms Collins]*". I do not accept that evidence. I find that this email demonstrates Mr Suppipat's own keenness to conclude the deal swiftly and that he was firmly of that mindset *before* he had his telephone call with Ms Collins. Ms Collins insists at [188] of her Witness Statement that she "*did not urge Mr Suppipat to move his shares*"; and she said in cross-examination that "*Lek had been chased by Linklaters, and … someone had to phone Mr. Suppipat and I agreed it would be me… to ask if he was going to move the shares.*" I accept Ms Collins' evidence on this issue as I do not consider that she needed to urge or persuade Mr Suppipat to move his shares. By this stage, he had the comfort of Khun Nop's representation that he intended to honour Part B of the Global Transaction and in reliance on that he had decided to enter into the REC SPAs. It made obvious sense to do so as swiftly as possible in order to secure the Watabak funding.

1017. Nor do I accept that Ms Collins made the implied representation alleged in paragraph 53.2 of the RAPOC. Mr Suppipat's evidence did not support such an implied representation. Ms Collins gave evidence that "*[t]hat is not what happened*"[737] and I accept her evidence. The evidence did not support the Claimants' case that she knew by 23/24 August that Khun Nop had decided not to proceed with Part B of the Global Transaction. As the HP Defendants and WEH Managers point out, the fact that in the period immediately following 24 August, the WEH Managers continued to negotiate and discuss the draft WEH Managers / Fullerton Services Agreement, which was part of a proposed incentive scheme contingent on the call option, is entirely inconsistent with the allegation that Ms Collins knew that Khun Nop had decided not to enter into a call option.

1018. In all the circumstances I find as a fact that the alleged Watabak misrepresentations were not made by Ms Collins and accordingly this element of the Claimant's case would have failed, regardless of it being time barred.

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[736] So as to show Khun Nop's company, Fullerton, as the new REC shareholder which could then be presented to SCB to secure the Wattabak funding.

[737] Collins WS 1 [193]

The Payment Representations

(1) Applicable law

1019. Just before the end of the factual evidence when the Claimants conceded that Thai law and not Chinese law applied to both the Global Transaction and Watabak Representation claims, it became common ground that Thai law applies to all of the Claimants' claims save for the Payment Representation claims and the claim under section 423 of the Insolvency Act 1986. English law applies to the Insolvency Act claims; so far as the Payment Representation claims are concerned, the Claimants maintain that Singapore law governs these claims, which is materially identical to English law.

1020. It is common ground that the law applicable to the claims is to be determined in accordance with Article 4 of Rome II.

1021. Article 4(1) provides that the law applicable to non-contractual obligations:

> "*shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.*"

1022. It is settled law that a cause of action is situated in the country where the action may be brought.[738]

1023. Applying this test to the Payment Representations, the Claimants contend that damage occurred upon Mr Suppipat's Companies losing their right to rescind the REC SPAs. The situs of that right was Singapore, where it would have been enforceable by Arbitration under the REC SPAs.[739]

1024. The HP Defendants contend, however, that the claims arising from the Payment Representations are governed by Thai law, relying on Article 4(3) of Rome II, which provides as follows:

> *"Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question."*

1025. The applicable principles under Article 4(3) are contained in the detailed analysis in *Avonwick Holdings v Azitio* [2020] EWHC 1844 (Comm) at [150]-[176] together with the succinct recent summary by Foxton J in *Kingdom of*

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[738] See Dicey, Morris & Collins on the Conflict of Laws (16th edn, 2022) ("***Dicey***"), Rule 136: *"Choses in action generally are situate in the country where they are properly recoverable or can be enforced"* and at §23-044: *"A right of action in contract or tort is situate in the country where the action may be brought"*

[739] See cl. 12.14: "*Any dispute arising out of or in connection with this Agreement, including…any non-contractual obligation…shall be resolved by arbitration in Singapore*".

Sweden v Serwin [2022] EWHC 2706 (Comm) at [80] (citing *Avonwick*, among others):

> "*i) The fact that Article 4(3) is an exception to the general rule in Article 4(1) does not mean that it should be given an overly restrictive construction, although true it is that article 4(3) represents an exceptional route and to avail itself of this route a party must overcome a high hurdle.*
>
> *ii) Before Article 4(3) applies, it is not required that the tort not be connected with the jurisdiction which would engage Article 4(1).*
>
> *iii) 'All the circumstances' as referred to in Article 4(3) might include a variety of features, including*
>
> *(a) Where the alleged wrongdoing was planned, orchestrated and implemented, which may involve focusing on the country in which the puppet masters pulling the strings carried out the relevant acts, even if other entities carried out the acts in one or more other countries;*
>
> *(b) The places of domicile of the parties;*
>
> *(c) The location of the damage arising from the tort, whether direct or indirect;*
>
> *(d) The location of the assets which are at the heart of the wrongdoing;*
>
> *(e) Any 'pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question'.*
>
> *iv) Article 4(3) has as its focus 'agreements in place before the allegedly tortious acts took place' and not 'mechanisms by which the allegedly dishonest scheme was implemented.*"

1026. The HP Defendants maintain that the test in Article 4(3) is satisfied in view of the following features of the claim:

a. all of relevant individuals are Thai (Khun Nop, Khun Nuttawut and Mr Suppipat), with Khun Nop and Khun Nuttawut living in Thailand;

b. the first payment representations, although made in France, were made in a conversation in the Thai language;

c. the second payment representations were made by telephone between Khun Nuttawut in Thailand and Mr Suppipat in France;

d. the alleged representations concern payment for the transfer of shares in REC, which in turn held shares in WEH, both being Thai companies;

e. the recipients of the share transfer payment which was the subject of the alleged misrepresentations were Khun Nop's Companies, which were either Thai or controlled from Thailand;

f. the alleged representations were allegedly made in respect of payments under the REC SPAs, which constituted the parties' pre-existing relationship at the time of the alleged misrepresentations, and which were governed by Thai law and provided for the sale of a Thai company, whose business was conducted in and concerned assets located in Thailand;

g. the alleged right to rescind arose under Thai law;

h. the share transfers were coordinated from Thailand by Khun Lek;

i. the alleged wrongdoing was allegedly planned, orchestrated and implemented in Thailand, with the alleged puppet masters (Khun Nop and Khun Nuttawut) being domiciled in Thailand;

j. one limb of the alleged representations relates to the Crown Prince of Thailand. Another limb relates to the source of funding from Khun Nop's wider Thai family whose business interests were in Thailand; and

k. the other wrongdoing which the Claimants allege is said to be part of an overarching conspiracy which is manifestly more closely connected with Thailand and governed by Thai law and it is now conceded that the other alleged representations (Global Transaction and Watabak) are governed by Thai law.

1027. Considered in light of the guidance in *Avonwick* and *Serwin*, the HP Defendants submit that on these facts the Court should find, by a wide margin, that the alleged Payment Representations claims are manifestly more closely connected with Thailand than any other jurisdiction, with the result that Thai law applies, as it now does to all other misrepresentation and 'conspiracy' claims advanced by the Claimants.

1028. I accept the HP Defendants' submissions. The Claimants did not address me on this topic in oral closing submissions, perhaps recognising the strength of the HP Defendants' arguments on this issue. They addressed it briefly in their written closing submissions at paragraph 813 but I consider it to be clear that the Payment Representation claims are manifestly more closely connected to Thailand than Singapore for all the reasons given by the HP Defendants. This was alleged wrongdoing orchestrated from Thailand, perpetrated by Thai domiciled parties, concerning Thai assets under a pre-existing contract governed by Thai law which provided for the sale of a Thai company, whose business was conducted in and concerned assets located in Thailand.

1029. In the circumstances, Thai law applies to the alleged Payment Representations, as it does to the other alleged misrepresentations. The Defendants accordingly overcome the high hurdle.

(2) Time bar

1030. Mr Fenwick KC accepted in closing that so far as the payment misrepresentation claims are concerned, unless they are governed by Singapore law, they are time barred as a matter of Thai law because no criminal offence is pleaded in relation to them.

1031. In the circumstances, the Payment Representation claims are time barred and must fail.

Abuse of process

1032. The HP Defendants also allege in paragraph 463 of their written closing submissions (and they advanced the case orally in closing) that even if there is merit in any of the misrepresentation claims, it is an abuse of process for the Claimants to bring these claims because, it is said, they were previously brought in the two arbitrations which the Third and Fourth Claimants brought against KPN Energy Holding Co Ltd and Fullerton.

1033. At paragraphs 111 and 111A(4) & (5) of the RAD, the HP Defendants contend that the Claimants' claims for damages (a) against Khun Nop and Khun Nuttawut under Section 420 TCCC arising from the Global Transaction Representations and Payment Representations, and (b) against Khun Nop arising from the Watabak Representations, and any associated Thai law conspiracy and any other related claims, are an abuse of the process of the English court.

1034. However, the HP Defendants confirmed in closing that they no longer contend that the asset-stripping claims are an abuse of process.[740]

1035. Since the Payment Representation claims and the Watabak Representation claims are bound to fail for the reasons set out above, I confine the abuse of process analysis to the Global Transaction Representation claims (although those claims are time barred for the reasons set out above).

(1) The HP Defendants' submissions

1036. The HP Defendants contend that it is an abuse of process for the Claimants to bring these claims in the English proceedings because:

a. All of the s. 420 TCCC misrepresentation (and related) claims fall within the scope of the arbitration clauses in the REC SPAs.

740 RAD, [111C]

b. The claims in the arbitrations were all governed by the same applicable law as the s. 420 misrepresentation (and related) claims in these proceedings.

c. To the extent that Mr Suppipat's Companies asserted the fraudulent misrepresentation claims in the arbitrations, which is the case as regards the Global Transaction Representations, they failed against Fullerton and KPN EH.

d. Mr Suppipat's Companies had the requisite knowledge at the relevant time to make all of the current claims in the arbitrations.

e. The matrix of fact considered in the arbitrations was the same matrix of fact falling for consideration in the English proceedings. The fact that some of the allegations have been recast somewhat does not prevent the current claim being an abuse.

f. As for Mr Suppipat:

    i. Mr Suppipat is either a *Gleeson* privy of his companies, that is a person where "*having due regard to the subject matter of the dispute, there [is] a sufficient degree of identification between the two to make it just to hold that the decision to which one was a party should be binding in proceedings to which the other is a party*"[741], or he is so close to being a *Gleeson* privy for the purposes of the abuse argument as to make no practical difference. An abuse of process may be found even where there is no identity of parties or privity. Mr Suppipat, and Mr Suppipat alone, is the sole beneficial shareholder of his companies; he participated fully in the arbitrations by giving evidence on their behalf (and was the subject of cross-examination); he and he alone gave instructions on behalf of his companies in the arbitrations and (if relevant) it is to be inferred that he funded his companies' legal costs in the arbitrations. Mr Suppipat caused his companies to sue Khun Nop's Companies as principals based on alleged representations allegedly made by Khun Nop (or Khun Nuttawut) - as the agent of Khun Nop's Companies - to Mr Suppipat as the agent of Mr Suppipat's Companies and now seeks to advance the same claims, or claims which could and should have been advanced by his companies, in his own name.

    ii. Even if, which is disputed, Mr Suppipat has standing in Thai law to make his personal claims for damages under s. 420 TCCC in the English proceedings against Khun Nop and Khun Nuttawut,

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741 *Gleeson v Wippell & Co Ltd* [1977] 1 WLR 510. And see Warren J in *Dadourian v Simms* [2006] EWHC 2973 (Ch), at [721] *"This all goes to illustrate that the question whether one person is privy on another is highly fact-dependent. The fact that a particular relationship (e.g. solicitor/client or director/company) exists in one case, where the circumstances are such that there is no privity, does not mean that, judged against the facts of another case, that same relationship might not be a very important factor in establishing that there is privity."*, cited with approval by Briggs J in *Potiwal*, below.

those personal claims add nothing to the claims of Mr Suppipat's Companies and are entirely derivative of the claims of his companies. Save for his presence as a claimant, there is identity between the claimants in the arbitrations and the claimants herein.

g. As for Fullerton and KPN EH, in the arbitrations those companies were alleged to be liable for incidental fraud owing to the acts and omissions of Khun Nop and Nuttawut, who gave evidence for those companies. Khun Nop is or is close to being a *Gleeson* privy of Fullerton, which at all material times was 100% under his ownership and control; he also exerted effective control over KPN EH, together with Khun Nuttawut. Khun Nop was accepted by all parties to be the principal whose acts of fraud would bind his companies. Even if he is not a privy, however, his interest in not being forced to face the same claim, under a different guise, where he was forced to give the same evidence, on the same issues falls to be protected by the wider abuse doctrine.

h. The case falls within the 'spirit' of the doctrine of issue estoppel, although the allegations are made against those individuals who caused Fullerton and KPN EH to act and/or omit to act so as to give rise to liability; the reality is that the claimants allege that Khun Nop and Khun Nuttawut are jointly and severally liable with Fullerton and KPN EH for the alleged fraud. Not only were Fullerton and KPN EH named as defendants to these proceedings on the original claim form, before being removed by amendment (doubtless for jurisdictional reasons in light of the arbitration clauses), but it continues to be alleged, for example, that the defendants conspired with Fullerton and KPN EH[742], that the Global Transaction Representations[743], First Payment Representations[744] and Second Payment Representations[745] were made on behalf of Fullerton and KPN EH.

i. It is therefore abusive for Mr Suppipat and his companies to litigate against Khun Nop and Khun Nuttawut the same issues that were dismissed in the ICC arbitrations or which could and should have been made and which should be treated as having failed before the Tribunal.

(2) The Claimants' submissions

1037. The Claimants contend that the Global Misrepresentation Claims are not an abuse of process because "*the claimants in each set of proceedings are seeking different remedies against different defendants. Even if that were not the case,*

742 RAPOC, [41] and [42]

743 RAPOC, [49.2]

744 RAPOC, [65]

745 RAPOC, [67]

the Tribunal's reasons for declining to decide the relevant claims in the Arbitrations would not make any aspect of these proceedings abusive".

1038. The Claimants also contend that this is not an issue that the relevant defendants should have "*left to fester*" until trial, let alone until closing submissions, relying upon *Aldi Stores Ltd v WSP Group plc* [2007] EWCA Civ 1260 at [42] per Longmore LJ:

> *"The parties should have raised the possible difficulties of a further set of proceedings with the court at a stage when the matter could have been sorted out in a proper way at a Case Management Conference and not left it to fester in a way that has now made the difficulties problematic, time-wasting and expensive at a later stage."*

1039. These proceedings were issued in August 2018; the Second Partial Awards are dated 5 June 2019. The HP Defendants amended their Defence in order to plead an abuse of process defence on 1 April 2022[746]. The HP Defendants only addressed substantively the abuse of process defence in their written Opening and Closing submissions. The Claimants maintain that that approach should itself lead to the Court rejecting the arguments – with the Defendants' conduct in raising, but not properly pursuing, abuse arguments itself amounting to an abuse of process.

1040. In a passage in the judgment of Lord Millett in *Johnson v Gore Wood* [2002] 2 AC 1 at [61], Lord Millett considered a situation where proceedings were started in 1991 by W Ltd, through which Mr Johnson conducted his affairs, which led to a settlement sum being paid to W Ltd during the trial. In April 1993 Mr Johnson issued a personal claim against the same defendants arising out of the same matters. It was only in December 1997 that the Defendants applied for the action to be struck out as an abuse of the process of the court. Lord Millett stated:

> "*This makes it unnecessary to deal with Mr. Johnson's submission that it is too late for the firm to raise the issue. If necessary, however, I should have regarded the delay as fatal. Indeed, I should have regarded it as more than delay; I think it amounted to acquiescence. There is no proper analogy with the case which discloses no cause of action. Although it is obviously desirable to apply to strike out a claim which is doomed to fail at the earliest opportunity, there is no point in proceeding with a trial which serves no useful purpose. Even if the point is taken at the trial itself, it is a matter for the trial judge to decide whether to hear the evidence and adjudicate on the facts before deciding whether they give rise to liability, or to assume that the plaintiff will establish his allegations and decide whether, as a matter of law, they give rise to liability.*

[746] Paragraphs 111 and 111A of the Re-Re-Amended Defence. See also the Procedural Chronology entry for 1 April 2022.

> *But the premise in the present case is that Mr. Johnson has a good cause of action which he should have brought earlier if at all. I do not consider that a defendant should be permitted to raise such an objection as late as this. A defendant ought to know whether the proceedings against him are oppressive. It is not a question which calls for nice judgment. If he defends on the merits, this should be taken as acquiescence. It might well be otherwise if the ground on which the proceedings are alleged to be an abuse of process were different. But in a case of the present kind the Court is not so much protecting its own process as the interests of the defendant."*

1041. I do consider that the fact that the HP Defendants only took this point at trial and only made detailed (oral) submissions on it at the end of the trial, after the court had heard the evidence of all of the relevant witnesses concerning the Global Misrepresentation Claims, and after the HP Defendants had defended those claims on their merits, is at least a factor which militates against a finding that the Claimants have abused the process of the court in bringing these claims.

(3) Factual analysis

(a) The relevant claims

1042. The starting point of the factual analysis is a consideration of the claims advanced in the ICC arbitrations. Mr Suppipat's Companies filed 2 Requests for Arbitration ("the **RfAs**"):

a. The Symphony RfA against Fullerton (as primary obligor) and KPN EH (as guarantor) was dated 26 January 2016 ("**the Symphony RfA**"), and was filed together with an application for emergency measures, and

b. The NGI and DLV RfA against KPN EH (as primary obligor) and Fullerton (as guarantor) was filed on 25 March 2016 ("**the NGI RfA**").

1043. As for the Symphony RfA, Symphony thereby sought:

a. A declaration that the Symphony / Fullerton SPA was validly terminated by Symphony on 8 January 2016 on the grounds of Fullerton's material breach thereof as a result of its failure to pay the purchase price pursuant to the agreed payment schedule;

b. An order that Fullerton transfer its REC shares back to Symphony;

c. Damages against Fullerton to compensate for the '*frustration of the Global transaction*' and the '*wilful reneging on Part B*', to be assessed; and

d. A declaration that pursuant to the Deed of Guarantee KPN EH is jointly and severally liable with Fullerton.

1044. On 25 March 2016, NGI and DLV filed the NGI RfA against KPN EH and Fullerton (which was later consolidated with the Symphony RfA). The NGI RfA sought the following relief:

a. Payment of the balance of the KPN First Instalment;

b. Transfer of the Pradej Stake to NGI and DLV or compensation for the failure to fulfil that condition of the Second Rescheduling;

c. An Order for payment of the Remaining Amount of the Purchase Price in the KPN SPA;

d. The payment of damages by KPN "*aimed at compensation, inter alia, for the frustration of the Global Transaction … and the wilful reneging on Part B, the amount of which shall be assessed at a later stage of the arbitration proceedings*", mirroring the same request from the Symphony RfA; and

e. An Order holding Fullerton liable as guarantor.

1045. Symphony, NGI and DLV then crystallised their request for relief in Mr Suppipat's Companies' post-hearing brief at paragraph 131, seeking:

a. Rescission of the Fullerton SPA; and restitution of the REC Shares;

b. As a subsidiary request if rescission was denied (being the first time that any alternative to rescission had been presented on behalf of Mr Suppipat in the arbitrations), payment of the First Instalment of the Fullerton SPA; and payment of the Remaining Amount of the Fullerton SPA;

c. Payment of the Shortfalls due under the KPN SPA; and

d. Payment of the Remaining Amount under the KPN SPA.

(b) First Partial Awards

1046. The First Partial Award in respect of the Claimants' claims was issued on 22 September 2017 ("**the Symphony First Partial Award**"). As to the Symphony First Partial Award:

a. As appears from paragraph 64 of the Symphony First Partial Award, the procedure was bifurcated such that phase 1 dealt with breach of the Fullerton SPA, the claim for rescission and the availability of restitution.

b. The Tribunal's primary conclusions were (i) there was no meeting of minds at the First Paris Meeting (paragraph 208); (ii) there was no meeting of minds during the telephone conversation on 3 November 2015 (paragraph 211); (iii) there was no consensus on the terms of Mr Suppipat's email of 10 November 2015 (paragraphs 215-219); (iv) Fullerton breached the SPA by its non-payment on 30 December 2015 (paragraphs 224 & 227); (v) there was no need to resolve the allegations

that the Respondents did not have the financial means to pay (paragraph 226); (vi) Fullerton failed to comply with s.387 TCCC (which was not validly excluded by the REC SPAs) as it failed to give the Respondents a reasonable notice under that provision (paragraph 272). The rescission claim was therefore dismissed.

c. The Tribunal then considered the subsidiary argument that Symphony should be entitled to an award for (a) the balance of the First Instalment, and (b) payment of the remaining amounts due under the Fullerton SPA (from paragraph 278). The Tribunal held that (i) Symphony was entitled to interest from October 2015 (paragraph 290); (ii) all claims and cross-claims for damages, including the request for accelerated payment, should be deferred to Phase II (paragraphs 299 and 338); and (iii) the claim for payment of the First Instalment was granted (paragraph 345(b)).

1047. The NGI and DLV First Partial Award found that the Parties had agreed that the apportioned payment of the First Instalment was subject to contractual interest of 15%. It concluded that the issue of any representations as to the Pradej Stake (and whether the breach of that condition triggered acceleration of the Remaining Amounts under the SPA) should be deferred to the Second Phase. The issue of frustration of the IPO and Wind Farm Projects was similarly deferred.

(c) Phase II Arbitrations

1048. On 19 February 2018, Mr Suppipat's Companies filed a document comprising the submissions and a statement of their claims on the Deferred Phase I Claims and the Phase II Claims which fell to be determined in Phase II of the arbitrations:

a. The Claimants opened their "Executive Summary" with a reference to "*Respondents' behaviour commencing from the fraudulent negotiations of the SPAs in May 2015* …". They then summarised the relevant behaviour of NN's Companies:

> "*In the summer of 2015, Respondents wilfully misled Claimants as to their intentions with respect to Part B of the Global Transaction and fraudulently induced the Claimants into entering and closing the SPAs*…"

b. The claimants then stated (at paragraph 10, p.8) that the "*above egregious conduct calls for severe consequences in Phase II of these arbitration proceedings*", and (at paragraph 10.1) they maintained that they were fraudulently induced into entering the SPAs without Part B and then abstained from seeking rescission. They claimed relief in damages under s.161 TCCC.

c. The claimants' claims for damages for fraudulent misrepresentation were then articulated in Section IV of this document, which is headed "*Claimants are entitled to Damages for Respondents' Incidental Fraud in Causing Claimants to Enter into the SPAs*". Essentially, Section IV A, paragraphs 34-45 articulated similar allegations to those which are now set out in these proceedings as the 'Global Transaction Representations', and Section IV part B, paragraphs 46-49 replicates the 'Payment Representations'. The Thai law consequences, including claims under sections 159 and 161 of the TCCC, are relied upon in Section IV part C (from paragraph 50)

1049. So, in Phase II, the claimants clearly advanced Thai law claims against Fullerton and KPN EH based on the Global Transaction Representations.

1050. These claims were restated and amended in the "Claimants' Second Submission on Deferred Phase I and Phase II Claims", filed in the Arbitrations on 15 July 2018. There, from paragraphs 179-209 at pp.83-93, the claimants repeated their claims that "*Symphony, NGI and DLV are entitled to damages for Respondents' Incidental Fraud*", relating to the Global Transaction Representations. The relief sought is identified at paragraph 336.2, p.131, and included damages caused by the alleged fraud. In particular the claimants contended as follows:

"***First Fact Pattern (mid-May 2015 - September 26, 2015)***

183. In essence the first fact pattern covers the period between the initiation of negotiations between Mr Suppipat and Mr Narongdej (as well as his partners) in mid-May 2015 and the September 26, 2015 meeting in Paris which essentially transformed the Global Transaction into a straight sale arrangement limited to the SPAs. The key elements of the First Fact Pattern are : set out below and substantiated with contemporaneous evidence and witness evidence, including testimonies of Srisant Chitvaranund and Stephane …

183.1 Starting from the outset of the negotiations between Mr. Suppipat and Mr. Narongdej (and his partners), the latter understood that Mr. Suppipat was interested in a custodial / buy back arrangement over the WEH Shares.

183.2. This arrangement thereafter crystallised in what the parties dubbed "Part A" and "Part B" of the "Global Transaction."

183.3. "Part B" was an essential element and condition for Mr. Suppipat agreeing to the terms of "Part A", which Mr. Narongdej fully understood.

183.4. Likewise, from the outset of the negotiations, Mr. Narongdej confirmed his interest in such an arrangement and maintained such interest throughout the negotiations.

183.5. However, in reality Mr. Narongdej (and his partners) never intended to enter into "Part B" of the Global Transation. Rather, they intended to

limit it to "Part A," yet with all the terms that were discussed on the apparent understanding that "Part B" would be implemented…

191. … in view of:

(i) Mr. Narongdej representing that he is interested in both "Part A" and "Part B" of the Global Transaction, whereas he internally intended to only benefit from "Part A"; (ii) Mr. Suppipat believing this representation, not knowing Mr. Narongdej's true intentions; and (iii) Mr. Suppipat (through Symphony, NGI and DLV) entering into the SPAs based on this representation, this First Fact Pattern amounts on its face to fraud, as understood in Thai law.

192. Second, Mr. Suppipat appears to have discovered Mr. Narongdej's fraud (e.g. misrepresentation of his intention to enter into "Part B" of the Global Transaction during the September 26, 2015 meeting in Paris (on which date the First Instalment under the KPN EH SPA was already overdue)."

1051. The Claimants' claims were summarised and re-stated, again, in their final iteration in their "Phase II Post-Hearing Brief". That document is useful as a final clarification of the case the claimants advanced before the Tribunal — comprising, on the claimants' own summary "*Seven separate heads of Claim*", which includes: "*Claimants are entitled to damages for Respondents' incidental fraud*". The substance of those summarised claims is materially the same as their second submissions document, above.

(d) Second Partial Awards

1052. The Second Partial Awards on Phase II of the arbitrations are dated 5 June 2019. They followed oral hearings at which further cross-examination took place. The same "*seven heads of claim*" advanced in the Claimants' "Post-Hearing Brief" above, are recited by the Arbitral Tribunal in the Symphony Second Partial Award.[747]

1053. In paragraph 129 of the Award, the Tribunal recorded that:

"*…in Section XI of Claimant's Phase II Reply submitted on 15 July 2016, Claimant requests the following relief from the Tribunal:*

With respect to Claimants' claim for fraudulent inducement:

[747] See Symphony Award at p.53; these are summarised as "*(i) incidental fraud; (ii) abuse of right; (iii) frustration of the SPA Payment Conditions; (iv) breach of contractual conditions to seek additional financing or source of funds to pay the Remaining amount promptly after financial close; (v) breach of "all-reasonable-endeavours" covenant; (vi) failure to achieve CODs according to Schedule 4 of the SPAs and (vii) rescission of the Fullerton SPA*".

Hold that Respondents (i) in a first step, fraudulently induced Claimants into signing and closing the SPAs without Part B (First Fact Pattern).”

1054. In paragraph 131 of the Award, the Tribunal recorded that the claimants requested it to make certain factual findings in its Final Award, to include the following:

> “*217. With respect to misrepresentations related to Claimants ’ incidental fraud head of claim:*
>
> *217.1. Mr: Nop Narongdej and Mi: Nuttawut Phowborom represented to Mr. Nopporn Suppipat that they intended to carry out Part B of the Global Transaction;*
>
> *217.2. Mr. Nop Narongdej and Mr. Nuttawut Phowborom did not intend to do so, or at least had decided not to do so by August 24, 2016 and failed to correct their previous representations;*
>
> *217.3. Part B of the Global Transaction was important to Mr. Nopporn Suppipat and he would not have transferred the REC Shares without it;*
>
> *217.4. Mr. Nop Narongdej and Mr. Nuttawut Phowborom knew that, and intended Mr. Nopporn Suppipat / his companies to transfer the REC Shares under the impression / conviction that they did intend or still intended to carry out Part B of the Global Transaction.”*

1055. In the Symphony Second Partial Award, the Tribunal then addresses the claim for rescission of the Fullerton SPA first, considering it “*potentially dispositive of the numerous cross-claims by both Parties*”. The Tribunal rejected Symphony’s claim that its second attempt at rescission had cured the defects in its first notice of rescission (which the Tribunal had rejected as ineffective in its First Partial Award).

1056. The Tribunal then considered the claimants’ claim in “*Incidental Fraud*” at [247-265]. At paragraph 248 the Tribunal recited the claimants’ argument concerning the alleged wrongful act of the Respondent that led to the characterisation of an incidental fraud in these terms:

> “*Claimants were fraudulently induced into entering the SPAs and subsequently not pursuing available legal remedies (including recission) by way of two separate misrepresentations: (i) first, as to Respondents’ intention to enter into the buy-back/ custodial arrangement (e.g. Part B| of the Global Transaction), which led to the signing of the SPAs…”.*

1057. The Tribunal recorded the claimants’ argument that Khun Nop’s untruthful declarations in this respect concerning Part B constituted fraud under section 159 of the Thai CCC with respect to the First Fact Pattern.

1058. The Tribunal then recorded, at paragraph 253 of its Award, the Respondent's contention that the incidental fraud claim is based on false or spent factual premises and as a result it should be rejected by the Arbitral Tribunal:

> "*As a preliminary matter the Respondents point out that with respect to the First Fact Pattern concerning Part B of the contemplated transaction, Claimants waved this claim in Phase 1 of these proceedings, by renouncing any claim to the Part B claims or call options through its counsel and by admission of Mr Suppipat that the parties did not agree to such deals*.

1059. This was a reference to the Respondents' Phase II Post-Hearing Brief as follows:

> *"As highlighted at [47]-[52] of Respondents' Phase II D&CC; [70]-[73] of Respondents' Phase II Reply, the factual premises of this Claim (vi), the two alleged "deceptions" practised by Respondents / Mr Narongdej on Claimants / Mr Suppipat, concerning (i) "Part B" and (ii) Respondents' / Mr Narongdej 's creditworthiness) have already been shown / conceded as false and/or spent in Phase I.*
>
> *42. First, the Tribunal would recall that the factual substratum of the 'first deception" (that Respondents had 'pretend[ed] to consent to" "Part B" before "fraudulently reneging" on it) was already conceded as a falsehood at the Phase I Hearing, where Mr Suppipat admitted during cross-examination that parties did not in fact "consent to" / agree to any "Part B" / "nominee deal" / call option for a buy back of the REC Shares from Respondents. Claimants thus expressly renounced the "Part B" allegation at the Phase I Hearing in the following terms (and are bound by the same):*
>
> > Mr Bertrou: *I confirm that we are not arguing part B nor the call options and I confirm that we have basically renounced to such claims and we are focusing on the SPAs. The reason why we dropped that is because you raised an objection on the jurisdiction of the Tribunal, because although the MOU and the call options provide for an arbitration provision and we could have made the arguments that the provision extends to the SPAs that have been signed we did not want to waste time on the bifurcation of jurisdictions and we went straight to the core of the dispute, which is the SPAs. I mean we are not arguing that the agreements [i.e, in respect of "Part B"I are binding, just to spare time.*
>
> *43. Given the foregoing, Claimants' assertion at the Phase II Hearing that they had only given up the "enforcement" of "Part B" ("Claimants renounced to enforcing the COAs or the MOU, which have not been signed") and can presumably still rely on "Part B" for other purposes (e.g., to provide the basis for the alleged " first deception"), is nothing short of absurd — their confirmation to the Tribunal in Phase I (see [42] above) was, without any qualification, that they "are not arguing part B nor the call options" (i.e., not rely on "Part B" for any and all purposes). What is*

more, this confirmation was rightly made given Mr Suppipat's repeated concession that there was in fact no agreement on "Part B" (see FN 87).”

1060. Footnote 87 stated as follows:

“*See Respondents' Phase I PHB at [16]-[25]; Respondents' Phase T Reply P1-TB at [10]-[12]; 8 Feb 2017 transcripts at p 335 (lines 7-20) ("MR YEO: You see, Mr Suppipat, you were choosing to go ahead with the sale without reaching an agreement on the call option lie Part B]. Is that not right? Mr. Suppipat: We have an agreement but we have vet to know the detail of the transaction... I believe I can ask him to do anything within reason and as long as it is legitimate, so I would not be worried if the call option is not structured or is not final.."); 8 Feb 2017 transcripts at p 354 (line 21)-p 355 (line 3) ("MR YEO: Have I summarised your evidence correctly first? They have agreed to having a call option so long as they will not fall ford of the law but they have not agreed on the terms of that call option...? MR SUPPIPAT: We have not come up with terms yet so yes."); 8 Feb 2017 transcripts at p 356 (lines 6-9) ("The Chairman: As long as you have not made a firm deal, it is a possibility, it is not a certainty. Will you agree with me? MR SUPPIPAT: I do agree"); 8 Feb 2017 transcripts at p 450 (lines 8-21) ("MR KIM: ... do you still believe that it is a nominee deal? Mr SUPPIPAT: No, the nominee deal was gone.. .So, yes, no more nominee deal, now just straight deal ... MR KIM. So you now agree that there is no nominee deal? MR SUPPIPAT: I do agree"). See also Respondents' Phase II D&CC at [70]-[72].”*

1061. In its Analysis and Decision at paragraph 258, the Tribunal stated that it found, as a “*preliminary matter*”, in relation to the allegations as to Part B of the transaction (i.e., the Global Transaction Representations): “… *the various representations allegedly made by Mr Narongdej or Respondents' representatives regarding Part B of the transaction or the call option (First Fact Pattern) described immediately above cannot be invoked as evidence of fraudulent inducement or incidental fraud in light of the fact that Mr Suppipat subsequently agreed to abandon the Part B under the SPAs and also in light of the statements made by Mr Suppipat and Claimants' counsel in Phase I of this arbitration. To attempt to use the statements or representations of Mr Narongdej concerning Part B at this stage, following the admission that no such agreement could be made and in light of the plain wording of the amended and restated SPA, is ineffective.”*

1062. It appears therefore that the Tribunal dismissed the Global Transaction Misrepresentation claim by reason of the fact that Mr Suppipat and his counsel conceded that there was no binding call option agreement ever entered into. That analysis seems wrongly to conflate two separate issues. The fact that Mr Suppipat conceded that no binding call option agreement was *in fact* reached does not lead to a conclusion that Fullerton or KPN EH, through Khun Nop, did not fraudulently represent that they *intended* to enter into a call option. The Tribunal accordingly did not address the latter issue on the merits nor did it make the factual findings requested by the Claimants concerning the alleged Part B misrepresentation; rather it simply stated that “*to attempt to use the*

statements or representations of [Khun Nop] concerning Part B at this stage… is ineffective".

(4) The law

(a) Issue estoppel

1063. Although the HP Defendants allege that Mr Suppipat is a *Gleeson* privy of his companies, they do not allege that an issue estoppel arises as a result of the Tribunal's award, and instead confine their argument to an alleged abuse of process: they contend that it is an alleged abuse of process to bring these claims which they say were brought in the Arbitrations.

1064. I consider that they are right to do so and that there is no issue estoppel. In order for the HP Defendants to establish an issue estoppel, it would be necessary for them to prove the following:

a. The determination of the issue must be necessary for the decision. In other words, was the issue an essential step in the reasoning of the first tribunal or was the determination so fundamental that the decision cannot stand without it? See *Spencer Bower & Handley*, paragraphs 8.01 and 8.24;

b. That the determination of that ultimate issue was clear. In *Mints*, Foxton J stated at [46]: "*That requirement is even more important when the original determination is said to have been made by an arbitration award. Consistent with the distinct roles of the court and the arbitral tribunal, and the policy expressed in s.1(c) of the Arbitration Act 1996, as Gross J noted in Norsk Hydro ASA v State Property Fund of Ukraine [2002] EWHC 2120 (Comm), [17]-[18] the court will not second-guess the intentions of the arbitration tribunal or "stray into the arena of the substantive reasoning and intentions of the arbitration tribunal" where the relevant issue is not crystal clear on the face of the award";*

c. That the issue is substantially the same in both sets of proceedings: see *Carpatsky Petroleum Corp v PJSC Ukrnafta* [2020] Bus LR 1284 at para 122 per Butcher J.

1065. In the present case, the court is being asked to determine an issue which, in the event, the Tribunal decided not to determine, namely whether or not Khun Nop and Khun Nuttawut (in the case of the Arbitrations, through their companies) made a fraudulent representation that Khun Nop intended to enter into Part B of the Global Transaction prior to the conclusion of the REC SPAs. The issue determined by the Tribunal – that there was no Part B agreement entered into (as was conceded) is a different issue to that which falls for determination before this court. The Tribunal decided that the determination of the Global Transaction Misrepresentation case was not necessary for its

decision (it was, said the Tribunal, "ineffective"). Why it so decided is, as I have said, unclear.

(b) Abuse of process: legal principles

1066. Turning then to abuse of process, the court has an inherent power to prevent the abuse of its procedures by actions which, although not involving an express breach of the rules, would give rise to manifest unfairness to another party or bring the administration of justice into disrepute: *Hunter v Chief Constable of West Midlands Police* [1982] AC 529, 536.

1067. In *Michael Wilson v Sinclair* at [48] Simon LJ summarised the legal principles in determining whether a claim should be struck out for abuse of process:

> *"(1) In cases where there is no res judicata or issue estoppel, the power to strike out a claim for abuse of process is founded on two interests: the private interest of a party not to be vexed twice for the same reason and the public interest of the state in not having issues repeatedly litigated; see Lord Diplock in Hunter v. Chief Constable, Lord Hoffmann in the Arthur Hall case and Lord Bingham in Johnson v. Gore Wood. These interests reflect unfairness to a party on the one hand, and the risk of the administration of public justice being brought into disrepute on the other, see again Lord Diplock in Hunter v. Chief Constable. Both or either interest may be engaged.*
>
> *(2) An abuse may occur where it is sought to bring new proceedings in relation to issues that have been decided in prior proceedings. However, there is no prima facie assumption that such proceedings amount to an abuse, see Bragg v. Oceanus; and the court's power is only used where justice and public policy demand it, see Lord Hoffmann in the Arthur Hall case.*
>
> *(3) To determine whether proceedings are abusive the Court must engage in a close 'merits based' analysis of the facts. This will take into account the private and public interests involved, and will focus on the crucial question: whether in all the circumstances a party is abusing or misusing the court's process, see Lord Bingham in Johnson v. Gore Wood and Buxton LJ in Taylor Walton v. Laing.*
>
> *(4) In carrying out this analysis, it will be necessary to have in mind that: (a) the fact that the parties may not have been the same in the two proceedings is not dispositive, since the circumstances may be such as to bring the case within 'the spirit of the rules', see Lord Hoffmann in the Arthur Hall case; thus (b) it may be an abuse of process, where the parties in the later civil proceedings were neither parties nor their privies in the earlier proceedings, if it would be manifestly unfair to a party in the later proceedings that the same issues should be relitigated, see Sir Andrew Morritt V-C in the Bairstow case; or, as Lord Hobhouse put it in the Arthur Hall case, if there is an element of vexation in the use of litigation for an improper purpose.*

(5) It will be a rare case where the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse of process, see Lord Hobhouse in In re Norris."

1068. Moreover, in three reported first instance decisions it has been held that it may be an abuse of the process of the court to seek to relitigate in court proceedings issues which have been the subject of prior proceedings before an arbitral tribunal, even where the identity of parties necessary for an issue estoppel is lacking[748]. In *Michael Wilson v Sinclair* at [66]-[68] Simon LJ explained the reasoning behind these cases as follows:

"*Mr Samek was critical of the decisions in these cases, going so far as to contend that the Art & Antiques case was wrongly decided. I reject his criticism*

In my view Teare J correctly stated the law in [50] of his judgment in the present case. There is no 'hard edged' rule that a prior arbitration award cannot found an argument that subsequent litigation is an abuse of process. The Court is concerned with an abuse of its own process; and there are abundant references in the authorities to the dangers of setting limits and fixing categories of circumstances in which the court has a duty to act so as to prevent an abuse of process

I agree with Reyes J's observation in the Parakou case that, although a Court will be cautious in circumstances where the strike out application is founded on a prior arbitration award, that caution should not inhibit the duty to act in appropriate circumstances. I would also add my agreement with Teare J's observation at [50] of his judgment that it will probably be a rare case, and perhaps a very rare case, where court proceedings against a non-party to an arbitration can be said to be an abuse of process.

(c) Privity of interest

1069. The HP Defendants contend (at paragraph 466.6 of their Written Closing) that Mr Suppipat is either a *Gleeson* privy of his companies or so close to being one that for the purpose of the abuse argument it makes no practical difference and that this fact feeds into the abuse of process analysis.

1070. Privity of interest is a "somewhat narrow" doctrine and privity for this purpose is not established merely by having some interest in the outcome of the litigation: *Gleeson v Wippel* [1977] 1 WLR 510 [515A] per Sir Robert Megarry VC. In *Gleeson at* [515], Megarry VC formulated the test for a "privy in interest" as follows:

[748] *Arts and Antiques Ltd v Richards* [2014] Lloyd's Rep IR 219 at [20]; *Parakou* at [171]-[173]; and *OMV Petrom v Glencore International* [2014] 2 Lloyds rep 308 at [23]-[24].

> "*Privy … is not established merely by having 'some interest in the outcome of the litigation.' … [T]he doctrine of privity for this purpose is somewhat narrow and has to be considered in relation to the fundamental principle nemo debet bis vexari pro eadem causa …. I do not think that in the phrase 'privity of interest' the word 'interest' can be used in the sense of mere curiosity or concern …. I cannot see that this provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff suing him, unless there is a sufficient degree of identity between the successful defendant and the third party. I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject matter of the dispute there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party*".

This category of privies has been called "*Gleeson privies*".

1071. Whilst the test of identification of a privy is sometimes approached by asking if the party sought to be bound can be said "in reality" to be the party to the original proceedings[749], and whilst there are cases which, on their particular facts have found privity between a company and a controlling director/shareholder[750], as Foxton J explained in *Mints* at [33(iii)], this approach should be viewed with particular caution when it is alleged that a director, shareholder or another group company is privy to a decision against a company, because it risks undermining the distinct legal personality of a company as against that of its shareholders and directors. The danger is particularly acute as the company must necessarily act through and be subject to the ultimate control of natural persons, and directors and shareholders who "control" the company in this sense will frequently have a commercial interest in the company's success. The need for particular caution about privity arguments in this context is emphasised in *Standard Chartered Bank (Hong Kong) Ltd v Independent Power Tanzania Ltd* [2015] EWHC 1640, [143]-[145] (Flaux J) and *MAD Atelier International BV v Manès* [2020] EWHC 1014 (Comm), [67]-[69] (Bryan J).

1072. I am not persuaded that Mr Suppipat is a *Gleeson* Privy of Symphony, NGI and DLV. True it is, as the HP Defendants submit, that Mr Suppipat is the sole beneficial owner and controller of those companies. He was directly involved and fully participated in the Arbitrations, it is said in both giving instructions

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[749] See *Resolution Chemicals Ltd. v. Lundbeck* [2013] EWCA Civ 924 at [32].

[750] *Secretary of State for Business, Innovation & Skills v Potiwal* [2012] EWHC 3723, (Ch) (decision of VAT tribunal against company binding on its director, controller and significant shareholder in director's disqualification proceedings, which Foxton J said in *Mints* at [75] represents the high-water mark of abuse findings in cases concerned with the relitigation of issues where there is no identity of parties); *Tinkler v Ferguson* [2021] 4 WLR 27 (this was a case which fell within the "*spirit*" of the estoppel rule, even though no formal privity was made out: the later litigation concerned the defendants' vicarious liability for the alleged wrongs of the directors who were the defendants to the first action in respect of substantially the same wrongs).

to Mr Suppipat's Companies and giving evidence on their behalf. But as *Prest v Petrodel* [2013] 2 AC 415 at [8] per Lord Sumption JSC makes clear,

> "*Subject to very limited exceptions, most of which are statutory, a company is a legal entity distinct from its shareholders. It has rights and liabilities of its own which are distinct from those of its shareholders. Its property is its own, and not that of its shareholders. In Salomon v A Salomon and Co Ltd [1897] AC 22, the House of Lords held that these principles applied as much to a company that was wholly owned and controlled by one man as to any other company. In Macaura v Northern Assurance Co Ltd [1925] AC 619, the House of Lords held that the sole owner and controller of a company did not even have an insurable interest in property of the company, although economically he was liable to suffer by its destruction*
>
> *The separate personality and property of a company is sometimes described as a fiction, and in a sense it is. But the fiction is the whole foundation of English company and insolvency law…*"

1073. *Prest* was relied upon in the abuse of process context by Flaux J in *Standard Chartered Bank (Hong Kong) Ltd v Independent Power Tanzania Ltd* [2015] EWHC 1640 (Comm), in which the Judge said at [145]:

> *"the corporate relationship and financial interest alleged cannot on any view be sufficient to establish privity of interest. The contrary conclusion would effectively drive a coach and horses through the doctrine of separate corporate personality and lead to piercing of the corporate veil, something which is not to be encouraged given the limited scope ascribed to the doctrine of piercing the corporate veil by the Supreme Court in Prest v Prest [2013] UKSC 34; [2013] 2 AC 415."*

1074. Foxton J cited this paragraph of *Standard Chartered* at [33(iii)] of *Mints*, in the context of his emphasising the "*particular caution*" to be exercised when it is alleged that a director or shareholder is privy to a decision against a company.

1075. For the same reasons, I do not consider that Khun Nop is a *Gleeson* privy of Fullerton or KPN EH.

1076. This is not a case like *Johnson v Gore Wood* [2002] 2 AC 1, where the reason that Mr Johnson's control made him his company's privy was that if he had wished to issue his own proceedings in tandem with the company's he could have done so. As Lord Millett stated at 60D: "*He was in a position to decide when to pursue the two claims and whether to pursue them together or separately, and that is enough for present purposes*". Here, of course, Mr Suppipat could not issue his own proceedings in the Arbitrations in tandem with his companies because he was not a party to the arbitration agreements.

1077. But in any event, even had I found that Mr Suppipat and/or Khun Nop were *Gleeson* privies upon a close merits-based analysis of the facts, I would still have found that in bringing these proceedings Mr Suppipat is not guilty of an abuse of process for the following reasons:

a. The Tribunal did not decide the Global Transaction Misrepresentation issue on its merits.

b. The companies' claims in the Arbitrations were in the event much simpler than the claims which Mr Suppipat brings before this court in his personal capacity (I do not accept that those personal claims add nothing to the claims of his companies, nor that they are entirely derivative of the claims of his companies); ultimately the Tribunal considered that it was only called upon to decide the recission claims and the simpler claims for payment under the REC SPAs.

c. Further still, Khun Nop and Khun Nuttawut who are parties to the present proceedings, were not parties to the Arbitrations, not being parties to the REC SPAs. They could not, therefore, have been joined to the Arbitrations by Mr Suppipat's companies (and it is most improbable in view of their conduct that they would have consented to be joined). Nor are KPN EH and Fullerton parties to the present proceedings. Khun Nop has not been vexed twice, but only once, by the Global Transaction Misrepresentation claim. He was only a witness in the Arbitrations. Mr Suppipat likewise was not and could not be a party to the Arbitrations.

d. I have a much broader factual dispute before me which bears upon the issue which I have to decide. That is because Khun Nop and Khun Nuttawut chose to play a full part in the trial of this action and to give evidence on all of the issues in play, including both the misrepresentation claims and the asset stripping claims. Having considered the whole of that evidence, I have decided that it was Khun Nop and Khun Nuttawut's plan from the outset to deceive Mr Suppipat into transferring his shares in REC to Khun Nop and his companies by pretending to be willing to enter into the call option agreement. In particular, the Tribunal did not have the benefit of the asset stripping evidence before it (much of which post-dated its Awards) nor did it have as extensive evidence which I have heard over the course of a 20 week trial.

e. The Claimants have proved in these proceedings that part of Khun Nop's dishonest plan was to strip his companies of their assets in order to avoid satisfying the awards in Mr Suppipat's companies' favour in the arbitrations and accordingly bringing these proceedings against him in his personal capacity is the only way to recover the losses thereby suffered by the Claimants.

f. Moreover, as the Claimants point out in paragraph 1253 of their written closing, if Khun Nop is a privy of Khun Nop's Companies, it must follow that any arbitral awards against Khun Nop's Companies will be enforceable against Khun Nop personally. Yet that is not Khun Nop's position. The HP Defendants did not engage with this point in argument and the Claimants point out that the HP Defendants only re-re-amended

their Defence to plead an abuse of process on 1 April 2022,[751] after the Second Partial Awards in Mr Suppipat's Companies' favour had been set aside by the Singapore Court of Appeal. Khun Nop should not be allowed to have it both ways.

g. As explained above, I consider that the fact that the HP Defendants only took this point at the end of the trial, after the court had heard the evidence of all of the relevant witnesses concerning the Global Transaction Misrepresentation Claims, and after the HP Defendants had defended those claims on their merits, is a further factor which militates against a finding that the Claimants have abused the process of the court in bringing these claims.

1078. In all the circumstances, I do not consider that it is manifestly unfair for Khun Nop to have had to meet these allegations of misrepresentation and asset stripping as a whole on their merits at this trial, nor do I consider that by reason of his having voluntarily chosen to do so there is any risk of the administration of public justice being brought into disrepute.

1079. I am comforted by the fact that (leaving limitation to one side) the consequence of my finding that there is no abuse in Mr Suppipat bringing these proceedings is that I do not reach the unsatisfactory conclusion that the claim in fraudulent misrepresentation is barred against Khun Nop but not (in principle) barred against Khun Nuttawut, which might be seen to be a surprising and unjust outcome. Moreover, Khun Nop did not apply to strike out the Global Transaction Misrepresentation claim against him on the ground of abuse of process. Instead he gave extensive evidence and made extensive written and oral submissions at this trial, at the end of which I have decided that he did indeed make the Global Transction Misrepresentation alleged. To now find that that entire exercise was pointless because the second action was an abuse of process would again be an unsatisfactory outcome.

ASSET STRIPPING CLAIMS

1080. For the purposes of the asset stripping claims, the Claimants rely primarily upon section 420 of the TCCC and, in the alternative, on section 432 TCCC. I address the section 420 claim first.

s. 420 TCCC: Unlawfully causing injury

1081. For convenience I set out Section 420 TCCC again here:

[751] As confirmed by the Agreed Procedural Chronology

> "*A person who, willfully or negligently, unlawfully injures the life, body, health, liberty, property or any right of another person, is said to commit a wrongful act and is bound to make compensation therefor*."

1082. As set out above, to establish liability under s. 420 CCC, it was agreed between the parties that the following elements must be proved:[752] (i) a person committed an act; (ii) they did so wilfully or negligently; (iii) the act was unlawful; (iv) the act injured one of the specified interests ("*life, body, health, liberty, property or any right of another person*"); and (v) a causal link between the injury and the damage.

1083. Whilst this claim was put on a number of different bases at the start of the trial, by the end of the trial the claim was put on the basis that the asset stripping sequence was carried out unlawfully (requirement (iii) above) in the following 11 respects[753] (some of which apply to all Ds and some of which only apply to specific defendants):

a. Cheating against creditors (s. 350 TPC).

b. Abuse of right (s. 421/s. 5 TCCC).

c. Forming a combination with others to cause harm by unlawful means.

d. Defrauding of creditors (s. 237 TCCC).

e. Fabrication/falsification of documents (s. 264 TPC).

f. Breach of directors' duties (ss. 1168 and 1206-1207 TCCC).

g. Use of fabricated/false documents (ss. 265 and 268 TPC).

h. Breach of contract (Kasem SPA).

i. Breach of duty as an implied representative of REC (ss. 659 and 807 TCCC).

j. Breach of contract (the ASA).

k. Breach of section 807 TCCC and Art 18 of the Lawyer's Regulation.

1084. The Claimants maintain that the first four "*elements of unlawfulness*" above apply, equally, to all defendants against whom the claim in respect of the Kasem transfer is brought: Khun Nop, Khun Nuttawut, the WEH Managers, SCB, Khun Arthid, and Khun Weerawong. They then say that the first eight are relevant to more than one of them. The final three, they say, apply only to

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752 Munin 1 [35]; Suchart 1 [18]. See also the Thai Law Propositions document, paragraph 1.

753 As confirmed in their closing submissions at paragraph 900; see also paragraph 156 of the Claimants' RAPOC.

Khun Nop, the WEH Managers (Ms Collins and Khun Thun), Ms Siddique, and Khun Weerawong respectively.

1085. It is common ground between the Thai law experts that unlawfulness, for section 420 purposes, may take a number of forms and includes conduct that is:

a. Contrary to any principle or provision of Thai or foreign law.

b. Not expressly prohibited by Thai law, but against a right recognised by Thai law.

c. Causative of damage without any legal justification.[754]

1086. The Claimants have not pleaded their asset-stripping case on (in particular) the wider third basis of unlawfulness ((c) above). Thus:

a. Paragraph 154 of the RAPOC pleads (under the inapt heading "*VIII. CLAIMS ... B. Unlawful means conspiracy"*) *that "The Defendants ... are liable for their participation in the Conspiracy, which is also actionable under Thai law. In particular […] 154.2* ***The relevant Defendants acted unlawfully, as set out at paragraphs 155 and 156 below****. The Claimants rely on the relevant provisions of Thai and foreign law pleaded at paragraphs 151G and 151H above"* (emphasis added);

b. Paragraph 156 of the RAPOC then pleads in terms that "*The means used by the Conspirators to cause harm to the Claimants in furtherance of the Conspiracy were unlawful for the purposes of s.420. […] In particular:…*"

There is then a closed list of acts alleged to have been contrary either to the REC SPAs or specific provisions of Thai law. There is no plea that any of those alleged acts was unlawful on any other basis, in particular on the basis that it was "*causative of damage without any legal justification*". The position is the same in relation to the acts relied upon in respect of the pleaded bribery and inducing breach of contract claims.[755]

1087. No application to amend was made before me. I therefore agree with Mr Penny KC's submission that the Thai law case which the Claimants seek to advance must be limited to that pleaded in the RAPOC. It is not open to the Claimants to expand their pleaded case by reliance on Dr Munin or his answers in cross-examination referring to a 'second route' to unlawfulness.

1088. As Dr Munin further explained, it follows from this that the only question for the Court, in terms of unlawfulness under s. 420 TCCC, is whether there has been any unlawful conduct or not (in the narrow sense of paragraph 1083

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[754] Munin 1 [81]; Suchart 1 [84]

[755] See RAPOC, [160CC] (alleged 'bribery'), and [160G.2] (alleged 'inducing breach of contract').

(a)-(k) above) in light of the Court's factual findings.[756] If the answer is no, that is the end of the s. 420 TCCC claim; if the answer is yes, the Court moves on to consider the other elements of s. 420: wilfulness/negligence, damage and causation. A claimant need not further demonstrate that he (or any other party) has a "*separate*" claim, under any provision, in respect of such unlawfulness.[757]

1089. However, the Claimants also correctly emphasise that, whilst it is their case that the Kasem Transfer was unlawful in each of the ways set out above and analysed below, they need only to establish one breach of a provision of Thai law for their s. 420 TCCC claim in relation to the Kasem transfer to succeed (again subject to findings on wilfulness/negligence, damage, and causation); they do not need somehow to 'aggregate' the above "*elements of unlawfulness*".

1090. It is convenient to turn first to the constituent elements of the pleaded Thai law offences, before turning to consider whether the other elements of section 420 are satisfied in those cases where a Thai law offence is made out. That is because I find that only one Thai law offence has been committed, namely an offence under section 350 of the Penal Code.

(1) s. 350 TPC: cheating against creditors

1091. Section 350 of the Penal Code (cheating against creditors) provides:

> "*[w]hoever in order to prevent his creditor or the creditor of the other person from receiving payment in whole or in part which has been or will be claimed through the Court, removed, conceals or transfers any property to another person, or maliciously contracts a debt for any sum which is not true, shall be punished with imprisonment not exceeding two years or fined not exceeding forty thousand Baht, or both*"

1092. The experts agreed that the following elements must be established for the purposes of s.350:[758]

a. The creditor has filed a claim against the debtor with a court, or will do so;

b. The debtor is aware that the creditor has filed or will file such a claim;[759]

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[756] Munin 1, [79]

[757] Munin 1, [79].

[758] Munin 1 [198]; Suchart 1 [276]; Anurak 1 [81]

[759] See also Suchart 1 [279(iv)]

c. A person (Suchart: any person[760]; Anurak: any person including a direct or indirect transferee of property transferred by the debtor[761]);

d. Removes, conceals or transfers any property to another person;

e. With an intention to prevent the creditor or the creditor of the other person from receiving payment in whole or part through the claim which has been or will be filed by the creditor with the court.[762] To prevent the creditor from receiving payment must be the defendant's "*dominant intention*";[763]

f. The property under s. 350 can be tangible or intangible property.[764]

1093. In their Joint Closing Submissions on Thai Law, as explained orally by Mr Penny KC in particular, the HP Defendants submitted that the Claimants' s. 420 claim based on an alleged breach of s. 350 of the Penal Code should fail for the following reasons, any one of which is sufficient:

a. First, the only "rights" alleged to be affected in this case are rights to enforce a contract or associated arbitral award. Those are *relative* rights which are not protected by s. 420, as all Thai law sources before the Court agree (and even the Claimants' expert accepted that was the "*mainstream*" view).

b. Second, s.350 is not engaged in any event, because the Claimants were and are not creditors of REC, and therefore no property of a debtor was transferred to prejudice a creditor's claim.

c. Third, there was no intention (let alone a sole or dominant intention)[765] to prejudice a creditor; to the contrary, the ring-fencing plan was designed to *protect* WEH, without which Mr Suppipat's Companies would never become entitled to the Remaining Amounts (in his oral closing submissions, Mr Penny KC described this argument as the HP Defendants' "*predominant defence*" to the section 350 claim).

d. Fourth, the Claimants have failed to demonstrate that payment "has been or will be claimed through the court".

e. Fifth, the price payable of c. $68 million was commensurate with the value of the WEH shares, in the distressed circumstances WEH was in at the time, as confirmed objectively by Mr Caldwell's valuation range

760 Suchart 1 [277]

761 Anurak 1 [91]

762 Munin 1 [198]; Suchart 1 [276]; Munin 2 [117]

763 Suchart 1 [363]; Munin 2 [118]

764 Suchart 1 [278]

765 Thai Law Propositions document [62.5], Munin 2 [118]

of $39 to $226 million, and actually improved rather than diminished the prospects of Symphony being paid the Fullerton First Instalment.

f. Sixth, and in any event, s.350 applies only to valid and immediately enforceable claims, and any breach would therefore be limited to the Fullerton First Instalment, which has been paid.

1094. I shall address each of these six points in turn.

(a) s. 420: are relative rights protected by s. 420?

1095. By paragraph 162.7 of the RAPOC the Claimants allege that, but for the asset stripping sequence, "*NS's Companies would have been able to enforce their right to … payment against NN's Companies* […] *by his beneficial interest in Fullerton and/ or KPN EH, which would have been valuable because of REC's shareholding in WEH*".

1096. Further, by paragraph 163.1(d) of the RAPOC, the Claimants allege that "*by reason of the Defendants' acts in furtherance of the conspiracy, the Claimants or NS's Companies lost… the ability to enforce their rights under the First Partial Award against the assets of NN's companies and/or REC and under any future Award made in favour of NS's Companies in the 2021 Arbitration or any arbitration arising out of the REC SPA*."

1097. In other words, Mr Suppipat's Companies' rights as creditors of Khun Nop's Companies were thereby injured.

1098. However, the HP Defendants contend that this is an injury only to a *relative right* and that such rights are not protected by s. 420. They use the term "relative right" in contradistinction to an "absolute right", the latter being rights that can be exercised against anybody such as property rights (ownership), rights to privacy and confidentiality and so forth. Relative rights are rights which can only be exercised against certain persons. Obligatory rights owed to a creditor by a debtor are relative rights.

1099. Dr Munin fairly agreed in cross-examination that the traditional mainstream view in the past had indeed been that section 420 only applied to absolute rights. Indeed, in paragraph 63 of his first expert report[766] he stated that "*there is an academic opinion which takes the view that any rights of another person should exclusively mean absolute rights based on the observation that the preceding rights stated by section 420 CCC, namely life, body, health, liberty and property, are all absolute rights. This is also because the violation of relative rights can mainly be dealt with under breach of contract*".

1100. However, the defendants are wrong to say that Dr Munin was unable to support an argument that a claim under s. 420 based on a violation of s. 350

[766] And paragraph 18 of his second report

might be available even in principle by reference to any Thai law authority.[767] He went on to opine as follows, by reference to specific Supreme Court decisions:

> "*64. The academic debate over the relevance of the distinction between absolute and relative rights for a tortious claim stems from the question as to whether an act can constitute a wrongful act and breach of contract concurrently. Legal scholars commonly accept the feasibility of an act constituting both a tort and a breach of contract concurrently. That is consistent with the approach in the Courts. For example, the Supreme Court recently held that an act could constitute both a tort and a breach of contract. In a Supreme Court case decided in [2020], the defendants sold travel packages, including rooms at resort hotels and travel services, to a number of customers. The defendants had known that a resort hotel was closed for renovation but offered it to the customers who were subsequently unable to use the rooms. The Court held the defendants liable to pay damages under tort law. The Supreme Court opined that [SCD No 4189/2563]:*
>
> *'The circumstance that the defendants deceived the consumers into misunderstanding and paying money as the two lower courts described in detail is considered not only breach of contract but also a wrongful act...'"*

1101. Indeed, in that case, the Supreme Court specifically referred to the fact that it was awarding compensation under section 438 of the TCCC which provides for compensation for wrongful acts under section 420. The Court stated:

> "*After considering, it was found that the plaintiff filed the lawsuit to request a refund of money the consumer lost from the fraud by the two defendants, it can be considered as filing for punitive damages or compensation. This is because the Civil and Commercial Code, Section 438, paragraph two states that compensation includes the return of property that the injured person has lost because of the violation or the payment for the price of that property. The circumstances of the two defendants deceiving consumers into believing and obtaining their money, as the two lower courts have already decided in detail, is not only breaching the contract, but also can be regarded as a violation against consumers*[768]*. The court, therefore, applied the provisions on damages under Section 438, paragraph two as mentioned to this case."* (emphasis added)

1102. Dr Munin continues in his first report:

> "*65. Based on the Supreme Court Decision No 4189/2563, a plaintiff can seek compensation in tort for acts which also give rise to a claim of breach of contract. If it is proved that the defendant failed to perform the obligation*

[767] Day 37/138:19–24.

[768] Namely, a wrongful act. Dr Munin's translation of this sentence is as follows: "*The circumstance that the defendants deceived the consumers into misunderstanding and paying money as the two lower courts described in detail is considered not only breach of contract but also a wrongful act*."

which arises from the contract which is formed as a result of fraud by the defendant and the contract is not yet avoided by the plaintiff, the defendant would be held contractually liable for non-performance, i.e. breach of contract, under section 215 CCC. If fraud is proved to satisfy all conditions of section 420 CCC, the defendant would be liable under section 420 CCC for his wrong that damaged the right of the plaintiff."

1103. Accordingly, Dr Munin opines in paragraph 18 of his second report that the Thai courts now focus simply on whether there has been an "unlawful act" causing "damage" to a right of the injured person that is recognised by law. If that is satisfied, there is no need to further show that the injured right was an absolute, rather than relative, right. This is (what I shall call) "his broader proposition".

1104. Professor Suchart takes issue with this analysis of SCD 4189/2563 stating that "*it can be easily understood that to deceive customers to pay money is, in and of itself, a wrongful act. This would be the case whether or not the defendant has also made and breached a contract. The relevant unlawful act forming the basis for liability under section 420 here it's not a breach of contract but the act of fraudulent deception.*"

1105. However, I consider that this does not adequately address Dr Munin's analysis that "*if it is proved that the defendant failed to perform the obligation which arises from the contract which is formed as a result of fraud"*, then provided the other conditions of section 420 are satisfied, the defendant will be liable under that section for a wrongful act.

1106. Dr Munin further refers to and relies upon SCD 1808/2561 (2018) as supporting his opinion, stating that in that case, where the injured persons were deceived into buying houses, the Court found that their rights were violated without discussing the distinction between absolute and relative rights; rather, the court focussed on whether the right was protected by law.

1107. In that case, the SCD referred to the fact that "*Defendant's use of deception when entering into agreements by concealing facts concerning land and buildings that had been expropriated constituted a violation of the rights of the two consumers*…" and to the fact that because "*the Defendant used deception when entering into the agreements by concealing the facts, the Plaintiff has the right to make a claim against the Defendant, and the court has the authority to calculate the damages based on the circumstances of the case.*" (emphasis added)

1108. It was the defendant's use of deception in entering into the agreements which amounted to a wrongful act under section 420, and the consequent award of damages. Whilst the court refers to this being a case of "*the Defendant violating the rights of the two consumers under Civil and Commercial Code Section 420, as endorsed by Section 4 and Section 22 of the Consumer Protection Act, 1979*", it is nonetheless consistent with Dr Munin's analysis that the use of fraud in entering into a contract may render a defendant liable under section 420 for a wrongful act, despite the breach of only a relative right.

1109. Most importantly, in paragraph 96 of his first report Dr Munin relied upon a third Supreme Court decision, stating as follows:

> "*A fraudulent act which can be cancelled under s.237 CCC may concurrently constitute a wrongful act for the purposes of s.420 when the debtor transfers a specific thing to avoid it being enforced by the creditor. In a case decided in 1970 [SCD 648/2513], the first defendant conspired with the second defendant to transfer property between them to avoid it being seized by the creditor. The Supreme Court, in consultation with the General Assembly of Supreme Court Justices, held that the Defendants' fraudulent act under s.237 CCC constituted the crime of defrauding a creditor under s.350 of the Penal Code and constituted a wrongful act under s.420 CCC. The creditor was therefore entitled to demand damages in tort*." (emphasis added)

1110. This decision (SCD 648/2513) is closest to the facts of this case. Indeed, in his expert report served on behalf of SCB, Khun Anurak himself confirmed at paragraph 112:

> "*I agree with Dr Munin that if a transfer constitutes an offence under s350 of the Penal Code then that offence will constitute a wrongful act for the purposes of s420. The distinction is demonstrated by [SCD 648/2513] to which Dr Munin refers….*
>
> *b. It is clear from the following passage of the judgment of the Supreme Court that it was the offence under S350 of the Penal Code which gave rise to the claim under S420 of the CCC: "the actions of the two defendants were deliberately illegal which is an offense of cheating creditors under the Criminal Code, S350. […] For the defendants' offense, under the Civil and Commercial Code, Section 422, it is presumed that the defendants are at fault which is a violation of the plaintiff. Both defendants will be liable to pay compensation to the plaintiff under the Civil and Commercial Code, Section 420." In those circumstances there was no need to consider revocation under S237.*

1111. I agree, and I consider that this SCD does indeed confirm that if a transfer constitutes an offence under s.350 of the Penal Code then that offence will constitute a wrongful act for the purposes of s.420, despite the fact that only a relative right is infringed. Indeed, whilst he continued to dispute this point in cross-examination (although he accepted that there were "split opinions" on the point[769]), Professor Suchart, appeared (initially, at least) effectively to assume this point in his first expert report at paragraph 89 when he stated as follows:

> "*If the wrongful act alleged is a transaction designed to cheat creditors contrary to s.350, then in order to bring a claim under s. 420 TCCC the plaintiff would have to be the creditor affected; being a shareholder of such a creditor would not be sufficient.*"

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769 Day 39/90: 8-14

1112. However, in paragraphs 35-39 of his (second) supplemental report, Professor Suchart went much further and stated that he considers this case to be "irrelevant to the issue". He went on to distinguish between a claim for cancellation of a fraudulent act which is a juristic act and a claim for compensation resulting from a wrongful act. I consider that Professor Suchart's analysis ignores the clear wording of the key passage in the Supreme Court's judgment cited by Khun Anurak and I prefer the analysis of both Dr Munin and Khun Anurak that if a transfer constitutes an offence under s. 350 of the Penal Code then that offence will constitute a wrongful act for the purposes of s. 420, despite the fact that only a relative right is infringed.

1113. Furthermore, I reject the Defendants' submission in paragraph 200.3 of their Joint Closing Submissions on Thai Law that the Supreme Court's reasoning in SCD 648/2513 should be understood as simply concluding that "*since s.350 requires a debtor-creditor relationship but, as set out above, a creditor's contractual right is a relative right, it is only at the stage that a creditor gets a Thai court judgment requiring the payment of money that there is a judgment debt which qualifies as 'property', giving the creditor a relevant interest*." The reasoning of the Supreme Court is not as narrow as that; on the contrary it clearly states the general principle that a transfer which constitutes an offence under s. 350 of the Penal Code can without more be the foundation for a claim under s. 420. The defendants' argument, extrapolated to its logical end, suggests that s. 350 can never be the basis of an s. 420 claim because in all s. 350 cases necessarily it is but the "relative right" of the creditor to seek payment from the debtor that is injured. But SCD 648/2513 is authority to the contrary.

1114. My conclusions on this issue are accordingly as follows. I rely on SCD 648/2513 (and Dr Munin's / Khun Anurak's analysis of it) to conclude that an offence under s. 350 can constitute the foundation of an s. 420 claim. In other words, it is not sufficient for a defendant simply to show that only a "relative right" was injured in order to defeat the claim. However, since I go on to find that the only relevant "unlawful act" under s. 420 is the s. 350 offence committed by Khun Nop and Nuttawut, it is unnecessary for me to make any finding as to whether Dr Munin's broader proposition is or is not correct.

1115. Finally, it follows from this analysis that I also reject Mr Penny KC's submission which he skilfully and attractively developed in closing and which is referred to in the Defendants' Joint Closing Submissions on Thai Law at paragraphs 195-200, to the effect that if an offence under section 350 is established, the only relief which is then available is in restitution, following the avoidance of the transaction by an interested person. Dr Munin disagreed with this suggestion in his cross-examination by Ms Den Besten KC[770]. Indeed, as I pointed out to Mr Penny KC in closing, it would be surprising if in a case of dishonest asset stripping, the only relief were in restitution if the shares were no longer available to be restored. It is possible to envisage a variety of circumstances where a civil claim under section 420 is necessary in order to do

[770] Day 37/ 133-134

justice between the parties. For example, as in the present case, the defrauded party may not be the precise party from whom the shares have been dishonestly transferred away.

(b) The Claimants were and are not creditors of REC, and therefore no property of a debtor was transferred to prejudice a creditor's claim under s. 350

1116. The HP Defendants next contend that even if a s. 420 claim in respect of a s.350 offence were available in principle, the absence of a debtor–creditor relationship between REC and the Claimants means that no s. 350 offence (or at the very least one actionable by the Claimants) is established in any event. They develop their argument as follows.

1117. It is common ground that s. 350 requires a creditor, a debtor and an immediately enforceable (and valid) debt.[771] Here:

a. the Claimants were not REC's creditors (the party whose property was transferred), because no debt (immediately enforceable or otherwise) was owed to them by REC.

b. As Professor Suchart explained, to engage s. 350, the "*property*" removed, concealed or transferred "*must be the property of the debtor whose creditor is said to be prejudiced by the transfer*".[772] Whilst Dr Munin also contended that property qualifies if it was "*subject to enforcement of the debt*",[773] even if that were correct it would not assist the Claimants because what was transferred were WEH shares which were not, and could not have been, subject to enforcement in respect of Mr Suppipat's Companies' claims, which lay against Khun Nop's Companies and their property.

c. The Claimants are at most a creditor of a shareholder of the person whose property was transferred.

d. The Claimants' case is therefore incompatible with the basic structure of the s. 350 offence.

e. The Claimants have no standing to bring a s. 420 claim for the alleged loss based on the alleged s. 350 offence. Dr Munin accepted that "*to bring a tortious claim, it is necessary to be someone whose right was damaged by the wrongful act*".[774] The Claimants are not persons "*injured by the unlawful act*" or with a protected "*right … violated by such unlawful act*" (as expressed by Dr Munin).

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771 Suchart 1 [279(i)], [281]; Munin 2, [115]..

772 Suchart 1, [278]

773 Day 37/128:7–11.

774 Munin 1 [76]

1118. The HP Defendants also suggested that Professor Suchart was not challenged on his evidence that, if a claim under s. 420 in respect of a s. 350 offence were available at all, "*the plaintiff would have to be the creditor affected*".[775] However, I do not accept that: see Day 39/p. 93/lines 3-8.

1119. In contrast, the Claimants contended as follows with regard to their section 350 claim:

a. Whatever the exact date of the Kasem Transfer (i.e. after April 2016), by that date the Claimants had certainly already commenced (in January 2016) the Arbitrations in respect of Mr Suppipat's Companies' claims for the unpaid sums under the REC SPAs;[776]

b. By the date of the Kasem Transfer Khun Nop's Companies (and Khun Nop) (i.e. the alleged debtors) were aware of the claim by Mr Suppipat's Companies as the counterparties to the claims. Further, each of the other Defendants involved in the share-stripping scheme had knowledge of the claim by that date - the Defendants' own case is that the Kasem Transfer was a 'ring-fencing' strategy intended to prevent Mr Suppipat from returning to WEH if he succeeded in the Arbitrations;

c. Khun Nop and the other Defendants removed or transferred the Relevant WEH Shares from REC to Kasem and onwards to the WEH Managers and their companies. This constituted the removal/transfer of relevant property in that: (i) the Relevant WEH Shares, held indirectly by Nop's Companies via REC, were the only asset of Nop's Companies; and/or (ii) the Claimants had a right to rescind the REC SPAs and therefore to restitution of the REC Shares (of which the principal value was in the Relevant WEH Shares).

d. The Defendants acted with the intention of preventing Mr Suppipat's Companies from receiving performance in whole or in part under the claim (in the form of restitution or the value of the shares or the payment due).

e. Whilst Khun Nop contends[777] that his Companies had sufficient assets to satisfy the claim, that is neither legally relevant nor correct as a matter of fact. It is also simply not the case that the shares were transferred in the normal course of business.

1120. In closing Mr Fenwick KC and Mr Spalton KC put the Claimants' case in an attractively simple way, namely that there was the transfer of property from REC (the WEH shares to Kasem etc) with the intention of preventing the creditor (Symphony, DLV, NGI) of another (KPNEH / Fullerton -the debtor)

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[775] Suchart 1, [89]

[776] Symphony's request for arbitration was dated 26 January 2016 and NGI/DLV's request for arbitration was dated 25 March 2016. See also Munin 1 [202]-[204]; Munin 2 [120]-[121], which confirm that submitting a claim to arbitration is sufficient for the purposes of s.350.

[777] RRRRAD D1/D17 [264(5)(vii)(a)]

from receiving payment, in whole or in part, which would be claimed through the court. In this regard, it was put to Dr Munin in cross-examination by Ms Den Besten KC for the 11th and 13th Defendants, that "*it's either got to be the debtor's property… or it's got to be something else that affects the debtor's ability to pay the creditor*". Dr Munin agreed with this.

1121. Both Professor Suchart and Dr Munin gave their opinions as to the proper construction of section 350 on this particular issue by reference to its wording and not by reference to any Supreme Court authority or academic writings[778]. Accordingly I have to determine whose construction I prefer.

1122. I prefer the approach of Dr Munin to this issue, which accords with the natural meaning of the wording of section 350, which applies, in particular, when a person transfers any property to another person in order to prevent the creditor *of another person* from receiving payment in whole or in part[779]. As was put to him in cross-examination, Professor Suchart's contrary interpretation of this section leads to the surprising result that if the debtor is a limited company and another person removes the company's assets in order to cheat his creditor, then the creditor does not have a claim against the person who removed the company's assets under sections 350 and 420, but rather can only bring a criminal complaint under section 350.

1123. It also follows, however, that the claim under section 420 (via section 350 of the Penal Code) belongs only to Mr Suppipat's companies, as the relevant creditors, and not to Mr Suppipat.

(c) Removes, conceals or transfers any property to another person with the dominant intention of preventing the creditor from receiving payment

1124. I find that it was the *entire asset stripping scheme* as implemented by the relevant defendants which amounted to an offence under section 350 of the Penal Code and which prevented Mr Suppipat's Companies from receiving payment as creditors of Khun Nop's Companies. In view of my factual findings, it is too narrow to view the asset stripping as being the Kasem Transfer in isolation from that which occurred subsequently.

1125. As I have set out above, the Project Houdini presentation and Mr Lakhaney's 7 April 2016 White Board clearly show that the asset stripping scheme did not end, and was never intended to end, with the Kasem transfer. It involved subsequent transfers and removals of the WEH shares (to other nominees/ offshore companies) and the concealment of these transfers by falsely creating and backdating documents to ensure that the shares were put

[778] See Suchart 1, [278]; Munin 2, [113]. At Day 37/139: 1-2, Dr Munin agreed that this point simply calls for an interpretation of the legal provision, section 350.

[779] This also accords with the correct approach to interpretation of a statute as a matter of Thai law: see Munin 2 [121]: "*Whilst it is correct that criminal laws will be construed restrictively, they will not be construed in a manner that defeats the clear effect of the law*."

well beyond the reach of Mr Suppipat. It was the totality of these acts which made up the asset stripping scheme and which made it impossible for Mr Suppipat's Companies to subsequently enforce their claims against Khun Nop's Companies. The transfer, removal and concealment of all of these share transfers consisted of one combined plan of the relevant defendants, in breach of section 350, albeit that the transfer to Dr Kasem alone would have been sufficient for an offence to have been committed under section 350, had that been the only share transfer.

1126. I have found that Khun Nop, Khun Nuttawut, Khun Weerawong and the WEH Managers combined, by the asset stripping scheme, to (i) transfer REC's relevant WEH Shares to Dr Kasem and then further on to the other recipients (Golden Music, Pradej, Cornwallis, Opus, the WEH Managers and their offshore companies, Khun Janyaluck and Khun Nuttawut); (ii) remove the Relevant WEH Shares from REC and (iii) conceal the fact and nature of these transfers by falsely creating and backdating documents.

1127. I find that this was done with the dominant intention of removing (or at least massively reducing) the value of Khun Nop's Companies' REC shares (by removing its only asset, the WEH Shares) in order to prevent Mr Suppipat's Companies from successfully enforcing their claims against them.

1128. My factual findings above demonstrate that the share stripping plan was devised in March/April 2016 (after the commencement of the arbitrations). Having obtained the REC Shares without paying for them, the plan was hatched to strip the REC shares of their value by putting the WEH shares (held by REC) beyond Mr Suppipat's reach, such that any arbitration award and court order in Mr Suppipat's favour for payment of the purchase price under the REC SPAs would be valueless.

1129. After Mr Suppipat commenced his arbitration in January 2016 and the Emergency Arbitrator had made his order on 17 February 2016, on 17 March 2016 the meeting took place between Khun Nop, Khun Nuttawut, Khun Weerawong and all three WEH Managers (collectively, "the co-conspirators") in which Khun Weerawong proposed the asset stripping strategy which was adopted by them. It was also agreed during that meeting that in return for their participating in the strategy, each WEH Manager would receive a 1.25% stake in WEH *personally* from Khun Nop as a reward in return for playing their part in the transfer of WEH shares contrary to s. 350.

1130. The agreement reached at the 17 March Meeting was summarised in the Project Houdini presentation the following day, 18 March. This important presentation outlines the essence of the s. 350 offence which was subsequently committed, and each of the co-conspirators were not only aware of it but were centrally involved in its development and implementation.

1131. In particular, the Project Houdini presentation outlines that the plan was as follows:

a. To transfer REC's WEH shares to a foreign SPV (ultimately, to Golden Music, Cornwallis, the WEH Managers' companies).

b. That those foreign SPVs could be based in any jurisdiction but "*given Sellers are HK Companies and a BVI injunction has been given, it may be best to avoid these jurisdictions.*"

c. KPN would remain in control of the shares.

d. A reward of 1.25% would be paid to each of the WEH Managers.

e. The REC SHA and KPN EH SHA would need to be terminated.

1132. Mr Lakhaney's 7 April 2016 White Board again summarises the steps in the plan to transfer the shares out of Mr Suppipat's reach contrary to s. 350, which steps were then implemented, in particular:

a. SCB's wish for a shareholders' agreement (SHA);

b. The need for "historic documents" to be terminated, to be arranged by WCP (the KPN EH SHA and ASA);

c. The replacement of the REC directors, with WCP's assistance;

d. The plan to move the shares to an offshore SPV;

e. The need for a "real sale process", anticipating the sham loan agreements later created by the WEH Managers;

f. An opinion from WCP and "FA valuation" (which led to the concocted Ploenchit report - below).

1133. I consider that the documentary record shows clearly that the co-conspirators developed the plan to commit the s. 350 offence. They then committed the offence exactly as they had anticipated by, in particular:

a. Removing the REC directors and substituting Khun Nop's associates as New REC Directors to enable the dishonest scheme to be approved by the REC board and to distance Khun Nop, Khun Nuttawut, Khun Thun and Ms Collins from the dishonest transfer to Dr Kasem;

b. Deliberately terminating the KPN EH SHA and the ASA in order to free themselves of their obligations to protect Mr Suppipat's interests and, in particular, to ensure his companies received payment under the REC SPAs (and lying to the court about their reasons for terminating);

c. Transferring the WEH shares to Dr Kasem at a significant undervalue (and dishonestly taking steps to conceal that it was a transfer at a massive undervalue by backdating contractual documents and instructing Baringa and Ploenchit to falsify documents) and then onwards to other third parties for little or no consideration;

d. Falsely pretending that the transfers of the 1.25% WEH shareholdings to each of Khun Thun, Mr Lakhaney and Ms Collins by way of reward for carrying out the dishonest scheme were in fact made as a payment

for legitimate services carried out by them and creating false documents in order to support this false account;

e. Taking steps to conceal the transfers by failing to update the share register of WEH and renumbering the shares (and then lying to the court about the reasons for doing so).

1134. In my judgment there is from this ample evidence to conclude that the co-conspirators combined to transfer REC's Relevant WEH Shares to Dr Kasem then further onto the other recipients for no consideration or at a massive undervalue, remove the Relevant WEH Shares from REC and transfer them on to other persons, and conceal the fact and nature of these transfers by falsely creating and backdating documents and deliberately failing to update WEH's share register.

1135. It follows that I reject the submission advanced in closing by the HP Defendants alone that neither Khun Nop nor Khun Nuttawut is a 'wrongdoer' at all, because he did not do the relevant act.

1136. To say in the present case that the various transfers of the WEH shares were done by REC or by Dr Kasem/Madam Boonyachinda and were not done by those who planned the transfer and put it into effect, so as to defeat the purpose of section 350 of the Penal Code, is to interpret section 350 in a literalist and absurd way. For example, (at least) Khun Nop, Nuttawut and Weerawong were responsible for the removal of the REC directors and substituting Khun Nop's associates as New REC Directors. The New REC Directors (or indeed REC) were not doing anything other than the co-conspirators' bidding. Each of the transfers of the WEH shares took place pursuant to the implementation of the joint plan of all of the co-conspirators.

1137. In this regard I accept Dr Munin's evidence, contained in paragraph 121 of his second expert report that:

> "*Whilst it is correct that criminal laws will be construed restrictively, they will not be construed in a manner that defeats the clear effect of the law*."

1138. That s. 350 should be given an interpretation consistent with its obviously intended effect of criminalising the conduct of "whoever" is the (real) person who cheats the creditors by means of the relevant transfer, removal or concealment of the property is supported by paragraph 91 of Khun Anurak's expert report. He cites the Supreme Court Decision 271/2522 and opines that:

> " *For the purposes of S350, the transferor of property may be a party other than the debtor itself. For example, if Party A (a debtor) transfers the property to Party B, and then Party B transfers the same to Party C with knowledge that Party A's creditor is going to claim for cancellation of the transfer between Party A and Party B for the purpose of enforcing performance from Party A, Party B can be held to have committed the offence of S350 (this example was adapted from Supreme Court Decision No. 271/2522)."*

1139. This Supreme Court Decision shows the court adopting a wide, purposive approach to section 350.

1140. It follows that I find that each of the co-conspirators, in implementing their common plan, are guilty of the offence under section 350.

1141. Nor do I accept the HP Defendants' contention that there was no intention (let alone a sole or dominant intention) to prejudice a creditor. I find that that was indeed the relevant defendants' dominant intention in transferring/removing/concealing the WEH Shares.

1142. This was undoubtedly so in the case of Khun Nop and Khun Nuttawut. But it was also so in the case of the WEH Managers. This was why the WEH Managers terminated the ASA: they chose to take the 1.25% shareholding from Khun Nop and participate in the share-stripping scheme because they knew that they would not receive their $10m under the ASA. They knew that, under the plan, Khun Nop was not going to make payment under the REC SPAs, meaning that payment of the WEH Managers' $10m would not be triggered.

1143. It was also so in the case of Khun Weerawong who drew up the false documentation and gave the misleading legal opinions. He conceded in cross-examination that he "*knew perfectly well the effect of the transfer was likely to be that there was no money within the original structure* [ie REC] *to pay M Suppipat*"[1] and that after the transfer "*there is no legal basis on which Khun Nopporn could have obtained the money … from the future development of the WEH business*": Day 32/20:24-21:5 {I/32/6-7}. I consider that this, too, was his dominant intention in transferring, removing and concealing the Relevant WEH Shares

1144. So far as the other defendants are concerned, I find that there is insufficient evidence to hold that they also committed an offence under section 350:

a. **The WEH Managers' companies:** I consider that their companies did not 'transfer, remove or conceal' any of the WEH shares. They were a passive recipient of the WEH shares. Rather, they provided assistance in the scheme, as discussed in relation to s. 432 below.

b. **Madam Boonyachinda**: Likewise with Madam Boonyachinda. I consider that her role in the dishonest scheme was as an assister.

c. **Kasem**: By their closing submissions, the Claimants stated that a s. 350 case against Dr Kasem only bites if I were to find that the Kasem SPA and Agency Agreement were not false documents. I have found that they were indeed false documents, being back-dated as part of the dishonest share-stripping scheme. Further, the Claimants accept that the further dissipation of WEH shares (via the Golden Music SPA, WEH Managers SPA, Pradej SPA) was done without his knowledge or consent, even though he was (even on the defendants' case) owner of the WEH shares. This is perhaps unsurprising given Kasem's belated wish to cooperate with the Hong Kong authorities (and therefore assist Mr Suppipat) in May 2018. In any event, like Madam Boonyachinda and the WEH

Managers' companies, I find that Dr Kasem was only a passive recipient of the WEH shares. Although his signatures were found on the various transactional documents (e.g. the Kasem SPA), he has said that these were forged. For present purposes I am unable to make any finding in that respect (and I do not need to), although the fact that his signature was also found on the Kasem Agency Agreement – a document he clearly did not consent to, given my finding that it was created in 2018 – lends some support to his claim.

d. **Pradej**: The Claimants contended in their closing submissions that the Pradej SPA was another attempt to distance the Relevant WEH Shares from Khun Nop's companies as part of the asset stripping sequence. They referred to the fact that the WEH Shares were transferred not just to Pradej but to 30 other recipients all related to him. Moreover, he was privy to the Pradej-Nop Loan Agreement which aimed to misleadingly recharacterise payments under the Pradej SPAs as loans in order to avoid the undertaking to the court given by Golden Music. However, there is insufficient evidence for me to conclude that Pradej was a party to the formulation of the dishonest share stripping scheme. I deal with his role, instead, in the context of his assistance in the scheme (see below).

e. **Ms Siddique:** Although Ms Siddique (Mr Lakhaney's wife) received the 1.25% incentive and was party to the 23 January 2019 indemnity agreement, the documentary evidence reveals absolutely no participation on her part in the backdating or false creation of documents or the share dispersals themselves. Having heard her give evidence, I consider that at all times she was acting on the instructions of her husband, Mr Lakhaney and she held the 1.25% on his behalf. Moreover, she did not know that the relevant transfers of WEH shares in which she unwittingly participated were part of the dishonest share stripping scheme; nor did she have the dominant intention of thereby depriving Mr Suppipat's Companies of payment from Khun Nop's Companies.

f. **SCB:** I have explained in the factual narrative of this judgment above that whilst SCB acted at times injudiciously, there is insufficient evidence to establish that they acted dishonestly. In summary, the s. 350 case against SCB fails for two main reasons.

    i. Firstly, the Claimants have not been able to satisfy me that they removed, concealed or transferred the WEH Shares from Mr Suppipat's Companies. I have set out my factual findings so far as SCB is concerned above. In particular, I have found that they did not know of the Kasem Transfer until after it had happened. The Claimants have not established that SCB committed any unlawful act.

    ii. Secondly and fundamentally, I am persuaded by Mr Davies-Jones KC for SCB that SCB did not have the dominant intention to deprive Mr Suppipat's Companies of payment from Khun Nop's Companies. This is because their support for the ring-

fencing scheme was conditional on two matters, namely: (i) that Mr Suppipat should be paid under the REC SPAs (as this would avoid his return as shareholder which SCB was keen to ensure), as evidenced by their insistence on the Escrow Condition and even elevating it to an Event of Default in the Watabak Facility Agreement; and (ii) that the ring-fencing scheme should be legal, as evidenced by their continued input into the First and Second WCP Opinions.

For the same reasons, I find that SCB did not assist in or instigate a breach of section 350 of the Penal Code under section 432 of the TCCC (which I address below).

g. **Khun Arthid:** I also do not consider Khun Arthid to be liable under s. 350. As with SCB, I have found as a fact that Khun Arthid did not play any part of the transferring, removal or concealment of any of the Relevant WEH Shares. I consider that Khun Arthid became too close to Khun Nop and in wanting to help him acted at times injudiciously. However, I do not consider that the Claimants have proved that he acted as a knowing party to the dishonest scheme. The Claimants have not established that he committed any unlawful act.

For the same reasons, I find that Khun Arthid did not assist in or instigate a breach of section 350 of the Penal Code under section 432 of the TCCC (which I address below).

The Claimants sought to suggest that Khun Arthid was the true beneficial owner of Cornwallis, with Khun Arj acting as his agent, and that the 1,000,000 WEH Shares transferred under the Cornwallis SPA by Kasem represented a reward for his assistance in the dishonest scheme. However, I accept Ms den Besten KC's submission for Khun Arthid that the Claimants have adduced insufficient evidence to make this claim good. The only documentary evidence available records that Khun Arj was acting as the agent for Madam Boonyachinda. Moreover, the contemporaneous documents suggest that Khun Arthid was the person who decided upon the Escrow Condition, so as with SCB, I find that he did not have the dominant intention of preventing Mr Suppipat's Companies from receiving payment from Khun Nop's companies.

(d) Payment "has been or will be claimed through the court"

1145. It is also necessary, in order to satisfy the criteria of section 350, for the Claimants to demonstrate that payment "has been or will be claimed through the court". The Defendants maintain, through Professor Suchart, that "court" in this context means a Thai Court only and does not include arbitration, whereas the Claimants maintain through Dr Munin that the reference to court can include both a foreign court and arbitration.

1146. I accept the Claimants' argument on this point. In his first report, Dr Munin opines at paragraph 202ff that:

> "*202. Although s.350 of the Penal Code only mentions 'Court', not arbitration, based on the Supreme Court Decision No 8774/2550 I consider that entering an arbitration can prove that a person would file a claim against the debtor to enforce an arbitral award or to claim the repayment of the debt where the arbitration fails.*
>
> *203. It would be sufficient to found a criminal offence under s.350 that the defendant knew that the plaintiff had issued an arbitration claim, and concealed property to prevent the plaintiff receiving sums they might be found entitled to in that Arbitration. In my opinion, an informal letter sent to the debtor expressing the creditor's intention to initiate an arbitration is also sufficient for the purposes of s.350. It sufficiently gives the debtor a warning that the creditor intends to enforce the debt over the property of the debtor through court in the future."*

1147. Professor Suchart disagrees with this conclusion. In paragraph 291 of his first report he argues that since criminal provisions should be interpreted strictly, there is no warrant for extending the word "court" to "arbitration". I do not accept that evidence but, moreover, it fails to answer Dr Munin's point. Arbitration judgments create a debt that can be enforced by a Thai court. His point, which he elaborated upon in cross-examination, was that if a defendant knows that a plaintiff has issued or is going to issue an arbitration claim and transfers or conceals property precisely in order to prevent the plaintiff from receiving sums which he/she may recover in the arbitration, then these are sums which the debtor knows will (ultimately) be claimed through the Thai court. He cites SCD 8774/2550 in support of this opinion: in that case the Supreme Court held that it was not necessary to commence a court claim in respect of a debt for section 350 to apply; it was merely necessary to intimate the prospect of a court claim (in that case by giving notice and demanding payment for an adulterous affair). Khun Anurak states in his expert report at paragraph 86 that he agrees with this analysis of Dr Munin although (of course) it is a question of fact in each case: "*it will be a question of fact whether commencing an arbitration in Singapore against a Thai company and a BVI company communicates an intention to commence court proceedings in Thailand*."

1148. I find as a fact in this case that commencing the arbitration did indeed communicate such an intention. Khun Nop was not going to pay the sums due under the REC SPAs. The co-conspirators knew this and they knew that the shares had to be transferred precisely because Mr Suppipat was pursuing his legal remedies to recover the shares and obtain payment.

1149. Dr Munin adds in his second report at paragraph 121 that "*Whilst it is correct that criminal laws will be construed restrictively, they will not be construed in a manner that defeats the clear effect of the law. In this case, it would make the offence completely arbitrary if the offence depended on whether it was a debt enforceable in the courts or in arbitration, particularly given the importance and widespread use of arbitration. The key issue is*

whether the creditor has filed or will file a claim and claims can be brought in courts or arbitration."

1150. I am comforted in this conclusion by the fact that the section 350 criminal claim which has been brought in Thailand by Symphony, NGI and DLV against Khun Nop and others has been allowed to proceed by the Thai court – see the judgment of the South Bangkok Municipal Court dated 28 October 2020.

(e) The price payable of c. $68 million was commensurate with the value of the WEH shares sold, in the distressed circumstances WEH was in at the time, as confirmed objectively by Mr Caldwell's valuation range of $39 to $226 million, and actually improved rather than diminished the prospects of Symphony being paid the Fullerton First Instalment.

1151. I entirely reject this contention. The purpose of the transfer to Dr Kasem at book value was to ensure that Symphony would not be paid by Fullerton.

1152. I do not accept that THB 37 per share (which leads to a purchase price of $68m) was anywhere near a fair valuation for the WEH shares at the time of the Kasem Transfer. I reject Mr Caldwell's suggestion to the contrary. I find as fact that the true value of the WEH shares was no less than the $700m which Khun Nop paid for REC in June 2015. Whilst I consider that this is apparent from the contemporaneous documents which are a more reliable guide than the expert valuations, I prefer the expert evidence of Mr Schumacher to that of Mr Caldwell so far as the value of REC between April 2016-September 2016 is concerned, which is more consistent with the contemporaneous documentary material available to the court.

1153. WEH was clearly a profitable business. During 2013 and 2014, the shares were valued in the private markets at THB 380-570. Prior to Mr Suppipat's *lèse-majesté* charges, various investment banks valued WEH in preparation for an IPO in the range of USD $1.7-$3bn. Mr Suppipat then sold his REC shares on to Khun Nop for $700m. On any account therefore, the THB 37 per share valuation in May 2016 when the Kasem Transfer took place represented a massive fall in value.

1154. The reason for the transfer to Dr Kasem being at such a low value ("book value") was, of course, because this was part of the dishonest share stripping scheme implemented by the co-conspirators. Their procuring the valuation of the shares at book value by Ploenchit (based upon Baringa's instructed valuation) demonstrates that this was not a genuine valuation at all but rather one chosen by the co-conspirators as part of their dishonest plan. The transfer to Dr Kasem was never intended to be a genuine sale. Rather, Dr Kasem was used as a nominee to allow Khun Nop to retain beneficial ownership of the WEH shares while distancing the shares from Mr Suppipat in order to deprive him of payment for them.

1155. The valuation reports belatedly obtained which certify that THB 37 was a fair value were a sham. The documentary record shows how Mr Lakhaney,

Khun Thun and Khun Nuttawut put undue pressure on the valuers to produce a figure that was consistent with what they wanted, rather than the genuine value.

1156. Contemporaneous valuations that were produced *by the defendants themselves* after the 2016 Arbitrations were brought (ie whilst the risk of Mr Suppipat returning remained) also confirm that THB 37 was a serious undervalue in May (or indeed April) 2016. On 13 June 2016, during the negotiations to sell the shares to Orix, a reputable third party, Mr Lakhaney sent an email to Ms Collins asking her to "*Show WEH valuation [to Orix] at US$ 2bn / THB 70 bn*". Further, on 2 August 2016, Mr Lakhaney emailed Khun Nop and Khun Nuttawut, copying in Ms Collins and Khun Thun, saying "*We all like Orix as an investor*" and stating that, "*In terms of overall valuation we can push a $1.9 - $2 bn pre money valuation for WEH …"*, to which Khun Nuttawut responded: "*Please try to push it to 450+ level for all of us*". The WEH finance team's presentation to Orix was that the shares were to be valued at 560 THB per share with "*significant valuation expansion potential*". It is true that, at this stage, SCB had approved drawdown under the Watabak Facilities; but as I have found (and as I explain further below), SCB was always ultimately going to do so.

1157. Other independent valuations conducted at the time are consistent with this. On 3 January 2017, Baker McKenzie advised Gunkul in connection with their proposed purchase of the Relevant WEH Shares from Dr Kasem that the purchase price under the Kasem SPA was "*as much as 10 times lower"* than their fair value, based on the fact that it was USD $68m, being less than 10% of the purchase price of $700m agreed under the REC SPAs. Similarly, when considering the WEH Managers SPA which listed a purchase price of THB 38 per share, Grant Thornton emailed the WEH Managers: "*Given that transactions before and after the Ploenchit Valuation are at a higher value, it is difficult to justify that that the acquisition by Dr Kasem meets this definition [of fair value/orderly transaction]. This will be raised by the SEC.*"

1158. The defendants sought to justify the valuation by contending that the risk of Mr Suppipat's return to WEH, following his bringing of the 2016 Arbitrations, resulted in the shares having a massively deflated value. I reject that contention. I find that that bank funding could have been obtained to prevent WEH's business from collapsing after Mr Suppipat's departure. Indeed, I find as a fact that SCB would have funded WEH's projects (including Watabak and the next 5 projects) to ensure that WEH retained its substantial value (well above the book value of the business) and the IPO of WEH went ahead. I rely upon the fact that SCB did indeed allow Watabak to draw down on its facility in this case and ensure that WEH was funded. In particular:

a. The Chairman of SCB gave the green light to Watabak funding in August 2015.

b. Whilst SCB had informal concerns about funding Watabak in the first quarter of 2016, no formal decision not to fund had taken place; the situation was fluid and remained under consideration, including by the taking of legal advice from Khun Weerawong.

c. Khun Arthid was regularly consulted about the situation and he was seeking to assist Khun Nop in all ways possible to allow drawdown and enable Khun Nop to meet his payment obligations under the REC SPAs.

d. On 22 March 2016 SCB formally sought the WEH IPO Mandate. It was clearly the case that SCB was committed to the IPO of WEH and would do all that it could to ensure that the IPO would go ahead.

e. It is clear that SCB viewed WEH as a very valuable business with massive potential. Its approach was accordingly to assist Watabak to draw down under its facility subject to conditions. SCB repeatedly granted extensions for compliance with those conditions and waived defaults arising from Watabak's failure to satisfy those conditions.

f. In particular, between 2016 and 2017, SCB granted numerous extensions for compliance with the Escrow Condition. In total Watabak requested and they granted four extensions to 31 December 2016, 31 January 2017, 28 February 2017 and 30 June 2017. SCB's purpose in imposing the Escrow Condition was to ensure that Mr Suppipat would get paid under the REC SPAs so as to prevent his return to WEH, and so it is understandable that SCB was willing to agree to extensions of the deadline for the fulfilment of the condition.

g. On 13 July 2017, the Credit Committee resolved to approve Watabak's request for waivers (i) under the Watabak ECA to allow Dr Kasem to sell WEH shares as a way of funding the cash placement of the First Instalment under the REC SPA with the ICC in Singapore; and (ii) changing the terms of the cash placement condition to enable the cash to be placed with SCB instead of the ICC.

h. Khun Nop eventually satisfied the Escrow Condition through the selling of WEH shares to Golden Music and Khun Pradej and drawdown by Watabak under its facility went ahead.

(f) Section 350 applies only to valid and immediately enforceable claims, and any breach would therefore be limited to the Fullerton First Instalment, which has been paid.

1159. The experts agree that the debtor's *obligation* to the creditor must be valid and immediately enforceable at the time of the transfer of the property.[780] Where the amount of the debt is uncertain or disputed at the time of the alleged prejudicial action, Dr Munin maintains that this does not prevent liability under section 350: what is essential is the existence of a valid debt.[781] I accept this evidence of Dr Munin which I consider to be persuasive and logical. I do not accept the evidence of Professor Suchart on this issue, namely that where the

780 Suchart 1 [279(i)], [281]; Anurak 1 [83]; Munin 2 [115]

781 Munin 2 [116]

amount of the debt is uncertain or disputed at the time of the alleged prejudicial action, the transfer of property may be considered not to have been carried out with the special intention to defraud the creditor.[782] There is no reason why the mere fact that the debt is disputed should lead to the conclusion that there is no intention to defraud the creditor. The Supreme Court Decision cited by Professor Suchart, SCD 3107/2532 (to which I was not taken), is not authority for the proposition relied upon by him. Rather, as explained by Dr Munin, the reason for the defendant being found not guilty of an offence under section 350 of the Penal Code was the creditor's failure to prove the debtor's intention to prevent the creditor from receiving payment from the debtor (because the debtor's property exceeded the claim made by the creditor), not the uncertain amount of the debt.

1160. I should add that Khun Anurak did not support Professor Suchart's position on this point (instead he concentrates on the timing of the creditor's claim: he considers that where the debtor disputes that a debt is valid, then in order to succeed in a claim under s.350 the creditor will need to prove to the court that the debt is valid. In practice he says, this means that the validity of the debt and the debtor's intention in making the disputed transfer will need to be considered by the court at the same time[783]).

(2) s. 421 TCCC

1161. I have analysed s. 421 TCCC in some detail above in the context of the Global Transaction Representations.

1162. As regards the asset stripping claims, since section 421 is concerned with liability for otherwise lawful conduct, I consider that it is of no application in this case, as the transfers to Dr Kasem and subsequently to the other, further transferees were made in breach of section 350 of the Penal Code and were accordingly unlawful.

1163. In any event, section 421 TCCC does not rely on a criminal offence; does not have the benefit of the ten year extended limitation period; and is accordingly time-barred.

1164. It follows that I do not need to determine the question of whether section 421 is satisfied on the facts, namely whether each defendant exercised their right with the *sole or primary/dominant* intention to cause harm to another person or whether each defendant exercised their right with the intention of benefiting themselves despite knowing that the corollary of their action is unreasonable or excessive harm or damage to another person.

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[782] Suchart 2 [294]

[783] Anurak 1 [83(b)]

(3) Combining together to effect the transfer causing harm to Cs

1165. The Claimants state in paragraph 834 of their closing submissions that Dr Munin was clear that the mere act of combining with others to cause harm by unlawful means is "*unlawful*" for the purposes of s. 420 TCCC,[784] being contrary to a principle/provision of Thai law.

1166. However, I do not accept Dr Munin's evidence, which is unsupported by any Thai caselaw or commentary, that the mere fact of a combination can constitute an unlawful act under s. 420. I prefer Professor Suchart's opinion. Professor Suchart explained at paragraph 96 of his first report that while the fact that the defendants entered into a combination might have evidential significance in terms of proof of wilful conduct, the combination is not itself sufficient to establish the claim. In these circumstances, it is not the combination which constitutes the 'unlawful act': the defendant(s) must have committed some other act(s) which qualify as being 'unlawful'.

1167. He accordingly stated in paragraph 99 that

> "*I do not agree that "forming a combination to cause harm" is generally an 'unlawful act' (for the purposes of the s.420 action)… The point may be hypothetical, and has not (to my knowledge) been considered by the Thai courts, because a mere formation of a combination would in any case fail to meet all the elements of a wrongful act for the purpose of s. 420 (since there would be no damage resulting from the mere combination). In fact, even if an act is committed, but there is no damage done, it will not be a wrongful act for the purpose of s. 420…*"

1168. Dr Munin accepted in his oral evidence that a 'combination' would always be inchoate from a s.420 perspective, because a mere combination in and of itself could never cause injury, and to be actionable, there would need to be "*implementation*" of the combination — by the carrying out of a specific unlawful act.[785]

1169. It follows that I accept the submission of Mr Penny KC that the Claimants' suggestion that merely "*combining with others*" constitutes a relevant unlawful act is wrong in principle and adds nothing to the further specific alleged unlawful acts relied upon by the Claimants.

(4) s. 237 TCCC: rescission of transactions which cheat creditors

1170. By paragraph 156.3 of the RAPOC, the Claimants plead as follows in relation to the Kasem Transfer:

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[784] Munin 1, [82]; Munin 2, [35]; Day 37/91:1-95:4.

[785] Day 37/92:4 to 95:4.

> "*The transfers of the Relevant WEH shares were unlawful as contrary to s.350 Criminal Code and/or s.237 TCCC. In particular, they constituted a fraud on the creditors of REC, and on the creditors of NN's Companies whose only substantial asset was their interest in WEH held through REC … . The transfer from REC to Kasem was at an undervalue, leaving REC and NN's Companies unable to satisfy their debts when they fall due, and without full compensation for the assets transferred, to the detriment of their creditors*".

1171. Section 237 TCCC provides as follows:

> "*The creditor is entitled to claim cancellation by the Court of any juristic act done by the debtor with knowledge that it would prejudice his creditor; but this does not apply if the person enriched by such act did not know, at the time of the act, of the facts which could make it prejudicial to the creditor, provided, however, that in case of gratuitous act the knowledge on the part of the debtor alone is sufficient.*
>
> *The provisions of the foregoing paragraph do not apply to a juristic act whose subject is not a property right*."

1172. I can deal with this allegation shortly. As is clear from its express terms ("*The creditor is entitled to claim cancellation by the Court…*"), s.237 is a remedial provision only. The Claimants are not seeking cancellation of any transaction. The mere availability of a remedy of cancellation under s.237 does not of itself constitute an 'unlawful act' for the purposes of s.420.[786]

1173. Section 237 may be invoked together with section 350 as Dr Munin explains in paragraph 96 of his first report, but that does not mean that the remedy of cancellation under section 237 itself constitutes a wrongful act:

> "*A fraudulent act which can be cancelled under s.237 CCC may concurrently constitute a wrongful act for the purposes of s.420 when the debtor transfers a specific thing to avoid it being enforced by the creditor. In a case decided in 1970, the first defendant conspired with the second defendant to transfer property between them to avoid it being seized by the creditor. The Supreme Court, in consultation with the General Assembly of Supreme Court Justices, held that the Defendants' fraudulent act under s.237 CCC constituted the crime of defrauding a creditor under s.350 of the Penal Code and constituted a wrongful act under s.420 CCC. The creditor was therefore entitled to demand damages in tort*."

1174. Dr Munin accepted in his oral evidence that s.237 is a purely remedial provision defining the circumstances in which a juristic act may be avoided, which the Claimants have not sought in these proceedings; whereas "*tortious liability is a separate matter*", which requires proof of a wrong (rather than

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786 Munin 1, [96]; Suchart 1 [120]-[121]; Anurak 1, [112].

entitlement to a separate statutory remedy to avoid a contract).[787] As Dr Munin put it:[788]

> "*It depends on the Claimant, what he wants. If he wants to, you know, cancel the transaction, then he can go for section 237, okay? But if he — if he want to seek damages, then he can go for section 420.*"

1175. It follows that section 237 does not assist the Claimants in proving liability under section 420.

1176. Had that not been the case, I consider that the Claimants would also have faced another significant hurdle in that section 237 TCCC provides that "***The creditor** is entitled to claim cancellation by the Court of any juristic act done by **the debtor** with knowledge that it would prejudice his creditor ...*"[789] [emphasis added]. That wording is narrower than section 350. The relevant "*juristic act done by the debtor*" relied upon by the Claimants is the transfer of WEH shares by REC. However, there is force in the HP Defendants' argument that the Claimants are not creditors of REC and REC is not a debtor of the Claimants (the debtors of the Claimants were Khun Nop's Companies); Khun Nop's Companies did not do and are not alleged to have done the relevant juristic act; and therefore the Claimants were not parties whose right was relevantly damaged by conduct falling within s.237.[790] Indeed, the Claimants themselves state in their Foreign Law Summary, at paragraph 46 that "*[t]he claimant must be the creditor in respect of an existing debt owed by the debtor to the creditor*" and "*[the] debtor [must enter] a juristic act ... after the creation of the debt*".

1177. However, I do not need to decide the correctness of this further argument of Thai law in view of my finding that s.237 is a remedial provision only.

(5) Falsifying of documents contrary to sections 179, 264, 265 and 268 TPC

1178. The Claimants' allegations encompass both documents said to be false in their *contents*[791] and documents on which Dr Kasem's signature is alleged to have been *forged*.[792] In general their allegations cover: REC's accounts, the

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787 Day 37/103:3 to 105:11. Dr Munin also suggests that if the criteria for relief under s.237 were satisfied, that may give rise to a relevant unlawful act for the purposes of s.420 by way of his 'second route' of damage without legal justification. See at Day 37/102:15–18: "*A: and 237 itself is an unlawful act, in opinion. This can be the second route. Q: Second route only? A: yes.*" However, that 'second route' is not part of Cs' pleaded case.

788 Day 37/104:7–10.

789 Suchart 1 [118]

790 Suchart 1 [376], [379(c)], [383]; Munin 1, [262(1)]; Anurak 1, [99]-[101]

791 Thai Law Claims Spreadsheet, rows 23 (REC's accounts) and 24 (the REC Minutes).

792 Thai Law Claims Spreadsheet, rows 25 (the Kasem Transfer), 30 (transfers to the WEH Managers), 38 and 39 (the GML transfer), 45 (the Pradej transfers), 49 and 50 (the Cornwallis transfer), 55 (the WEH Management SPAs) and 67 (the Kasem Agency Agreement). It is not clear from that table, the Thai Law Claims Spreadsheet, or the relevant paragraphs of the RAPOC cited therein, whether in respect of certain of those transfers the Claimants

REC Board Meeting Minutes (especially the Third REC Minutes), the Kasem Transfer documents and the documents surrounding the subsequent transfers (viz the WEH Managers Transfers, Golden Music Transfer, Pradej Transfer, Cornwallis Transfer). It is common ground that civil claims based on offences against these provisions benefit from a longer, 10-year prescription period, and if there is merit in them, they are not time-barred.

1179. The Claimants rely upon the following provisions of Thai law.

(a) Forgery (s. 264 TPC)

1180. s. 264 provides:

> "*Whoever, in a manner likely to cause injury to another person or the public, fabricates a false document or part of a document, or adds to, takes away from or otherwise alters a genuine document by any means whatever, or puts a false seal or signature to a document, if it is committed in order to make any person believe that it is a genuine document, is said to forge a document, and shall be punished…*".

1181. There are three ways in which it was said s. 264 applied to the facts.

1182. Firstly, it was common ground between the experts that forging a signature constitutes an offence under s. 264. However, as I have mentioned the Claimants were given an opportunity during the CMC to adduce evidence by handwriting experts to show that Dr Kasem's signature was forged but failed to do so. Accordingly there is no evidential basis to sustain this argument.

1183. Secondly, the Claimants rely on documents which contained false information. However, the section (unlike others relied on by Claimants, notably s.341 of the Penal Code) does not respond to the contents of a document. Rather, the gravamen of an offence contrary to s.264 is lack of authority in relation to the creation or alteration of a document. It was accordingly common ground between the Thai law experts in their written reports that s.264 of the Penal Code[793] applies only to documents which are themselves falsified (that is, forgeries in the true sense), as opposed to circumstances where "*a person produces or amends either their own document, or a document which they have authority to produce or amend*", including where such a document "*contains false information*", viz:

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also rely on documents said to be false in their contents, rather than forged. If so, they fall to be dealt with in the same way as those set out above.

[793] "*Whoever, in a manner likely to cause injury to another person or the public, fabricates a false document or part of a document, or adds to, takes from or otherwise alters a genuine document by any means whatever, or puts a false seal or signature to a document, if it is committed in order to make any person to believe that it is a genuine document, is said to forge a document*". Section 265 and 268 provide for offences parasitic on forgery contrary to s.264.

> *"If a person produces or amends their own document, or a document which they have authority to produce or amend, then they do not commit an offence under s.264. Further s.264 does not apply to a situation where a person who has the authority to produce a document produces a document which includes false information. For example, s.264 does not apply to the backdating of a document where the person produces the entire document or had authority to backdate the document."*[794]

1184. As Professor Suchart put it:[795]

> "*[W]here a person has the authority to amend a document, it is not a forgery because the document is truly made by him.*"

1185. And Dr Munin opined as follows:[796]

> "*Section 264 of the Penal Code does not apply to the situation where a person who has the authority to produce a document produces a document which contains false information. For example, if a university Registrar who has the authority to make a certificate of graduation makes a certificate for a student who has not graduated that will constitute a false certificate, but will not fall under s.264 of the Penal Code. ...*
>
> *By contrast a person who forges a signature of another to complete the transfer of shares commits a crime under s.264 of the Penal Code. He has no legal authority to make a document in the name of that other person.*"

1186. Therefore, I find that the fact that the relevant documents contained false information does not render them forgeries under s. 264.

1187. Thirdly, the Claimants rely on the fact that several of the key transactional documents, such as the Kasem SPA, were backdated. The issue then became whether backdating constitutes a forgery under s. 264. They suggest that Professor Suchart initially took the position that section 264 would not cover the backdating of a document to make someone believe that it was a genuine document [797], but that he later changed his evidence upon a question from the Court, accepting that such backdating "*would fall… within section 264*".[798] I do not accept that suggestion. His evidence was as follows:

> "*A. Because if the power of attorney is still with you, you may always change it. But if the power of attorney, for example, had been submitted to the court, to submit to some authority or any third parties, you take it back, make some amendment in that, then it should fit 264 as a forgery. Because you no longer have the authority to do that.*

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794 Thai Law Propositions document, [78].

795 Suchart 1, [327]. See also at [317]–[319].

796 Munin 1, [218]–[219].

797 Day 40/99:14-102:1

798 Day 40/102:2-8

> *MR JUSTICE CALVER: The premise of this question, Professor Suchart, is that the forgery is committed to make a person believe it is a genuine document.*
>
> *A. Yes, it must −−*
>
> *MR JUSTICE CALVER: If that is the case, backdating, then it would fall, wouldn't it, within section 264.*
>
> *A. Right, my Lord*."

1188. I consider that properly understood, Professor Suchart was agreeing that if the document - the power of attorney - had been submitted to a court or a third party and then was taken back by the author and backdated in order to mislead a third party, then that would amount to a forgery for the purpose of section 264, because the author no longer had the legal authority to do that. But if the document is backdated by the person who is authorised to make it, before it is submitted to a court or third party, then the document is not a forgery (although it may be that some other offence has been committed). The case at hand falls under the latter situation. In the circumstances I do not consider that the relevant documents were forgeries within the meaning of section 264.

(b) Fabricating and adducing false evidence (s. 180 TPC)

1189. s. 180 TPC provides:

> "*Whoever, adducing or producing false evidence in any judicial proceedings, if such evidence is for an essential issue of the case, shall be imprisoned… or fined…*".

1190. There was little between the experts on these provisions. Professor Suchart accepted during his oral evidence, that, where a party in court proceedings produces a document – which relates to a central matter in the case or which is important – which the party says is genuine and was created on a certain date, when in fact that is false and the document was not created until a later date, that falls within s. 180.[799]

1191. However, it is wholly unclear what the Claimants allege in this respect. These provisions only received the most cursory (alternative) analysis in the Claimants' written closing at paragraph 932 as follows:

> "*Further, to the extent that ss. 264, 265 and 268 do not, for any reason, apply, Cs also rely on ss 179 and 180 TPC (concerning, respectively, the*

[799] Day 40/102:9-104:7

fabrication of false evidence and the adducing or producing of false evidence in any judicial proceedings)."

1192. I am not prepared to make adverse findings of fact against the Defendants on such an unparticularised and generalised basis.

(c) Forgery of a document of right/using a forged document (ss.265 and 268 TPC)

1193. s. 265 TPC provides:

"*Whoever, forges a document of right or official document, shall be punished…*".

1194. s. 268 TPC states:

"*Whoever, in a manner likely to cause injury to another person or the public, makes use of, or cites the document begotten from the commission of the offence according to* [ss. 264–267 TPC]*, shall be liable to the punishment*".

1195. The disagreement between the experts concerned the meaning of "*document of right or official document*" in s. 265:

a. Professor Suchart's stance was that a contract is not a "*document of right*".[800] He cited no authority or commentary for this and accepted, during cross-examination, that a "*contractual arrangement which transfers rights to property or money or future performance*" is a "*document of right*", as is a "*document which transfers the ownership of shares is a document of right*".[801]

b. Professor Suchart also considered that the minutes of a meeting of a limited company are not a "*document of right*". Again, his view was unsupported by authority. However, such minutes would be an "*official document*" of the company, for s. 265 purposes;[802] and Professor Suchart later conceded in his oral evidence that where such minutes (i) transfer ownership of shares[803]; (ii) "*appoint a director or authorise directors to enter into a sale contract*"[804] or (iii) grant a right to an individual, then

[800] Suchart 1, [334]; Day 41/104:8-15

[801] Day 41/105:6-106:12.

[802] Day 41/109:6-22. There was subsequently some debate, during Professor Suchart's oral evidence, as to whether the correct English translation of the relevant term in s. 265 is "*official document*" or "*government document*": Day 41/110:3-116:25. However, the TPC simply defines "*official document*" as "*a document drawn up or authenticated by an official in the course of his duty, and includes also a copy of such document authenticated by an official in the course of his duty*"

[803] Day 40/106:10-12

[804] Day 40/17:18-21

they are a "*document of right*"[805] (as illustrated by Supreme Court Decision No. 394/2544).

1196. Consequently, I accept Dr Munin's opinion – based on academic commentary from Professor Taweekiat and not challenged during cross-examination – that a "*document of right*" can be defined as "*written proof of transactions that create, modify, transfer, preserve or extinguish rights*".[806]

1197. However, I also accept the HP Defendants' submission that Section 265 and 268 provide for offences parasitic on forgery contrary to s.264. Accordingly, if (as here) the document cannot be described as a forgery, there can be no breach of section 265 or 268.

1198. It follows that I do not consider that any of sections 180, 264, 265 or 268 of the Penal code are satisfied (and so they do not amount to unlawfulness for the purposes of section 420) as a result of the facts relied upon by the Claimants. Rather, I consider that the importance of these facts is that they support the Claimants' main submission that the relevant defendants were dishonest and prepared to lie (including to this court) and that the Kasem SPA was not a genuine arm's length sale.

(6) Breach of directors' duties under s. 1168, 1206 and 1207 TCCC

1199. Section 1168 provides as follows:

> *"The directors must in their conduct of the business apply the diligence of a careful business man.*
>
> *In particular they are jointly responsible:*
>
> *(1) For the payment of shares by the shareholders being actually made;*
>
> *(2) For the existence and regular keeping of the books and documents prescribed by law;*
>
> *(3) For the proper distribution of the dividend or interest as prescribed by law;*
>
> *(4) For the proper enforcement of resolutions of the general meetings.*
>
> *A director must not without the consent of the general meeting of shareholders, undertake commercial transactions of the same nature as and competing with that of the company, either on his own account or that of a third person, nor may he be a partner with unlimited liability in another*

[805] Day 40/118:20-119:3

[806] Munin 1, [228]

concern carrying on business of the same nature as and competing with that of the company."

1200. Section 1169 then provides as follows:

"*Claims against the directors for compensation for injury caused by them to the company may be entered by the company or, in case the company refuses to act, by any of the shareholders.*

Such claims may also be enforced by the creditors of the company in so far as their claims against the company remain unsatisfied."

1201. Sections 1206 and 1207 further provide as follows:

a. s. 1206 TCCC:

"*The directors must cause true accounts to be kept:*

(1) Of the sums received and expended by the company and of the matters in respect of which each receipt or expenditure takes place.

(2) Of the assets and liabilities of the company."

b. s. 1207 TCCC:

"*The directors may cause minutes of all proceedings and resolutions of meetings of shareholders and directors to be duly entered in the books which shall be kept at the registered office of the company. Any such minutes signed by the chairman of the meeting at which such resolution were passed or proceedings had, or by the chairman of the next succeeding meeting, are presumed correct evidence of the matters therein contained, and all resolutions and proceedings of which minutes have been made are presumed to have been duly passed.*

Any shareholder may at any time during business hours demand inspection of the above documents."

1202. The Claimants submit in sub-paragraphs 923a-f of their written closings that Khun Nop, Khun Nuttawut, Khun Thun and Mr Lakhaney all breached their directors' duties to REC. Their main allegation was that their facilitation of the Kasem Transfer by reason of their role in REC (viz resigning as directors, appointing the New REC Directors, returning monies paid under the REC SPAs to KPN EH, falsifying REC's accounts to record that the REC SPAs was paid in full, falsely creating the REC Board Meeting Minutes) was a breach of their duties as directors to REC under ss. 1168, 1169, 1206 and 1207 of the TCCC (and therefore an unlawful act for the purposes of s. 420 TCCC). I accept these factual contentions. However, I consider that they nonetheless fail in making out ss. 1168 or 1206 offences because, as neither creditors nor shareholders of REC, they do not have standing to bring the claim.

1203. The HP Defendants allege, backed by the expert opinion of Professor Suchart, that insofar as there was a breach of duty under s.1168, 1206 and 1207 of the TCCC,[807] any claim may only be made by the company, shareholder or creditor to whom the duty is owed. Whilst the HP Defendants cited multiple Thai Supreme Court authorities in support of the proposition that the company is the proper plaintiff in respect of a breach of the s.1168 duties (none of which the court was taken to)[808], upon analysis those are in fact cases concerning section 1169 which section concerns damage caused to the company and not to anybody else.[809].

1204. However, the HP Defendants further alleged that Dr Munin was unable to articulate a basis on which anyone other than the company, its shareholders or its creditors could bring a s.420 claim on the basis of breach of a duty owed to a company,[810] and neither Thai law expert could identify any Thai authority supporting the existence of such a claim.[811] The Claimants are neither shareholders nor creditors of REC.[812]

1205. In response, the Claimants relied on Supreme Court Decision 3771/2545 (being a case to which Professor Suchart himself in fact referred[813]). That was a case where six plaintiffs filed a lawsuit against a company (D1) as well as its managing director (D2). D6 drove a gas truck filled with liquified petroleum, which was his official duty according to his employment with D1. He crashed and caused substantial fire damage to assets of the six plaintiffs. The Supreme Court ruled as follows:

> "*This case has issues that need to be addressed, the court has to determine according to the petition of the 1st and 2nd defendants whether the 2nd defendant shall be personally liable to the incident together with the 1st defendant or not. The 2nd defendant filed a petition that the 1st defendant is a legal entity, a separated entity from the 2nd defendant. Mr Sutan was an employee driving the truck, in the official capacity employed by the 1st defendant, causing the violation. In this case, the 2nd defendant was not Mr Sutan's employer and did not cause the violation directly. The 2nd defendant was a director of the company, who assumes responsibility for duties*

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807 Sections 1206 and 1207 provide for the duties of directors to, respectively, keep accounts and enter minutes.

808 or the shareholders or creditors under the derivative mechanism in s.1169 TCCC.

809 "*Claims against the directors for compensation for injury caused by them to the company may be entered by the company or, in case the company refuses to act, by any of the shareholders. Such claims may also be enforced by the creditors of the company in so far as their claims against the company remain unsatisfied*"

810 Day 38/19:10 to 20:1.

811 See in particular Professor Suchart at Day 40/40:13–15.

812 See also Section J(1) of the Defendants' Thai Law Document.

813 Suchart 1 [205]

> *according to the Civil and Commercial Code, Section 1168. If the director does not perform such duties, the director will be personally liable to the company and third parties. The 2nd defendant was therefore not personally responsible for the violation. Commerce Section 1169 states that "if a director causes damages to the company, the company may file a lawsuit to claim compensations from the director. In the event that the company refuses to file a lawsuit, any shareholder may do so.*
>
> *Incidentally, for such claim, the creditor of the company may file a claim as long as the creditor still has the right to file a claim against the company." From such provisions, the company can file a lawsuit to claim compensations from a director only in the case that such director causes damages to the company, and such damages must be a direct result of the action or omission of the appropriate action*." (emphasis added)

1206. The court appears to say in this case that if the director does not fulfil his duties under section 1168 ("*The directors must in their conduct of the business apply the diligence of a careful business man"*), he may be liable to the company and also to third parties damaged by his actions (under section 420); whereas the company can file a lawsuit against a director only if damage has been caused to the company.

1207. I say "appears to say" because (a) the clarity of this ruling is not all that it might be and (b) as Professor Suchart pointed out, the first part of this extract from the Supreme Court's judgment appears in fact to be quoting the judgment of the Court of Appeal, the substance of which it overturned (although it is true that it does not expressly say that it disagrees that damage to third parties, caused by the director failing to perform his section 1168 duties, may be recovered in principle under section 420). It follows that it is not clear precisely what the Supreme Court was saying about sections 1168 and 420.

1208. On balance I consider that this decision cannot stand as authority for the proposition advanced by the Claimants, namely that claims could be brought against company directors under s.420 TCCC by "*third parties*" (i.e. persons not qualifying as the company, its shareholders or its creditors). I accept Mr Penny KC's submission that that is a misreading of the case, as Professor Suchart suggested (both in writing in paragraphs 199-200 of his first expert report and orally). The important factual feature of that case was that the plaintiffs were "*creditors*" of the company: (ibid, paragraph 200). Their claim against the directors in fact failed; but I agree that the fact that the Supreme Court was prepared to entertain the possibility of it succeeding does not imply (still less establish) that a person who is not a creditor of the company can bring a claim against a director under s.420 TCCC by reason of the words: "*If the director does not perform such duties* [under s.1168]*, the director will be personally liable to the company and third parties.*" There was no analysis or argument as to what "*third parties*" meant in this context, and, crucially, no reason for it to extend beyond "*shareholders and creditors*".

1209. Additionally, Dr Munin said[814] that a breach of a director's duties under section 1168 can also constitute a tort and that such a breach can constitute an unlawful act for a claim under section 420 by persons other than the company. However, the authority cited by him (SCD 3199/2545) does not support that proposition. That was a case concerning a liquidator who violated duties to the Revenue Department by distributing assets to shareholders rather than setting aside funds to perform outstanding tax obligation. I agree with Mr Penny KC's submission, based upon Professor Suchart's evidence, that the case is authority for the proposition that a creditor owed money by a liquidator can sue the liquidator for unlawful conduct (in this instance an action contravening s.1264 and s.1269 of TCCC, i.e. specific statutory provisions intended for the protection of creditors). Simply because this decision does not say that a director's breach of duty is not actionable under s.420 does not mean that such a breach of duty is or might be actionable under s.420.

1210. In the circumstances, whilst I find that the Claimants' factual contentions in this regard, set out in paragraph 923a-f of their written closing, are made good (and support their section 350 claim), I do not consider that the Claimants can themselves bring a section 420 claim based upon unlawfulness under sections 1168, 1206 and 1207 of the TCCC because they are neither shareholders nor creditors of REC.

(7) Non-performance of the Kasem SPA

1211. This claim is made against Khun Nop only, and I agree with the HP Defendants that it is hopeless. As Dr Munin accepted, the "*mainstream view*",[815]confirmed by a Thai commentary of which he himself authored the latest edition[816], is that "[*n*]*on-performance of the contract could only entitle the creditor to enforce his right relating to the effect of obligations. It is true that a contract may be enforceable like a law, but it is not a law. Breach of contract is therefore not a wrongful act for the purposes of s.420.*" Such a claim based upon a simple breach of contract stands in contrast to section 350 of the Penal Code, where there is a breach of the criminal law and an undoubtedly wrongful act for the purposes of s. 420 TCCC, as confirmed by the Thai Supreme Court in case 648/2513. I therefore reject the Claimants' case that breach of contract and inducing breach of contract are "*unlawful*" acts under s. 420, in that they constitute interferences with rights without legal justification.

[814] Munin 1, [91]-[93]; [130]-[134].

[815] Day 37/20:2–3.

[816] The 3rd edition of Professor Seni's *Civil and Commercial Code.*

1212. In any event, the only party whose right might have been injured by the simple act of *non-payment under the Kasem SPA* was the contractual counterparty to the Kasem SPA, namely REC.

(8) Further alleged elements of unlawfulness

1213. Finally, in paragraph 939a-c of its closing submissions, the Claimants briefly advance three further "elements of unlawfulness" (as they term them) against Khun Nop, the WEH Managers (Ms Collins and Khun Thun) and Ms Siddique and Khun Weerawong respectively. I reject all of these "tail-end Charlie" arguments. These arguments were maintained in closing despite the fact that they were barely touched upon during the course of the 20 week trial.

1214. The first such element is advanced in paragraph 939a as follows:

a. Khun Nop also acted as an implied representative of REC, such that he owed duties (in addition to those under s. 1168 TCCC) under ss. 659 and 807 TCCC, to "*exercise as much care as he is accustomed to exercising in his own affairs*"; "*exercise such care and skill as a person of ordinary prudence would exercise in the circumstances*"; and "*pursue the accustomed course of business in which he is employed.* Khun Nop's facilitation of the Kasem Transfer is said to be a breach of these duties under ss. 659 and 807 TCCC – and therefore unlawful as per s. 420 TCCC.

b. Section 807 of the TCCC provides for a general duty owed by agent to principal:

> "*The agent must act according to the express or implied directions of the principal. In the absence of such directions, he must pursue the accustomed course of business in which he is employed.*
>
> *The provisions of Section 659 concerning Deposit apply* mutatis mutandis*.*"

c. In turn, s.659 provides:

> "*If the deposit is undertaken gratuitously the depositary is bound to exercise as much care of the property deposited as he is accused to exercising in his own affairs.*
>
> *If the deposit is undertaken with remuneration the depositary is bound to exercise such care and skill as a person of ordinary prudence would exercise in the circumstances. This includes the exercise of special skill where such skill is required.*
>
> *If the depositary professes a particular trade, business or calling, he is bound to exercise the degree of care and skill usual and requisite in such trade, business or calling.*"

1215. No particulars of breach are pleaded in the RAPOC, which fails to identify which limb of s.807 (acting in accordance with express or implied directions, or breach of a s.659 duty) is alleged, or which of the three different standards provided for by s.659 is alleged to have been engaged.

1216. The only plea in the RAPOC (and now in the Claimants' closing) is the unparticularised allegation that the Kasem Transfer "*was done in breach … of NN's duties as an implied representative of REC under ss.659 and 807 … in that NN as an implied representative … ought to have obtained the best price for the WEH shares, or not sold them*".[817]

1217. The Claimants do not explain how an alleged breach of these provisions works in relation to a s.420 claim advanced solely on the basis of wilful (not negligent) conduct.

1218. Neither expert addresses the content of the two provisions in any meaningful detail,[818] and neither was cross-examined on them. In the circumstances I do not consider that the Claimants are able to establish unlawfulness within the meaning of section 420 in respect of these heads of claim.

1219. In any event even had the Claimants done so, the fundamental flaw in this argument is that the Claimants are not an "*injured person*" under s. 420 in relation to an alleged violation of duties owed to REC by its alleged agent — in Dr Munin's words, none of the Claimants were a party "*whose right … was violated by such unlawful act*"[819]. Dr Munin accepted that in practice the only injured persons in respect of a breach of duty by a director owed to a company (and there is no principled basis to distinguish a breach of duty owed by an implied representative) were the company, its shareholders and its creditors,[820] and the Claimants are not REC, shareholders of REC or creditors of REC.

1220. The second further element of unlawfulness in paragraph 939b of the Claimants' closing submissions is said to be that the WEH Managers (Ms Collins and Khun Thun) and Ms Siddique were parties to the ASA and owed obligations to NGI thereunder. By virtue of their assistance with and participation in the Kasem Transfer, it is said that they acted in breach of the ASA. The Claimants argue that such a breach of contract can be unlawful, within the meaning of s. 420 TCCC, if (*inter alia*) it is causative of damage without any legal justification.

1221. It is then said that the WEH Managers (Ms Collins and Khun Thun) and Ms Siddique were obligated not only to provide their services with reasonable skill

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817 RAPOC, [156.4(a)]

818 See Munin 1, [137]–[139] (paraphrasing the sections); Suchart 1, [207]

819 Day 38/10:4–7.

820 Day 38/19:10-20.

and care but also to notify NGI of any materially adverse developments (such as the Kasem Transfer) and investigate and remedy the same. Instead they assisted with and participated in that transfer for their own benefit and such breaches contributed to Mr Suppipat's companies' loss of their interest in REC/WEH and their inability to recover the outstanding amounts under the REC SPAs via the arbitration awards.

1222. The short answer to this alleged aspect of unlawfulness is that, as I have said, the Claimants did not plead unlawfulness on the basis of causing damage without legal justification (see above), and "mere" breach of contract *per se* does not involve a breach of a principle or provision of Thai law sufficient to constitute an 'unlawful act' under s. 420 (see above).

1223. The third element of unlawfulness contained in paragraph 939c of the Claimants' closing submissions is alleged against Khun Weerawong. They say that, apart from acting as Khun Nop's companies' lawyer in the 2016 Arbitrations and advising SCB in relation to the ring-fencing strategy, Khun Weerawong (via WCP) also owed duties to WEH. In that regard, he provided the First WCP Opinion, which he knew falsely stated that Fullerton would be able to satisfy its obligations under the Fullerton SPA (despite the Kasem Transfer), and the Second WCP Opinion, which he knew falsely stated that the Kasem Transfer was at a fair value. This they say was a breach of his duties *to WEH* its representative and lawyer under s. 807 TCCC and Article 18 of the Lawyer's Regulation, which provides that lawyers must not conduct themselves or behave in a way that is contrary to good morals or which diminishes the dignity and reputation of lawyers. There is said to be nothing to prevent Mr Suppipat and his companies, as third parties, relying on these breaches for the purposes of their s. 420 TCCC claim in respect of the Kasem Transfer against Khun Weerawong.

1224. However, the Claimants' pleaded case at RAPOC paragraph 156.6(g) solely focused on Khun Weerawong's (and WCP)'s duties to Khun Nop, his companies and SCB:

> "*Mr Weerawong acted in breach of his duties to SCB (as its director under s.1168 TCCC) and/or to NN and NN's Companies (as their legal adviser under s.807 TCCC, and under Article 18 of the Lawyer's Regulation) by preparing or directing the preparation of the First WCP Opinion and Weerawong Advice, in that (i) he knew or ought to have known the First WCP Opinion falsely to state that Fullerton would be able to satisfy its obligations under the Fullerton SPA despite the Kasem Transfer, and the Weerawong Advice falsely to assert that the transfer to Kasem was at fair value, and (ii) in any event, he placed himself in a position of conflict of duty in respect of that advice*".

1225. It follows that the case which the Claimants wish to run in this respect is not pleaded against Khun Weerawong and no application has been made to amend the RAPOC in order to plead it. I do not consider that it is open to the Claimants to run it in those circumstances. In any event, I do not consider that

the Claimants can themselves bring a section 420 claim based upon unlawfulness under section 1168 for the reasons set out above.

1226. By Article 18 of the Regulation of the Lawyers Council on Conduct of Lawyers 1980, a lawyer is not entitled:

> "*To engage in the trade, business or to behave himself which is contrary to good morals or which prejudices the dignity and reputation of a lawyer*."

1227. Professor Suchart gave evidence in paragraph 151 of his first report to the effect that a violation of Article 18 is simply a violation of the regulatory rule of conduct of lawyers and only the Lawyers Council under the Royal Patronage may take action as they are the only regulatory body on the conduct of lawyers. Contrary to paragraph 110 of Dr Munin's first report, therefore, it is not an unlawful act for the purpose of section 420. Dr Munin simply asserted this proposition and did not cite any academic or judicial authority for his opinion. Accordingly I do not accept it and I prefer the opinion of Professor Suchart on this point: this is clearly a regulatory provision. I agree with the submissions of Ms Den Besten KC that this gives rise (only) to disciplinary action before the Lawyers' Council; it does not support a claim under section 420. (I add that I do not consider Khun Anurak's rather confused analysis at paragraphs 126-127 of his report assists on this point).

1228. Having dealt with all the aspects of alleged unlawfulness which the Claimants maintained in closing, and having found that the Claimants have only established a contravention of section 350 in that respect, I turn now to consider whether the other elements of a section 420 claim are made out in the case of section 350 of the Penal Code.

(9) The other elements of the section 420 claim (based on s. 350 TPC)

1229. As already explained, section 420 TCCC provides that: "*A person who, wilfully or negligently, unlawfully injures the life, body, health, liberty, property or any right of another person, is said to commit a wrongful act and is bound to make compensation therefore.*"

1230. The elements of s.420 TCCC are agreed to be: (i) a person committed an act; (ii) they did so wilfully or negligently; (iii) the act was unlawful; (iv) the act injured one of the specified interests ("*life, body, health, liberty, property or any right of another person*"); and (v) the establishment of the necessary causal link between the act and the injury.

1231. As for (i), I have found that each of the co-conspirators committed the relevant act under section 350.

1232. So far as (ii) is concerned, for an act to be committed wilfully, the actor must be conscious that his act might cause damage of some nature when he/she

committed it[821]. For that purpose, it is sufficient that the defendant knows that theoretically there might be adverse consequences from his act.[822] It is not necessary for the actor to intend or know the specific consequences or the gravity of the consequences.[823] There was a debate between the experts as to whether actual or constructive knowledge is required for this purpose, but I do not consider that it matters in view of my finding that the co-conspirators each had actual knowledge (and indeed the intention) that the Kasem Transfer and the further transfers would cause damage of some nature to Mr Suppipat's companies.

1233. I have already examined element (iii) in some detail. I repeat my conclusion that the only "*element of unlawfulness*" in this case is an offence under s. 350 committed by the co-conspirators.

1234. Criterion (iv) is satisfied. I have dealt with this above.

1235. Finally, so far as (v) is concerned, there was plainly a causal link between the act and the injury. I accept Dr Munin's evidence, which was supported by Khun Anurak,[824] (with which Professor Suchart "*partially*" agreed[825]) that causation, under s. 420, "*receives relatively little attention*" in Thai law jurisprudence and is therefore a "*relatively low hurdle to overcome*".[826]

1236. What the Claimants must prove under Thai law, so far as causation is concerned, is simply that the "*wrongful act*" – the Kasem Transfer (and subsequent transfers) – caused their damage. It is common ground that the claimant must establish 'but-for' causation (referred to in Thai academic writing as the "*necessary condition theory*").[827] It is also common ground that the Thai courts sometimes use the language of "*direct result*", i.e. concluding that the damage either is or is not the direct result of the defendant's wrongful act[828].

1237. Following cross-examination the experts were more or less *ad idem* on causation. Professor Suchart accepted that the "*direct result*" test means that "*but for"* the act, the damage would not have occurred; and that an act may be

[821] List of Agreed propositions of Thai Law, [4].

[822] Munin 1 [46]-[48], [50]; Suchart 1 [37].

[823] Anurak 1 [58]; Munin 1 [46]; Suchart 1 [37].

[824] Anurak 1, [75].

[825] Suchart 1, [58]

[826] Munin 1, [60].

[827] Munin 1 [57]; Suchart 1 [48].

[828] Munin 1 [59]; Suchart 1 [52]; Anurak 1 [75]; Munin 2 [15].

either the sole cause of harm or one of several contributing factors.[829] Similarly, Dr Munin agreed that, where an injury is caused by several circumstances, the defendant's wrongful act amongst them, causation is established,[830] provided that the outcome is not too remote.[831]

1238. The Claimants' case on causation is simply that had the Kasem Transfer and the subsequent share stripping not taken place, Mr Suppipat's Companies would have been able to enforce their right to payment under the REC SPAs against Khun Nop's companies via a subsequent arbitration judgment in their favour (as in fact turned out to be the case, with Awards on 22 September 2017 and 17 March 2023 respectively).

1239. In contrast, the HP Defendants contended in closing that had REC continued to hold its shares in WEH, SCB would have refused to permit draw down on the finance for the Watabak Project, and WEH would have been unable to secure financing for the other Future Projects. Accordingly, the Remaining Amounts, which were contingent on Watabak and the Future Projects reaching their CODs, or an IPO, would not have fallen due[832] and the maximum value of Mr Suppipat's's Companies' claims in the Arbitrations would have been the sums then remaining due in respect of the First Instalments, namely the Fullerton First Instalment of $85.75 million (the KPN EH First Instalment having already been paid) plus interest. The value of the relevant WEH shares, against which Mr Suppipat's Companies might ultimately have enforced any successful claim against Khun Nop's Companies, would have been limited to a pro-rata share of the value of WEH's minority interest in the two underperforming Operating Projects.

1240. I reject the HP Defendants' argument. The Defendants' case on causation cannot succeed in the light of my factual finding that even had REC continued to hold the WEH shares, SCB would not have refused to permit draw down on the finance for the Watabak Project and that WEH would have been able to secure financing for the other Future Projects.

1241. In the circumstances therefore I consider that, but for the asset stripping sequence, the Remaining Sums under the REC SPAs could have been recovered by Mr Suppipat's companies.

1242. SCB would have funded Watabak to its completion; Khun Nop would still have contested the REC SPAs in the 2016 Arbitrations; Khun Nop would have had the means, via the valuable REC shares, to raise money for his companies to pay Mr Suppipat's companies under the REC SPAs pursuant to an arbitration judgment; and in the absence of payment by Khun Nop, Mr Suppipat would

[829] Day 40/50:13-14; Day 40/52:17-23

[830] Day 38/39:3-7

[831] Day 38/40:18-24; Day 38/49:21-50:6

[832] Re-re-re-re Amended Defence of D1 and D17, [280(2)]. The Reply does not address it in terms.

have been able to enforce the arbitration awards against Khun Nop's companies in his favour.

1243. Accordingly I find that the Claimants have proved their case under section 420 TCCC, reliant upon section 350 of the Penal Code.

1244. But even if I were wrong about the liability of some or all of the co-conspirators under section 420 of the TCCC, then I find that they are liable in any event under section 432 TCCC as follows.

s. 432 TCCC: Joint wrongdoers/ assisters/ instigators

(1) Joint wrongful act: s. 432(1)

1245. The Claimants plead at paragraph 154.4 of their Re-Re-Re-Amended Particulars of Claim that:

> "*Further, the Claimants will rely upon the principles of joint tortfeasorship under ss. 291 and 432 and accessorial criminal responsibility under ss. 83, 84 and 86 Criminal Code as necessary*".

1246. Section 432(1) TCCC provides:

> "*If several persons by a joint wrongful act cause damage to another person, they are jointly bound to make compensation for the damage. The same applies if, among several joint doers of an act, the one who caused the damage cannot be ascertained.*"

1247. Professor Suchart explained, and I accept, that a "*wrongful act*" for the purposes of s. 432 is in fact the same as an "*unlawful act*" under s. 420.[833]

1248. Dr Munin opined that joint liability under s. 432(1) arises in two situations: (i) where individuals jointly commit a wrongful act with a common intention or design and (ii) where individuals share no common design, act and end in respect of the joint wrongful act but cause the same inseparable damage (see paragraph 269 of his first report). Whilst Professor Suchart and Khun Anurak took issue with this, contending that liability under section 432 requires the existence of a common design or joint intention, I reject that suggestion.

1249. In SCD 8793/2551 the second, third and fourth defendants were senior officials of the first defendant. They had the duty to review and inspect documents supporting requests for the treasury to disburse funds. They signed their names without conducting an inspection or checking for supporting documents and this enabled the first defendant dishonestly to misappropriate funds for personal use. They were held to bear joint liability with the first defendant by reason of their wilfulness or gross negligence in the performance

833 Suchart 1 [422].

of their duties, despite not having a joint intention. Indeed, Professor Suchart accepted in cross-examination that there is no Supreme Court case where the court concluded that section 432 requires a common or joint intention. In any case this point is moot because, as I go on to find, the relevant defendants jointly committed a wrongful act with a common intention (and/ or instigated and assisted a wrongful act under s. 432(2)).

(2) Instigation/ assistance: s. 432(2)

(a) The relevant act

1250. Section 432(2) TCCC further states: "[p]*ersons who instigate or assist in a wrongful act are deemed to be joint actors*" and they are jointly bound to make compensation: see paragraph 123 of the List of Agreed Propositions of Thai Law.

1251. Khun Anurak notes that instigation/ assistance under s. 432(2) is a separate route to liability under s 432 from joint wrongdoings under s. 432(1).[834] I accept his evidence because, as will be seen, the requirements for the mental state under s. 432(2) (which are largely common ground between the experts) are significantly different from that of s. 432(1).

1252. The List of Agreed Propositions of Thai Law continues as follows:

"*Instigation*

"Instigate" for the purposes of s.432(2) CCC is construed in line with s.84 of the Penal Code.[835] This provides:

> *'Whoever, whether by employment, compulsion, threat, hire, asking as favour or instigation, or by any other means, causes another person to commit any offence is said to be an instigator.*
>
> *If the employed person commits the offence, the instigator shall receive the punishment as principal. If the offence is not committed, whether it be that the employed person does not consent to commit, or has not yet committed, or on account of any other reason, the instigator shall be liable to only one third of the punishment provided for such offence.'*

An instigator is someone who causes or motivates another person to commit a crime.[836]

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834 Anurak 1 [31].

835 Munin 1 [272]; Anurak 1 [29].

836 Munin 1 [242]; Suchart 1 [354].

Assistance / Accessory[837]

> *An accessory is someone who provides assistance for a principal or accomplice to commit a crime, while not (unlike an 'accomplice') being present at the scene of the crime itself.*[838]

Criminal liability for assistance is provided for by s.86 of the Penal Code, as follows:[839]

> *'Whoever, by any means, does any act to assist or facilitate the commission of an offence of another person, before or at the time of commission of the offence, even though the offender does not know of such assistance or facilitation, is said to be a supporter of such offence, and shall be liable to two thirds of the punishment provided for such offence."*"

(b) Intention/ knowledge requirement

1253. To be an instigator under s.84 of the Penal Code or an accessory under s.86 of the Penal Code the person must act intentionally in performing that role.[840] Khun Anurak separately opined that the alleged instigator must also intend the commission of a wrongful act by X.[841] If a course of action by X can be performed either lawfully or unlawfully, the instigator must intend that X pursues the course of action in a manner which is unlawful and causes harm.[842] I accept that evidence.

1254. As to the state of knowledge that an alleged instigator / accessory must have for these purposes with respect to the commission of an offence by the principal offender, Dr Munin opined that the alleged instigator / accessory must know the facts that constitute the criminal offence.[843] But it is not necessary for the alleged instigator / accessory to know the specific offence that the third party is to commit, because ignorance of the law is no excuse.[844] Intention can be

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837 Anurak does not opine on the elements of liability for 'assistance' (as opposed to 'instigation'): see Anurak 1 [9(a)] & [10]. References to Anurak's opinions below in this section should be read subject to that caveat.

838 Munin 1 [242]; Suchart 1 [354]

839 Munin 1 [240]; Suchart 1 [353]. The translation used here comes from a translation produced by the Office of the Attorney General (2013 Winyuchon Publication House). It is linguistically clearer than the translation at Munin 1 [240], without appearing to differ in substance.

840 Munin 1 [243].

841 Anurak 1 [41], [44].

842 Anurak 1 [41]-[44].

843 Munin 1 [243]; Munin 2 [138].

844 Munin 1 [243], Munin 2 [138].

inferred from conduct.[845] Khun Anurak similarly opined that the alleged instigator must know of the facts constituting all the elements of the wrongful act.[846] But it is not necessary for him to know, from a legal point of view, that the act he is instigating constitutes a wrongful act under a specific provision of law.[847] I accept his and Dr Munin's evidence in this respect.

1255. I also find that suspicion[848] and conduct can form part of the circumstances from which the court may infer actual knowledge of the facts constituting the elements of the alleged wrongful act. Indeed Khun Anurak suggested that a court "*may sometimes consider whether the defendant should have known something* […] *The more obvious a fact is, the more likely it may be that a defendant would have known it*." However, actual knowledge remains the test. A finding of actual knowledge is made by the court after the assessment by it of all the evidence.[849]

1256. As to the state of knowledge that an alleged instigator / accessory must have for these purposes with respect to the damage intended and actually carried out by the principal offender, the views of the experts were substantially aligned as follows:

a. Khun Anurak: An intention to cause harm (in the context of s.432, just as in the context of s.420) only requires the defendant to be conscious that damage *of some nature* could arise from the relevant wrongful act. The alleged instigator need not know precisely what the consequences might be and the extent to which they might cause damage.[850]

b. Dr Munin: the instigator / accessory must intend to cause *some* harm.[851]

c. Suchart: each of the joint tortfeasors must be aware of and mutually aim at causing the damage (*not necessarily the extent or amount of the damage*).[852]

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845 Munin 1 [244], Munin 2 [138].

846 Anurak 1 [41]-[45].

847 Anurak 1 [41]-[42].

848 Munin 1 [244], Munin 2 [138].

849 Anurak 1 [45]-[47]. Professor Suchart is probably correct to state (in his first report at [356]) that it is not sufficient for a person merely to suspect that an offence will be committed by the principal; they must have actual knowledge of those facts.

850 Munin 1 [46]; Anurak 1 [48], [52].

851 Munin 2 [163].

852 Suchart 2 [422].

(c) Causation

1257. As to causation in the context of 'instigation', Dr Munin points out that section 84 of the Penal Code expressly provides that the instigator commits a criminal act even if the person he sought to persuade to commit the crime has not committed the crime. He therefore concludes, by the same reasoning, that the instigator will be liable even if the person he sought to persuade would have committed the crime anyway.[853]

1258. Professor Suchart disagrees and suggests that if the principal offender already had the intention to commit the offence before the instigation, then the instigator will not be liable under s.84, relying upon SCD 466/2524, a case to which I was not taken by the parties.[854] However, I do not consider that that case is authority for the point made by Professor Suchart. The court simply decided in that case that by giving D1 the forged official document, D2 was not guilty of the offence under section 268 of the Penal Code, presumably because D2 did not "make use of" the document himself[855]. In the court's words, D2 did not "involve itself". However, D2's conviction for forgery under section 265 remained undisturbed.

1259. Khun Anurak considers that it is necessary to show that the wrongful act would not otherwise have occurred.[856] The alleged instigator's action must have caused the third party to commit all the elements of the wrongful act.[857] He explains that whilst Dr Munin is right to say that an act of instigating a person to commit a crime is punishable under s.84 of the Penal Code even though the person who is instigated and agrees to commit a crime has not commenced any criminal act yet, or does not go on to commit the criminal act,[858] this does not mean that such person is to be automatically held liable under s.420 and s.432. Liability under s.420 and s.432 requires a wrongful act (including injury) to have been committed.[859]

1260. Professor Jitti Tingsapat, a respected academic commentator has expressed the following view:

> *"156 – Any particular act that causes another person to commit an offense is certainly said to have "caused" another person to commit an offense,*

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853 Munin 1 [242]; Munin 2 [137]

854 Suchart 1 [358#

855 Section 268 reads: "*Whoever, in a manner likely to cause injury to another person or the public, makes use of … the document begotten from the commission of the offence according to … section 265 … shall be liable to the punishment as provided to such Section*."

856 Anurak 1 [49]-[51]

857 Anurak 1 [30]

858 Anurak 1 [79]

859 Anurak 1 [79]

> *whether directly by, among others, using, forcing, threatening, hiring, asking, encouraging, ordering or requesting him/her to do, or indirectly by any means, such as, bet that he would not dare to attack another person, provoke someone to get angry with another, persuade someone to act or even when an employer orders the driver to arrive in time, which necessitates a high speed exceeding the traffic law, this is said to be a form of using. … If the offender decides to commit such an offense, it is because the instigator has caused the offender to make such a decision, which is also deemed as using him/her to commit an offense. A mere suggestion or failure to prevent another person from committing any offense is not regarded as causing another person to commit an offense.*"

1261. I consider that the position is somewhere between the views of Dr Munin on the one hand and Professor Suchart/Khun Anurak on the other hand, in that under Thai law it is necessary to show that the instigator caused the other person to commit the offence, although causation can be established by a wide variety of means, including by encouragement (when the perpetrator may already be contemplating carrying out the offence) or by request, and this may even be done indirectly.

1262. As to causation in the context of 'assistance', I accept Dr Munin's evidence that 'assist' includes helping, supporting or facilitating as well as acting in combination with other persons to achieve a common unlawful end, but I reject his suggestion that to be liable as an accessory pursuant to s.86, the assistance or facilitation does not need to have caused the commission of the crime. [860] Rather, I find that as Professor Suchart states in his first report, 'assists or facilitates' pursuant to s. 86 is not limited to the assistance and facilitation that mainly facilitates the offence, but also includes partial assistance or facilitation of the offence as well as assistance or facilitation at any part of the offence.[861]

(3) Applying the law to the facts

(a) Khun Nop, Khun Nuttawut, Khun Weerawong and the WEH Managers

1263. I have already found that Khun Nop, Khun Nuttawut, Khun Weerawong and each of the WEH Managers are liable to Mr Suppipat's Companies under s. 420 TCCC, based on an offence committed as principals under s. 350 (caused the transfer of the WEH shares away from Mr Suppipat's companies).

1264. But they also thereby committed a joint wrongful act under section 432(1) which caused damage to Mr Suppipat's companies. It was wrongful because, as I have found, it breached s. 350 of the Thai Penal Code. Moreover, I find that it was committed with a "*common intention*" by these defendants. Their common intention was to deprive Mr Suppipat's companies of payment under

860 Munin 2 [139]

861 Suchart 1 [360]

the REC SPAs and any subsequent award which they might obtain from the subsequent arbitrations by stripping Khun Nop's companies' REC shares of their value.

1265. Yet further, had Khun Nuttawut, Khun Weerawong and each of the WEH Managers not committed the offence as principals and/or joint wrongdoers, I would have found that each of them was separately liable under s. 432(2) TCCC for their assistance in or instigation of the commission of the section 350 offence by Khun Nop. They each knew of the facts that constituted the criminal offence under s 350 and they were each conscious that damage *of some nature* to Mr Suppipat's companies could arise from the relevant wrongful act under s. 350. I find that their assistance and instigation caused the section 350 offence to be carried out by Khun Nop.

1266. So far as assistance and instigation is concerned, I also find that certain of the other defendants are liable under s. 432 TCCC for their assistance in or instigation of the commission of the section 350 offence, as follows.

(b) Madam Boonyachinda

1267. Madam Boonyachinda was not represented at trial. She lodged written opening submissions (settled by Leading and Junior Counsel) but did not lodge any closing submissions. She did, however, give evidence.

1268. I find that she assisted in the commission of the section 350 offence as follows:

a. She falsely pretended to have paid THB 2.4 billion for the shares transferred to Dr Kasem under the Kasem SPA;

b. She lied to the court about the supposed genuineness of and signing of the false Kasem Agency Agreement (to which she was a party) and the Kasem SPA;

c. She signed false promissory notes purporting to show that (i) Dr Kasem and (ii) she had promised to pay KPN Energy (Thailand);

d. She entered into the false Wichai/Itti Loan Documentation;

e. She assisted in creating the false REC Payor Letters;

f. She took steps to avoid the effect of the Hong Kong injunction by the appointment of a new director of Golden Music and by laying claim to the shares in Golden Music registered in Dr Kasem's name. On 25 June 2018 Khun Surat recorded the transfer of 459,109,350 shares in Golden Music from Dr Kasem to Madam Boonyachinda on the basis of an undated instrument of transfer and undated bought and sold notes which do not record any consideration having been received for the shares but bear the signature of (both Dr Kasem and) Madam Boonyachinda;

g. She assisted in the transfer of WEH shares from Golden Music to Khun Pradej;

h. She assisted in the transfer of 3,926,368 WEH shares from Dr Kasem to Khun Janyaluck Sawatree at a price of THB 10 per share;

i. She assisted in the incorporation of Cornwallis and appointed Khun Kraivin Srikraivin as principal of Cornwallis;

j. She assisted in the sale by Dr Kasem to Cornwallis of 1,000,000 WEH shares for the price of THB 37,085,000 and then falsely claimed that this was done for tax reasons; and

k. She was then involved in the sale onwards of 200,000 WEH Shares from Cornwallis to Opus.

1269. I infer actual knowledge on her part of the facts constituting the elements of the wrongful act under section 350 by reason of her conduct described above. I find that she was undoubtedly conscious that damage *of some nature* to Mr Suppipat's companies could arise from the relevant wrongful act under s. 350.

(c) Golden Music

1270. Golden Music played no part in the trial. It lodged written opening submissions (together with Madam Boonyachinda) but then played no further part.

1271. I find that Golden Music committed the relevant act of joint wrongdoing/ assistance under s. 432 TCCC in respect of the offence under section 350 of the Penal Code. Golden Music played an important part in the asset stripping scheme as it both received the Relevant WEH shares (from Dr Kasem) and subsequently transferred the Relevant WEH shares (to Khun Pradej) in an attempt to distance them from Mr Suppipat's companies.

1272. The issue that remains is whether Golden Music had the necessary mental state for the imposition of section 432 liability. In order to be liable Golden Music must have known about the facts which constituted the s. 350 offence and have intended to cause at least some damage to Mr Suppipat.

1273. The starting point is that Golden Music as a company has no conscious mind from which these findings can be made. This feature was adverted to by Lord Sumption in *Bilta v Nazir (No 2)* [2016] AC 1, [66], in considering how the principles of the illegality defence applied to companies:

> "*the principles can only apply to companies in modified form, for they are complex associations of natural persons with different interests, different legal relationships with the company and different degrees of involvement in its affairs. A natural person and his agent are autonomous in fact as well as in law. A company is autonomous in law but not in fact. Its decisions are*

determined by its human agents, who may use that power for unlawful purposes. This gives rise to problems which do not arise in the case of principals who are natural persons."

1274. The same issue arises here when applying the terms of s. 432 (coupled with s. 350) to a company.

1275. The parties proceeded on the footing that certain issues that might otherwise be governed by foreign law are to be determined on the basis that the foreign law is materially identical to English law. These issues include (i) questions of shadow directorship in relation to Golden Music (a matter of Hong Kong law – although there is a dispute on one point of Hong Kong law being different from English law) and (ii) attribution of knowledge in respect of Golden Music (again a matter of Hong Kong law).[862] I will accordingly apply English law to determine whether Khun Nop was a shadow director and whether his knowledge can be attributed to Golden Music.

1276. In view of my factual findings above I find that Khun Nop was the ultimate beneficial owner of Golden Music.

1277. I also find that, as a matter of Hong Kong/English law, Khun Nop was the *shadow director* of Golden Music.

1278. It is common ground that the test for shadow directorship as a matter of Hong Kong law is as set out in s.2 of the Companies Ordinance ("**CO**"): a shadow director is "*a person in accordance with whose direction or instructions (excluding advice given in a professional capacity) the directors or a majority of directors of the company are accustomed to act.*"[863]

1279. Drawing on *Re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180 (cited in *Cyberworks Audio Video v MEI AH (HK)* [2020] HKCFI 398 at [56]) and *Re UKLI Ltd* [2015] BCC 755, the relevant defendants (D9, 12 and 15) say at paragraph 122ZI(i)(d) of their Re-Re-Re Amended Defence that:

"*In order to establish that a person is a shadow director:*

(A) It is necessary to plead and prove: (1) the identity of the directors of the company, both de facto and de jure; (2) that the alleged shadow director instructed the directors how to act in relation to the company or that they were one of the individuals who did so; (3) that those directors acted in accordance with such instructions; (4) that they were accustomed so to act; (5) whether the company considered that person to be a director and held

[862] D9/D12/D15 written opening at §78 {B1/4/20}; letter from WFG (Cs) {Q5/249.1} dated 3 March 2022; letter from Harcus Parker (D1/D17) {Q5/397} dated 25 March 2022; letter from CMS (then acting for D9/D12/D15) {Q5/389} dated 25 March 2022.

[863] RAPOC §151H.2; D9/D12/D15 RRAD §122ZI(i)(d).

them out as such; and (6) whether third parties considered that they were a director.

(B) It is necessary to prove that there was a pattern of behaviour, over a period of time and amounting to a regular practice, in which the directors of the company did not exercise any discretion or judgment of their own, but acted in accordance with the directions of others."

1280. At paragraph 65A.4 of their Re-Re-Amended Reply to the Re-Re-Re-Amended Defence, the Claimants take issue with requirements (5) and (6) above: they contend that these requirements only apply to a *de facto* director rather than a shadow director. They therefore say that Hong Kong law (under s. 2 CO) is different from English law in this respect. I do not consider it necessary to decide that point since I find in any event that these requirements are met. The *de jure* directors of Golden Music were originally Christian Iuliano of Artemis Enterprises Ltd and Bartley Advisors Ltd, who were then replaced by Khun Surat when Dr Kasem wrote to Golden Music on 22 May 2018 informing it of the HK Injunction.

1281. I am satisfied that Khun Nop was a shadow director of Golden Music. He directed the affairs of Golden Music of which he was beneficial owner and it (and its directors) was/were accustomed to act on his directions. In particular, Khun Nop:

a. Caused Golden Music to be incorporated on 7 June 2016 and for WCP to direct Premier to acquire it in or around November 2016. I find that Khun Nop did this for the sole purpose of using Golden Music as one of his nominees. That this is so is evident from the 7 April 2016 White Board which recorded, as part of the asset stripping plan, the plan to move the shares to an offshore SPV, i.e. Golden Music.

b. Caused Golden Music to receive 55,709,642 of the Relevant WEH shares from Dr Kasem under the Golden Music SPA (dated 1 July 2017), again pursuant to the 7 April 2016 White Board plan.

c. Caused Khun Surat to be appointed as director. In late May 2018, when Dr Kasem expressed a 'change of heart' and wrote to Golden Music's directors notifying them of the HK Injunction and informing them of his intention to comply with the order, Madam Boonyachinda (whom I find was acting on Khun Nop's instructions) replaced the previous directors with Khun Surat. The facts above show that Khun Surat was nothing but a stooge for Madam Boonyachinda (and therefore for Khun Nop).

d. Caused Khun Surat as director to then transfer the shares away from Golden Music to Madam Boonyachinda (on 13 June 2018) and subsequently Khun Pradej despite the fact that they were clearly on notice of the HK Injunctions and Kasem's intentions to preserve his shareholding, made clear by Mr Suppipat's letters sent during the period. In cross-examination, Khun Surat accepted that his role was limited to

"*execut[ing] documents of the company*"[864] and in his written evidence, Khun Surat said "*I have not been involved in any decision making on behalf of GML*".[865] I find that he was not acting of his own accord but on the sole instructions and interests of another – Khun Nop.

1282. I am therefore satisfied that Khun Nop was a shadow director of Golden Music. The relevant defendants (D9, D12 and D15) opposition to this finding was only faint. They merely asserted, in one line of their written opening submissions (at paragraph 257(b)] that "*As for shadow directorship, the Claimants cannot prove the requirements set out at KKB Ds' RAD"* (which I have set out above). I find that they can and that they have.

1283. I am also satisfied that Khun Nop's *knowledge* can be attributed to Golden Music in light of my findings that he was a beneficial owner and shadow director of the company:

a. The central question is whose act, knowledge or state of mind is, for the relevant purpose, to count as the act, knowledge or state of mind of the company: *Meridian Global Funds Management Asia Ltd v The Securities Commission* [1995] 2 AC 500. As was noted in *Bilta* at [67], "*The special insight of Lord Hoffmann, echoing the language of Lord Reid in Tesco Supermarkets Ltd v Nattrass [1972] AC 153, 170, was to perceive that the attribution of the state of mind of an agent to a corporate principal may also be appropriate where the agent is the directing mind and will of the company for the purpose of performing the particular function in question, without necessarily being its directing mind and will for other purposes.*" In other words, a court must apply the test of attribution with the relevant purpose in mind (here, attributing civil liability).

b. The relevant defendants' defence is twofold[866]. Firstly, that Khun Nop was not beneficial owner of Golden Music. I have already rejected this.

c. Secondly, that even if he were, mere beneficial ownership is not sufficient for attribution.

Whilst I accept this as a general proposition, it is clear that Khun Nop's involvement in Golden Music went far beyond mere beneficial ownership. The same facts that I have relied on to conclude that Khun Nop was a shadow director are relevant to my conclusion that Khun Nop was the directing mind and will of Golden Music for the purposes of attributing civil accessorial liability to the company.

[864] Day 33/10:22-12:22

[865] Surat WS 1 [31]

[866] See [257] of D9, D12 and D15 Opening Submissions.

1284. Given therefore that Khun Nop's knowledge and intention clearly satisfied s. 432 (viz he knew about the criminal offence being committed and intended to cause damage to Mr Suppipat), I accordingly also find that Golden Music assisted the offence under section 350 of the Penal Code and committed a joint wrong under s. 432.

(d) Cornwallis

1285. The position with Cornwallis is similar to Golden Music. They too lodged written opening submissions but then played no further part in the trial. I also find them to be liable under s. 432 (s. 350).

1286. As with Golden Music, they committed the relevant act of assistance by receiving (from Dr Kasem) and transferring the Relevant WEH Shares (to Opus) as part of the asset stripping sequence. To reiterate:

a. A share purchase agreement dated 22 March 2018 was signed by Khun Kraivin[867] on behalf of Cornwallis, pursuant to which Dr Kasem agreed to sell to Cornwallis 1,000,000 WEH shares for the price of only THB 37,085,000. By a share transfer instrument of the same date, Dr Kasem transferred the shares to Cornwallis. Madam Boonyachinda confirmed that Cornwallis paid no consideration for these shares.

b. On 17 July 2018 Khun Nop wrote to the Bank of Thailand alleging that Khun Seriniyom acted as nominee for Madam Boonyachinda in respect of the Cornwallis share transfer.

c. Madam Boonyachinda claimed that the transfer was for the familiar unidentified tax purposes: "*it was recommended by lawyers that it should be the overseas company to avoid tax"*[868]. Yet no tax advice relevant to the transfer to Cornwallis has been disclosed by either Khun Nop or Madam Boonyachinda. I have found that this was another lie to seek to cover up this share stripping transfer.

d. Khun Nop gave inconsistent accounts of the nature of and reasons for the Opus share transfer. I find that the Opus Share Transfer was yet another dishonest attempt, engaged in by Khun Nop and Khun Thun, to distance the Relevant WEH Shares from Mr Suppipat and his Companies. It was not related to repayment under any loan agreements made with Khun Srun or otherwise.

1287. The law to be applied to determine Cornwallis' knowledge is Belize law. As with Golden Music, the defendants have accepted that, although Belize law is applicable to the question of attribution, it is materially similar to English

[867] Khun Kraivin was to act as an authorised person of Cornwallis in relation to the acquisition of the WEH shares

[868] Day 34/60:23-25

law, save that there is, they assert, no such concept as shadow directorship under Belize Law (D9, 12 and 15 Opening Submissions, [254]). However, Cornwallis did not call any evidence of Belize law, playing no part in the trial.

1288. At the outset, like with Golden Music, I find that Khun Nop was the beneficial owner of Cornwallis. The Claimants have argued that Mr Arj Seriniyom, who was former sole shareholder in Cornwallis and long-standing friend of Khun Arthid, in reality acted as a nominee for Khun Arthid, such that Khun Arthid was the true beneficial owner of Cornwallis at the relevant time. I have rejected this argument. I find that it is more likely that Khun Nop was the beneficial owner of Cornwallis (after June 2018) in view of my factual findings above.

1289. As to attribution, Khun Arj was originally the director of Cornwallis but again I find that he was not acting as Khun Arthid's nominee. Khun Surat then replaced Khun Arj as director and sole shareholder of Cornwallis on 17 September 2018. However, he admits to having effectively done nothing since becoming director.[869] I do not consider Cornwallis' position to be any different from Golden Music. I find as a fact that both were offshore SPVs used by Khun Nop as part of the asset stripping plan detailed on the 7 April 2016 White Board.

1290. It is unnecessary for me to make any finding as to whether Khun Nop was a shadow director of Cornwallis; in any event the Claimants did not sufficiently address this issue before me.

(e) WEH Managers' Companies: Colome, Keleston, ALKBS

1291. As I have described above, Ms Collins is the beneficial owner of The Sixth Defendant (**Colome**), a company incorporated in the British Virgin Islands (BVI). Khun Thun is the beneficial owner of the Seventh Defendant (**Keleston**), a company incorporated in the BVI. Mr Lakhaney is the beneficial owner of the Eighth Defendant (**ALKBS**), a company incorporated in Delaware. The sole shareholder of each of Colome and Keleston is Marlon Limited, a Belize company which holds the shares on trust for Ms Collins and Khun Thun.[870]

1292. Having secured their respective 1.25% shareholdings in WEH from Khun Nop as described above, pursuant to share purchase agreements dated 17 January 2017 ("SPV SPAs"), the WEH Managers then set about transferring half of their 1.25% WEH shares to companies owned by each other in order to put those WEH shares beyond the reach of Mr Suppipat and prevent Mr Suppipat's companies from enforcing payment under the arbitration awards:

[869] Day 33/55:1-12; Surat WS 1 [46]

[870] RAPOC 13; D3, D7 Defence at [15].

a. Ms Collins agreed to transfer 680,234 WEH shares to Keleston (owned by Khun Thun) and 680,233 WEH shares to Brascot (owned by Mr Lakhaney);

b. Mr Lakhaney agreed to transfer 680,233 WEH shares to Keleston (owned by Khun Thun) and 680,234 WEH shares to Colome (owned by Ms Collins);

c. Khun Thun agreed to transfer 680,234 WEH shares to Brascot (owned by Mr Lakhaney) and 680,233 WEH shares to Colome (owned by Ms Collins).

1293. In accordance with the SPV SPAs, the WEH shares were transferred to Colome, Keleston and Brascot on 30 January 2017[871]; and from Brascot to ALKBS on 13 November 2017, purportedly for the price of THB 6,802,340.[872] The WEH Managers had no convincing explanation for the effecting of the share transfers.

1294. None of the parties has suggested that anything other than English law applies to govern the question of the attribution of the acts and knowledge of the WEH Managers to these companies, as there was no suggestion that BVI law, if it were to apply, was any different from English law on this issue.

1295. In this respect, I accept the Claimants' submission (pleaded at paragraph 25.2-4 of their RAPOC, addressed at footnote 2038, paragraph 1023 of their Closing submissions) that in this regard, Ms Collins', Khun Thun's, and Mr Lakhaney's knowledge and acts are to be attributed to Colome, Keleston and ALKBS respectively, in that they were the beneficial owners and controlling minds of those companies. At trial (and in particular in the closing submissions of the WEH Managers) it was not suggested otherwise.

1296. I therefore find that each of these companies assisted the offence under section 350 of the Penal Code by seeking to transfer the WEH shares beyond the reach of Mr Suppipat's companies. In the absence of any plausible explanation for the share transfers to them, I infer actual knowledge on their part (through Ms Collins, Khun Thun and Mr Lakhaney respectively) of the facts constituting the elements of the wrongful act under section 350 by reason of their conduct. I find that each of the companies were undoubtedly conscious that damage *of some nature* to Mr Suppipat's companies could arise from the relevant wrongful act under s. 350.

(f) Dr Kasem

1297. Dr Kasem played no part in the trial and did not seek to justify his conduct. I find that Dr Kasem assisted in the commission of the section 350 offence by

[871] D2, D4-D6, D8 Defence [123.1]; D3, D7 Defence [15].

[872] D2, D4-D6, D8 Defence at [19].

participating in the Kasem SPA. I infer actual knowledge on his part of the facts constituting the elements of the wrongful act under section 350.

1298. As I have explained above, suspicion and conduct can form part of the circumstances from which the court may infer actual knowledge of the facts constituting the elements of the alleged wrongful act. The more obvious a fact is, the more likely it may be that a defendant would have known it. I find as a fact that in all the circumstances described above, it would have been obvious to Dr Kasem, and he must have had actual knowledge of the fact that the transfer of the WEH shares to him was to prevent Mr Suppipat's companies from receiving payment contrary to section 350. I find therefore that he was conscious that damage *of some nature* to Mr Suppipat's companies could arise from the relevant wrongful act under s. 350.

(g) Khun Pradej

1299. Khun Pradej played no part in the trial and did not seek to justify his conduct.

1300. I find that Khun Pradej assisted in the commission of the section 350 offence in the manner described below concerning the transfer of the WEH shares held by Golden Music. I infer actual knowledge on his part of the facts constituting the elements of the wrongful act under section 350.

1301. I find as a fact that in all the circumstances described below, it would have been obvious to Khun Pradej, and he must have had actual knowledge of the fact that the transfer of the WEH shares to him was to prevent Mr Suppipat's companies from receiving payment contrary to section 350. I find that he was conscious that damage *of some nature* to Mr Suppipat's companies could arise from the relevant wrongful act under s. 350.

1302. In the light of my factual findings above, the findings of fact upon which I rely concerning the transfers from Golden Music to Khun Pradej and his family (and diverting payment for those shares to Khun Nop) are as follows:

a. Khun Pradej was aware, by on or around 18 July 2017, of Mr Suppipat's companies' claims in the Arbitrations and the disputed nature of the WEH Shares when Symphony wrote to him warning him not to make his intended purchase of the WEH shares.

b. Despite this Khun Pradej received, together with members of his family, 14,390,244 Relevant WEH Shares from Golden Music (via Mrs Ramphai) via the Pradej SPA in August 2017.

c. Khun Pradej paid the sums of THB 100 million (to Mrs Ramphai) on 16 June 2017, and THB 2.85bn (to Khun Nop directly) on 9 August 2017, as consideration for the Relevant WEH Shares transferred from Golden Music.

d. Khun Pradej knew that the above sum paid to Mrs Ramphai was paid onwards to Khun Nop.

e. Khun Pradej paid the sum of THB 60 million to Madam Boonyachinda on or around 11 December 2018, as further consideration for the Relevant WEH Shares transferred to him from Golden Music. I consider it likely that Khun Pradej knew that the above sum was paid onwards to Khun Nop.

f. Khun Pradej paid the sum of THB 528.5 million to Khun Nop on 30 April 2019, as further consideration for the Relevant WEH Shares transferred to him from Golden Music.

g. Khun Pradej was involved in the creation of the Pradej-NN Loan Agreements dated 28 January, 2 April, and 30 April 2019, purporting to record that the above sum was a loan from him to Khun Nop, which were false documents.

h. Khun Pradej understood that the Pradej-NN Loan Agreements were created to give the false impression that the above sums were not consideration for the Relevant WEH Shares transferred to him from Golden Music.

i. Khun Pradej knew that none of the above sums were paid to Golden Music for the Relevant WEH Shares transferred to him.

1303. I make these findings against the background that Khun Pradej failed to play any part in the trial and accordingly failed to attend before the court in order to explain this behaviour. By acting as he did and with such knowledge, Khun Pradej assisted in the transfers from Golden Music to himself and members of his family, and wrongfully diverted the consideration to Khun Nop, with the purpose and effect of ensuring that the Relevant WEH Shares, or their value, were placed further beyond the reach of Mr Suppipat's companies, and thereby depriving Golden Music of any valuable assets.

Limitation

1304. It is common ground that (i) all of the Claimants' claims against Khun Nop and Khun Nuttawut relating to dealings with the WEH shares are governed by Thai law, and (ii) time started to run for limitation purposes no later than 7 May 2018, over a year before the Thai law claims were introduced by amendment on 4 August 2020[873].

[873] Claimants' Written Opening [408(a)]. See also RAPOC, [164B] ("*The Claimants gained the requisite knowledge in respect of the Conspiracy, of which all of the wrongdoing set out herein formed part, no earlier than 7 May 2018, then NS's Companies first obtained the updated 2018 WEH Register*") and [164F.1] ("*Time began to run, in respect of all of those claims, not before the Claimants discovered the person liable, the damage and the fact that the relevant act amounted in Thai law to a wrongful act actionable under s.420. Alternatively, time began to run in respect of those claims, which formed part of a continuing wrongful act, upon discovered of the most recent infliction of damage, i.e. not earlier than 7 May 2018*").

1305. In view of the fact that I have concluded that only the s. 420 claim based on s. 350 TPC and the s. 432 claim succeeds, I will confine the limitation analysis to those two claims.

(1) s. 420/ s. 350 claim

Submissions

1306. The HP Defendants rightly contend that Section 350 is a compoundable offence meaning that the prescription period is governed by s. 96 of the Penal Code[874]. However, Mr Penny KC forcefully argued that save for the 'cheating against creditors' case narrowly advanced in respect of the Kasem Transfer, no criminal complaint was made within the three-month prescription period over the ancillary fraud (such as the false Ploenchit valuation) and further share dissipations, with the result that save for those (limited) claims which are the subject of the cheating against creditors claim which was brought on 23 January 2018[875], the Claimants' claims based on alleged offending against s. 350 do not benefit from any longer limitation period under s. 448(2).

1307. As to the 'cheating against creditors' claim brought on 23 January 2018, the Thai law experts agree that it had suspensive effect on the limitation period for relevant civil claims, under s. 51(2) of the Thai Criminal Procedure Code, which provides that "*Where a prosecution has been instituted against any offence and the offender has been brought before the court also, but the case is not yet final, the prescription governing the victim's right to enter a [penal action]*[876] *on the basis of that offence shall be interrupted by virtue of section 95 of [the Penal Code*".

1308. However, the HP Defendants maintain that its effect in doing so is narrow in the context of the Claimants' case:

a. Professor Suchart maintains that in order for a "plaint" in Thailand to interrupt time under Thai law, it must comply with the procedural requirements of s. 172 of the Civil Procedure Code[877], which require an effective "plaint" to include an appraisal of the nature of the claim, the allegations on which the claims are based (including the acts or omissions giving rise to the liability in question, which must include the

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874 Section 96 of the Penal Code provides that '… *in [the] case of [a] compoundable offence, if the injured person does not lodge a complaint within 3 months … from the date of [the] offence and offender [being] known by the injured person, the criminal prosecution is precluded by prescription.*'

875 In Black Case Aor 157/2561

876 This should, it seems, likewise be a reference to "civil action" not penal action.

877 "*… the Plaintiff shall submit his claims by filing a plaint in writing with the Court of First Instance. The plaint shall set forth clearly the nature of the plaintiff's claims and the relief applied for, as well as the allegations on which such claims are based*."

core criminal allegations) and the nature of any relief sought.[878] A plaint failing to meet these requirements would be rejected for uncertainty under s. 172; and would not benefit from the extended limitation period.[879]

b. The relevant complaint in this case, filed in Thailand in *Black Case Aor 157/2561* on 23 January 2018, was made by Symphony, NGI and DLV. It has no effect on the limitation period for claims by other putative 'victims', and therefore the limitation period on NS's personal claims continued to run.[880] Whether this be correct as a matter of Thai law or not, as I have explained above Mr Suppipat does not have a personal claim under section 350 in any event. The claim is that of his companies.

c. As a matter of Thai law, the suspensive effect of s. 51(2) is limited to the four corners of the criminal complaint, affecting civil claims only against the named defendants, and only on the basis of the facts asserted.[881]

d. The basis of the claim in *Black Case Aor 157/2561* was confined to (i) alleged offending against s.350 of the Penal Code, and (ii) in respect of the Kasem Transfer only.[882]

1309. In terms of the RAPOC, it is alleged that those allegations correspond only to the plea in the first three sentences of paragraph 156.3, insofar as they relate to the Kasem Transfer:

> *"The transfers of the Relevant WEH shares were unlawful as contrary to s.350 Criminal Code and/or s.237 TCCC. In particular, they constituted a fraud on the creditors of REC, and on the creditors of NN's Companies whose only substantial asset was their interest in WEH held through REC … . The transfer from REC to Kasem was at an undervalue, leaving REC and NN's Companies unable to satisfy their debts when they fall due, and*

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878 Suchart 3, [22]; [24]–[29].

879 See Joint Thai Law Propositions, [178.2]: "*the offence of the defendant must be described in detail to fully cover the elements which constitute the criminal offence. Any plaint that falls short of what is required by law is not a proper plaint. In the event that it is uncertain whether the act of the defendant is contrary to any criminal offence, or where the person is criminally labile jointly with the wrongdoer, then the longer period of the criminal offence is not applicable.*"

880 Suchart 2, [75]: "*for s.51(2) to apply to the civil case brought in connection with a criminal case, it must be the plaintiff in the civil action who has also instituted criminal charges against the defendant in the criminal proceedings.*"

881 Suchart 2, [71]–[74].

882 See pages 5–8 of the complaint, which (i) recites alleged breach of the REC SPAS and the arbitral awards, and the discovery of the Kasem Transfer; (ii) contends that the named defendants "*jointly processed*" the Kasem Transfer with the intention to prevent NS's Companies as creditors from receiving payments of debts or being paid from execution against NN's Companies' assets; and (iii) alleges that by jointly transferring or giving consent to the Kasem Transfer, the named defendants' acts constituted "*cheating against creditors*". No other allegations are made.

without full compensation for the assets transferred, to the detriment of their creditors."

1310. For limitation purposes, Mr Penny KC argues that the only aspect of the Claimants' case that accordingly benefits from the longer 10-year prescription period, is the claim alleging a 'fraud on creditors' in connection with the Kasem Transfer itself. The longer limitation period does not extend to claims arising from other facts or causes of action not referred to in the criminal complaint (for example, alleged 'conspiracy', abuse of rights, breach of directors' duties, wrongdoing associated with the Ploenchit report, or 'false' documents), and in particular does not extend to other alleged breaches of s.350 in relation to subsequent transfers.

1311. Mr Fenwick KC took issue with the suggestion that their claim under section 350 is narrowly circumscribed by the complaint filed in *Black Case Aor 157/2561* on 23 January 2018.

1312. Mr Fenwick KC maintained that Professor Suchart's approach ignores the fact that the provisions are evidential[883] in the sense that s. 193/4 as a whole appears to be simply requiring that the claimant have evidence the fact that it intends to pursue a claim. However, when this was put to him in cross-examination, Professor Suchart simply continued to insist that "*we do not recognise any foreign jurisdictions*"[884] – a point which the Claimants submit is irrelevant to the question of prescription and the impact of starting a claim in a foreign jurisdiction in this context.

1313. Mr Fenwick KC submits, in contrast, that the Thai courts are "*flexible*"[885] when determining whether the limitation period has been interrupted, such that an interruption can benefit "*any potential claims based on the same facts or the same unlawful act*"[886]. In reliance on this argument, Dr Munin cited several Supreme Court Decisions – Nos. 7458/2553 and 9053/2552 and a further (more recent) authority[887] – Supreme Court Decision No. 3211/2559. The extract of the Thai Court's judgment in the first of these three authorities is too brief and vague to admit of sensible analysis. Likewise there is no clear statement in the second of these authorities to support Dr Munin's contention. However, so far as the third of these authorities is concerned, I consider that that does support Dr Munin's analysis that interruption of the limitation period in one action (an earlier insolvency claim) can benefit subsequent claims (a later insolvency claim) based on the same facts or same unlawful act.

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[883] Claimants' Written Closing Submissions [1094 (d)] 9

[884] Day 41/44:23-25

[885] Day 38/113:5-9 (Munin)

[886] Munin 3 [23]–[24]

[887] Munin 4 [28] .

1314. Mr Penny KC responded by contending that allowing the prescription of a potential claim to be interrupted by the bringing of a different claim would introduce "*unacceptable uncertainty*"[888].

1315. As a matter of fact the Claimants rely upon the bringing of these proceedings as interrupting the limitation period:

a. The starting point is s. 193/14(2) of the TCCC which provides that "*Prescription is interrupted if … (2) the creditor enters an action for the establishment of the claim."* This is expressed in general terms.

b. Moreover, the Claimants contend that the rest of s. 193/14 makes clear that the true reason for the interruption of prescription under this provision is that the Claimant has entered a claim through an official dispute resolution method, and not because of the involvement of the Thai Courts, hence the following further circumstances pursuant to which prescription will be interrupted:

i. "the creditor applies for receiving a debt to arbitration" [sub-section (3)];

ii. "the creditor submits the dispute to arbitration" [sub-section (4)];

iii. "the creditor does any act which brings an effect equivalent to entering an action" [sub-section (5)].

c. The Claimants observe that s. 193/14(2) TCCC does not refer to s. 172 TCPC but rather refers generally to the creditor "*enter[ing] an action for the establishment of the claim*". However, Professor Suchart argues that s. 193/14(2) requires the filing of a "*plaint*" pursuant to s. 172 CPC in the Thai courts and that in the Thai text the phrase "*Fong Kadee*" is used, where *"Kadee*" means a case or court action[889]. According to Professor Suchart, the word "*Kadee*" "*would not be used to describe arbitral proceedings.*"[890] Whilst Dr Munin accepts that the word Kadee used in s. 193/14(2) "*specifically refers to an action through court only*"[891], he emphasises that "Court" in the context of s. 193/14(2) can be a Thai court or a foreign court. Filing a claim in a foreign court can accordingly also interrupt the limitation period "*provided that the plaint*

[888] HP Defendants' Thai law Closing Submissions [330.3]

[889] Suchart 3 [18]-[19] 8

[890] Suchart 3 [20]

[891] Munin 3 [22]

is accepted by such foreign court"[892]. The Claimants make the following submissions in support of this interpretation[893]:

i. The Claimants say there is no reason to limit the applicability of s. 193/14(2) to actions before Thai courts alone. They submit that Professor Suchart's view rests on the definition of "*plaint*" under s. 172 CPC[894] which is inappropriate since s. 172 is more concerned with the "*linguistic*" aspects of a plaint than its substance[895] and it is not referred to in s. 193/14(2) TCCC.[896,897]

ii. The Claimants submit that Professor Suchart's view is overly literal and that, if adopted, "*the word 'arbitration' would mean domestic arbitration only, which is completely wrong*"[898] and in fact s. 193/14(5) covers "*any actions*" whether domestic or international[899]. By contrast, they say Dr Munin's approach is more holistic and the "*normal approach*" under Thai law.[900,901]

iii. The Claimants highlight that Professor Suchart insisted in cross-examination that the reference to "*arbitration*" in s. 193/14(4), must mean Thai court arbitration[902]. The Claimants submit there is no authority for this approach which would mean that a party starting an arbitration under Thai law as now permitted would not benefit from s. 193/14(4).

iv. The Claimants observe that the Defendants' interpretation would mean that a claimant would face a limitation argument even where they commenced proceedings in time in a foreign

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[892] Munin 4 [26]

[893] Claimants' Written Closing Submissions [1094]

[894] Suchart 3 [18]

[895] i.e. s. 18 TCPC provides that: "*If the Court is of the opinion that the pleading … is not legible or is drawn up unintelligibly or with excessive prolixity, or does not contain or bear all such particulars or signatures … the Court may issue an order returning it for redrafting, amendment, or duly paying or laying the Court fees …*"

[896] Munin 3 [12]; Day 38/96:3-4

[897] Claimants' Written Closings [1094 (a) and (e)(b)]

[898] Day 38/96:16-23

[899] Day 38/98:25-99:4

[900] Munin 4 [23]–[25]

[901] Claimants' Written Closings [1094(b)]

[902] Claimants' Written Closings [1094(c)]

jurisdiction but with judgment being delivered after the end of the limitation period.

Analysis

1316. I consider that the section 350 claims based upon the Kasem Transfer as well as the falsification of documents and subsequent transfers of the WEH shares were all brought within time by the Claimants:

a. The complaint filed by Symphony, NGI and DLV in *Black Case Aor 157/2561* on 23 January 2018 was filed in particular against Khun Nop; Khun Nuttawut, Khun Kasem and each of the WEH Managers. The allegation was that the Defendants "*jointly transferred the shares or gave consent to the transfer of the shares in WEH… in order to prevent [Symphony, NGI and DLV] as the creditor from being repaid in part of in full [under the REC SPAs]. Such acts are joint cheating against creditors under section 350 … of the Criminal Code*." The plaint describes the transfer of the shares to Kasem which was concealed from the plaintiffs by not being notified to the companies registrar. The essence of the complaint is the dishonest transfer, by the specified defendants, of the WEH shares away from the plaintiffs to prevent the payment to them as creditors under the REC SPAs. The transfers of the shares subsequent to the Kasem transfer were all part of that dishonest scheme and I accept Dr Munin's evidence, which is supported by Supreme Court Decision No. 3211/2559, that the Thai Court would find that the subsequent transfers were all part of that dishonest scheme which is articulated in the plaint.

b. Moreover, I accept Dr Munin's evidence and I find in any event that the introduction of the Thai law claims by amendment in these proceedings also interrupted the limitation period for the purposes of the claims based upon s. 350, and they undoubtedly cover the transfers of the WEH shares subsequent to the Kasem transfer. I accept Dr Munin's evidence that the applicability of s. 193/14(2) TCCC is not limited to actions brought in the Thai Courts, which I consider to be an unduly literal reading of that provision. As Dr Munin explained, the wording of s. 193/14 is not limited to actions brought in the Thai Courts or Thai court arbitrations, but rather is more general than that, referring as it does to "actions" "claims" and "arbitrations". Indeed, as the Claimants pointed out, Professor Suchart's interpretation would have the remarkable consequence that a claimant would face a limitation argument even where they commenced proceedings in time in a foreign jurisdiction but with judgment being delivered after the end of the limitation period. As Dr Munin contended and as I put to Professor Suchart during the course of his evidence, this section is simply requiring a form of proof that the claimant actually intends to pursue the claim. It is evidential in nature: it does not matter whether the claim is lodged in a foreign court or a domestic court, because in both cases, the claimant is evidencing the fact

that he/she does indeed intend to pursue the claim.[903] Accordingly I accept the evidence of Dr Munin that filing a claim in a foreign court can also interrupt the limitation period "*provided that the plaint is accepted by such foreign court*"[904].

1317. In the circumstances, I consider that Symphony, NGI and DLV have made out their case against Khun Nop, Khun Nuttawut, Khun Weerawong and the WEH Managers under section 420, by reference to section 350, in respect of both the Kasem transfer and the subsequent transfers of the WEH shares (viz the Golden Music, Pradej, Cornwallis and WEH Managers SPAs).

1318. In the circumstances, there is no need to add to the length of this judgment by analysing the parties' respective arguments on relation back in the context of the limitation defences under both English law and Thai law.

(2) s. 432 claim

1319. The Claimants submit that the longer limitation period under s. 448(2) TCCC is available not only where the defendant in question is alleged to have committed the relevant criminal offence, but also if the defendant is a joint tortfeasor but did not commit any criminal offence. As such, in Dr Munin's view, the longer limitation period applies provided that the wrongful act that is jointly committed by the relevant Defendants "*constitutes a criminal offence*"[905].

1320. However, it is Professor Suchart's view that s. 448(2) does not apply to *any* joint tortfeasor who does not *per se* commit the criminal offence.[906] I do not accept his evidence. Rather, I consider that those joint tortfeasors who were involved in the commission of the offence or, to adopt the language of the Thai Supreme Courts, were "*co-actors*", are subject to the extended limitation period. As s. 448(2) states:

> "*However if the damages are claimed on account of an act punishable under the criminal law for which a longer prescription is provided such longer prescription shall apply."* (emphasis added)

1321. Professor Suchart relies on three Thai Supreme Court decisions, none of which support his argument. At the outset, I consider that he is wrong to rely on *SCD 6026/2550*. Here the Defendant drove into a car owned by the Second Plaintiff, injuring the First Plaintiff. The Defendant was criminally liable for causing injury to the First Plaintiff and accordingly the First Plaintiff's civil

[903] Day 41/44:12-22.

[904] Munin 4 [26].

[905] Claimants' Written Closings [1092] citing Munin 2 [213]

[906] Suchart 2 [72]

claim in relation to this criminal offence had the benefit of the extended limitation period. However, the Second Plaintiff's claim did not because they had "*no standing to file a criminal complaint on such charges*". This is plainly different from the case we are considering here (joint tortfeasorship).

1322. The two more relevant cases are *SCD 7420/2548* and *SCD 14430/2555*. In *SCD 7420/2548*, the Second Defendant was a government agency jointly liable for the acts of the First Defendant. The court held that:

> "*As the Second Defendant is neither the actor nor the co-actor in criminal action with the First Defendant, but instead, the government agency shall be* [sic: who is] *liable for the wrongful act between the First Defendant and the Plaintiff, the Plaintiff's right to claim damages from the Second Defendant shall therefore be subject to the first paragraph of Section 448* […] *not the case where the statute of limitation under the second paragraph shall apply*."

1323. In *SCD 14430/2555*, the primary defendant was the Sixth Defendant, a minor, who was separately charged for a criminal offence of negligence causing the death of others. The plaintiff also brought claims against the Fourth and Fifth Defendants, who were the Sixth Defendant's guardians. The court found that the claim against them did not benefit from the s. 448(2) extended limitation period because, although they were jointly liable for the acts of the Sixth Defendants, they were not involved in the criminal activity:

> "*Though the Third Paragraph of Section 51 of Criminal Procedure Code provides that* […] *that is, the statute of limitation is 10 years, such statute of limitation shall apply towards the actor or co-actor in criminal act who shall be directly liable in civil case for wrongful act, and shall not include other person not involved in the criminal act or the person the law specified to be jointly liable for the act of other person, such as in the case of the Fourth and Fifth Defendants*."

1324. In my judgment, *SCD 7420/2548* and *SCD 14430/2555* do not support Professor Suchart's opinion. On the contrary, they demonstrate that persons who are co-actors in the criminal act are subject to the extended criminal limitation periods. The facts of those two cases are very different from ours. They concern the vicarious liability of, respectively, a government agency and guardians of a minor, whereas Khun Nuttawut, Khun Weerawong and the WEH Managers' involvement in the criminal offence in this case is deeper and more central. They were co-actors in the cheating of Mr Suppipat's Companies, as creditors of Khun Nop's Companies. Indeed, as I have found, their conduct constituted assistance and instigation for the purposes of ss. 84 and 86 TPC, which are in themselves criminal offences.

1325. Thus, even had Khun Nuttawut, Khun Weerawong and the WEH Managers not each been personally liable for a s. 350 offence, Mr Suppipat's Companies' claims against them under section 432 would benefit from the extended s. 448(2) limitation period in any event.

s. 423 Insolvency Act

1326. In addition to their Thai law claims under ss. 420 and 432 TCCC, Cs bring a claim under English law pursuant to s.423 Insolvency Act 1986 ("**IA**") against all of the defendants (save for Ms Siddique). The s. 423 claims are made on the basis that the defendants benefitted from the Kasem Transfer and the subsequent transfers of WEH shares (all of which transfers were, the Claimants say, at an undervalue and designed to defraud Mr Suppipat and his Companies).[907]

1327. S.423 provides in material part:

> ***423 Transactions defrauding creditors.***
>
> *(1) This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if—*
>
> *[…]*
>
> *(c) he enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by himself.*
>
> *(2) Where a person has entered into such a transaction, the court may, if satisfied under the next subsection, make such order as it thinks fit for—*
>
> *(a) restoring the position to what it would have been if the transaction had not been entered into, and*
>
> *(b) protecting the interests of persons who are victims of the transaction.*
>
> *(3) In the case of a person entering into such a transaction, an order shall only be made if the court is satisfied that it was entered into by him for the purpose—*
>
> *(a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or*
>
> *(b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.*

1328. The Claimants' case is that the Kasem Transfer and the subsequent transfers of the WEH shares were transactions at an undervalue which were designed to – and in fact did – prejudice them, by putting assets beyond their reach. The

[907] RAPOC [160H]-[160K].

Court is accordingly invited to exercise its discretion to grant relief pursuant to s.423(2).

1329. I address first the various elements of this claim.

(1) Sufficient connection with England and Wales

1330. In *Re Paramount Airways (No. 2)* [1993] Ch 223 at 235F ("***Re Paramount Airways***"), Sir Donald Nicholls V-C referred to the fact that section 423 "is of unlimited territorial scope."

1331. The extra-territorial effect of section 423 was confirmed in *HMRC v Begum* [2010] EWHC 1799 (Ch), [2011] BPIR 59.

1332. Sir Donald Nicholls considered the policy underlying the court's powers at 239:

> *"Trade takes place increasingly on an international basis. So does fraud. Money is transferred quickly and easily. To meet these changing conditions English courts are more prepared than formerly to grant injunctions in suitable cases against non-residents or foreign nationals in respect of overseas activities. As I see it, the considerations set out above and taken as a whole lead irresistibly to the conclusion that, when considering the expression "any person" in the sections, it is impossible to identify any particular limitation which can be said, with any degree of confidence, to represent the presumed intention of Parliament. What can be seen is that Parliament cannot have intended an implied limitation along the lines of Ex parte Blain,* 12 Ch D 522*. The expression therefore must be left to bear its literal, and natural, meaning: any person."*

1333. However, he continued at 239F, that:

> *This conclusion is not so unsatisfactory as it might appear at first sight. The matter does not rest there. Parliament is to be taken to have intended that the difficulties such a wide ambit may create will be sufficiently overcome by two safeguards built into the statutory scheme. The first lies in the discretion the court has under the sections as to the order it will make. Section 423(2) provides that the court 'may' make such order as it thinks fit for restoring the position and protecting victims of transactions intended to defraud creditors. Sections 238, 239, 339 and 340 provide that the court 'shall,' on an application under those sections, make such order as it thinks fit for restoring the position. Despite the use of the verb 'shall,' the phrase 'such order as it thinks fit' is apt to confer on the court an overall discretion. The discretion is wide enough to enable the court, if justice so requires, to make no order against the other party to the transaction or the person to whom the preference was given. In particular, if a foreign element is involved the court will need to be satisfied that, in respect of the relief sought against him, the defendant is sufficiently connected with England for it to be just and proper to make the order against him despite the foreign element. This connection might be sufficiently shown by the residence of the*

> *defendant. If he is resident in England, or the defendant is an English company, the fact that the transaction concerned movable or even immovable property abroad would by itself be unlikely to carry much weight. Likewise if the defendant carries on business here and the transaction related to that business. Or the connection might be shown by the situation of the property, such as land, in this country. In such a case, the foreign nationality or residence of the defendant would not by itself normally be a weighty factor against the court exercising its jurisdiction under the sections. Conversely, the presence of the defendant in this country, either at the time of the transaction or when proceedings were initiated, will not necessarily mean that he has a sufficient connection with this country in respect of the relief sought against him. His presence might be coincidental and unrelated to the transaction. Or the defendant may be a multinational bank, carrying on business here, but all the dealings in question may have taken place at an overseas branch.*
>
> *Thus in considering whether there is a sufficient connection with this country the court will look at all the circumstances, including the residence and place of business of the defendant, his connection with the insolvent, the nature and purpose of the transaction being impugned, the nature and locality of the property involved, the circumstances in which the defendant became involved in the transaction or received a benefit from it or acquired the property in question, whether the defendant acted in good faith, and whether under any relevant foreign law the defendant acquired an unimpeachable title free from any claims even if the insolvent had been adjudged bankrupt or wound up locally. The importance to be attached to these factors will vary from case to case. By taking into account and weighing these and any other relevant circumstances, the court will ensure that it does not seek to exercise oppressively or unreasonably the very wide jurisdiction conferred by the sections."* (emphasis added)

1334. It follows that the court has a broad discretion under s. 423 and in considering whether to exercise that discretion where there is, as here, a foreign element involved, the court will consider whether there is a sufficient connection with this country in the light of all the circumstances. Ultimately, the court will seek to ensure that it does not exercise its very wide discretion oppressively or unreasonably.

1335. In *Orexim Trading Ltd v Mahavir Port and Terminal Pte Ltd* [2018] 1 WLR 4847 the Court of Appeal endorsed the *Paramount Airways* sufficient connection test. Lewison LJ stated at [30] that:

> "*The effect of the legislation, therefore, is that it confers on the court power to make orders against persons or property outside England and Wales, subject to the court being satisfied that there is a close enough connection with England and Wales.*"

1336. At [54] Lewison LJ reiterated the point that the sufficient connection must be '*between the defendant and England and Wales*', and at [55] he emphasised that:

> "*The breadth of the potential scope of section 423 makes it all the more important that in a case with a foreign element the court is scrupulous to ensure that the safeguards are rigorously applied.*"

1337. At [58] Lewison LJ held that the first instance judge's failure to advert to the factors identified by Sir Donald Nicholls V-C in *Paramount Airways* vitiated his value judgment. At [59] Lewison LJ referred to the fact that:

> "*Contrary to the tentative view expressed by the judge, I consider that there is insufficient connection with England and Wales for the court to give permission to serve the claim out of the jurisdiction; and that it does not need a trial to resolve that question. None of the protagonists are incorporated in England and Wales. None of them carry on business here. There is no evidence that any of the defendants has any assets here. Nor is there evidence that Orexim has any assets here; or that any loss would be suffered in England and Wales. The vessel has never been flagged in this jurisdiction. There is no evidence that she has ever entered territorial waters. The impugned transactions all took place outside the jurisdiction, between foreign corporations. Zen's purchase of the vessel was financed by an Indian finance house. All the impugned transactions were governed by the law of Singapore. They took place before the making of the settlement agreement, which is the foundation of Orexim's assertion that there is sufficient connection with England and Wales. It is not suggested that those dates were manufactured. Although it is true to say that section 423 can apply even if there is no particular creditor in contemplation, the timing of the transactions fatally undermines Mr Adair's argument that the purpose of the transactions was to frustrate a judgment of an English court. At the time when the transactions took place there was no connection with England and Wales at all. None of the human actors in the story are resident or domiciled in England and Wales. Although the settlement agreement between Orexim and MPT is governed by English law, neither Singmalloyd nor Zen, which is the real target as the current owner of the vessel, was party to that agreement. Although it is alleged (and hotly disputed) that MPT, Singmalloyd and Zen acted in bad faith, that is not enough in itself weighed against all the other factors. While the claim under section 423 may be motivated by a desire to enforce the claim under the settlement agreement (if that claim were to be successful), it has its own distinct factual and juridical basis. I cannot, therefore, regard the existence of the settlement agreement as providing the necessary connection between the claim under section 423 and England and Wales: compare Erste Group at [131].* (emphasis added)

1338. Both *Paramount Airways* and *Orexim* were cited with approval by the Privy Council in *AWH Fund Ltd (In Compulsory Liquidation) v ZCM Asset Holding Company (Bermuda) Ltd* [2019] UKPC 37, in which it referred at [40-41] and

[55] to the importance of a sufficient connection between the jurisdiction and the defendant.

1339. The Defendants rely heavily upon *Orexim*. They submit that the overarching question is whether, in respect of the relief sought against the relevant defendant on the s.423 claim, the defendant is sufficiently connected with England for it to be just and proper to make the order against him despite the foreign element. The Defendants submit that the focus is on the s.423 claim against the defendant, not other claims against the defendant, still less other claims against other defendants or the proceedings more broadly.

1340. In contrast, the Claimants submit that it is highly relevant that the s.423 claims are inextricably connected to the Thai law asset stripping claims already before the English court. Both sets of claims proceed on an identical factual basis and both can be addressed by reference to the evidence elicited over the course of this 20-week trial. They submit that it would be perverse to conclude that there is an insufficient link between the claims and this jurisdiction in light of the fact that there are a number of identical claims (albeit proceeding under Thai law) which this Court has jurisdiction to decide. They cite *Jyske Bank (Gibraltar) Ltd v Spjeldnaes* [2000] BCC 16 ("***Jyske Bank***"), in which Evans-Lombe J granted relief under s.423 against a defendant whose only connection to the jurisdiction was its status as a defendant to other claims already being litigated in England. The judge held in that case at pp. 34-35 that there was no rule that a court should never grant an order under section 423(2) in the exercise of its discretion in the absence of the sort of connections with England which the Vice Chancellor set out in *Paramount*. Although there were no such connections in the Jyske Bank case, the judge adverted to the fact that no application for a stay on *forum non conveniens* grounds had been made; there had been no apparent disadvantage to the defendants in dealing with the issue in the English court at the trial and the judge was familiar with the background facts which made it suitable for him to decide the s. 423 application, whereas the foreign (Irish) judge would be unfamiliar with the issues and would have to hear the evidence all over again with serious costs implications; any order could in any event only act *in personam* and would require the assistance of the Irish courts.

1341. The Claimants further refer to *Dornoch v Westminster International BV* [2009] EWHC 1782 at [134] in which Tomlinson J stated, having referred to the relevant passage in *Paramount* at p.240:

> *"I particularly note from the foregoing that Sir Donald Nicholls regarded no one factor as decisive. Each case will turn on its own facts with the weight to be given to connecting factors or their absence dependent on their real significance having regard to the overall situation. In Jyske Bank (Gibraltar) Ltd v Spjeldnaes [1999] 2 BCLC 101 Evans-Lombe J, whose experience in this field is very considerable, exercised the jurisdiction even though as he expressly recognised there were present none of the sort of connections with England which the Vice Chancellor had set out*."

1342. Finally, the Claimants rely upon *Fortress Value Recovery Fund I LLC v Blue Skye Special Opportunities Fund LP* [2013] EWHC 14 (Comm) at 116-118 where Flaux J stated:

> *"[116] In this context, the actual decision of Evans-Lombe J in the Jyske Bank (Gibraltar) case is also illuminating. In that case the learned judge granted the claimant bank relief under s 423 against two Irish companies to reverse an assignment of land in Ireland by one company to the other pursuant to a contract governed by Irish law. The learned judge concluded that to grant relief under s 423 would not offend the principle of comity and that it was appropriate to do so against foreign parties properly before the court notwithstanding that, as he recognised (at 124), none of the connections with England that Nicholls V-C had identified in Re Paramount Airways Ltd was present, holding that Nicholls V-C was not laying down that the court should never grant an order under s 423 in the absence of the sort of connections with England he identified.*
>
> *[117] The approach adopted by Evans-Lombe J in that case was thus that the discretion given to the court as to whether to grant relief under s 423 was untrammelled by the necessity to establish particular types of connection with England. That approach was approved by Tomlinson J in Dornoch Ltd v Westminster International BV, The WD Fairway [2009] EWHC 1782 (Admlty) at [134], [2009] 2 Lloyd's Rep 420 at [134], where he stated:*
>
> > *'I particularly note from the foregoing that Sir Donald Nicholls [in Re Paramount Airways] regarded no one factor as decisive. Each case will turn on its own facts with the weight to be given to connecting factors or their absence dependent on their real significance having regard to the overall situation. In Jyske Bank (Gibraltar) Limited v Spjeldnaes [1999] 2 BCLC 101 Evans-Lombe J, whose experience in this field is very considerable, exercised the jurisdiction even though as he expressly recognised there were present none of the sort of connections with England which the Vice Chancellor had set out.'*
>
> *[118] In my judgment, the claimants' claim for relief under s 423 is fully arguable and, in accordance with those authorities, should not be determined now, but at the trial, when the court has heard all the evidence*."

1343. The Claimants argue that *Jyske Bank* has also been treated as authority for that proposition in the current editions of *Dicey*[908], *Gee on Commercial Injunctions*[909], *Sealy and Milman's Annotated Guide to the Insolvency Legislation*[910] and *Lightman and Moss on the Law of Administrators and*

[908] *Dicey* at fn. 426 to §30-135).

[909] 7th edn, 2021, at fn 129 to Ch. 7, s. 7.

[910] 25th edn, 2022, Part XVI.

Receivers of Companies; with the latter text commenting: *"In such a case it may be enough that the defendant is subject to the jurisdiction of the English court without it being necessary for any further connection with England to exist."*[911] However, it is fair to say that there is very little reasoned analysis of the point in those textbooks.

1344. I do not accept the Claimants' submissions. I consider that the correct analysis is as follows.

1345. The starting point is *Paramount.* The court has a broad discretion but if, as here, a foreign element is involved the court will need to be satisfied that, in respect of the relief sought against him, the defendant is sufficiently connected with England for it to be just and proper to make the order against him despite the foreign element. As Lewison LJ put it in Orexim at [30]: "*The effect of the legislation, therefore, is that it confers on the court power to make orders against persons or property outside England and Wales, subject to the court being satisfied that there is a close enough connection with England and Wales*".

1346. *Orexim*, which was decided in 2018, emphasises that the breadth of the potential scope of section 423 makes it all the more important that in a case with a foreign element the court is scrupulous to ensure that the safeguards are rigorously applied. None of the relevant factors referred to by the Court of Appeal in *Paramount* and *Orexim* to show a sufficient connection with England and Wales is present in this case. In particular, none of the protagonists is incorporated in England and Wales. None of them carries on business here. There is no evidence that any of the defendants has any assets here (other than perhaps Ms Collins). Nor is there evidence that Khun Nop's companies have any assets here; or that any loss would be suffered in England and Wales. The impugned transactions all took place outside the jurisdiction, between foreign corporations. At the time when the transactions took place there was no connection with England and Wales at all. None of the human actors in the story is resident or domiciled in England and Wales (save for Ms Collins). In the circumstances, I would have declined to exercise my discretion under section 423 of the Insolvency Act had it been appropriate to do so (which it is not for the reasons set out below).

1347. It is true that the three first instance decisions relied upon by the Claimants suggest that it may be appropriate in a particular case to exercise the discretion under section 423 despite the fact that none of the connecting factors referred to in *Paramount* and *Orexim* are present. As to that:

(1) Firstly, the three decisions pre-date *Orexim*. *Dornoch* and *Fortress Value* were both cited in Orexim. I respectfully consider that it is open to doubt whether it is correct, after *Orexim*, to suggest that an English Court is lawfully entitled to exercise its discretion under section 423 despite the fact that none of the

[911] 6th edn, At §30-013 and fns. 37 and 38 thereto.

connecting factors referred to in *Paramount* and *Orexim* is present[912]; or at least I consider that it will only be in an exceptional case that it is appropriate to do so.

(2) Secondly, the three first instance decisions relied upon by the Claimants are in any event distinguishable from this case:

a. So far as *Dornoch* is concerned, in that case it is apparent from paragraph 135 of the judgment of Tomlinson J that there was "*amply sufficient connection*" with England to justify the court exercising its discretion. That case was accordingly very different from the present case. Indeed, Lewison LJ referred to such fact in *Orexim* itself at [60] when he said:

> "*Mr Adair relied on the decision of Tomlinson J in Dornoch Ltd v Westminster International BV (The WD Fairway) (No 3) [2009] 2 Lloyds Rep 420. In that case the judge set aside the transfer of a ship registered in the Netherlands, but located in Thailand, to a Nigerian corporation. However, the impugned sale took place in the course of a dispute between the owners and underwriters which was already on foot. Indeed, the sale took place after the owners had been served with proceedings in England and had been notified of an application for an injunction to stop any disposal of the vessel (see the Dornoch case, paras 82—83). The dispute itself arose under a policy of insurance governed by English law, placed in the London market with English underwriters. It also contained an exclusive jurisdiction clause. The facts of that case could well be viewed as an attempt to frustrate any award of an English court arising out of a dispute that was already before the court. The facts of this case are entirely different*."

b. Similarly, *Fortress Value* was only concerned with an application for permission to amend, where all that the claimants had to show was that, if their case was made out, there was a real prospect that they would be entitled to relief under s 423, and Flaux J held that "*The claimants arguably demonstrate a close connection with England on the same grounds as they have an arguable case that there is a manifestly closer connection with England than with Luxembourg for the purposes of art 4(3) of the Rome II Regulation*". Again, that is therefore a very different case to the present as the claimants had a real prospect of establishing at trial that the applicable law was English law.

[912] I note in this respect that at the first CMC in these proceedings, Butcher J heard argument on the significance of the fact that the s.423 claims arise in the context of much wider English proceedings, holding, at [75] of his judgment (emphasis added): *"the existence of litigation in this jurisdiction between the same parties and which is related to the s. 423 claim is itself a connecting factor"*. For the reasons set out below, I take a different view where the parties have agreed that Thai law applies to the asset stripping claims. Butcher J did not of course, have the benefit of full argument and citation of caselaw on this point, unlike me.

c. So far as *Jyske Bank* is concerned, that case is also distinguishable from the present case. It is apparent from the judgment at p. 34F-H that the Judge was not invited to apply Irish law to the issue before him, despite the fact that under Irish law there were provisions similar to those in section 423-425 of the Insolvency Act. It followed that if the Judge had declined to exercise his discretion under section 423 of the Insolvency Act, the victim would have had to launch fresh proceedings in Ireland and call his evidence all over again. That would have had serious cost implications and would also have prejudiced the victim by reason of the delay in a court providing suitable relief under section 423(ii) of the Insolvency Act. Nor had any application been made by the alleged wrongdoer to stay the proceedings on grounds such as *forum non conveniens*. *Jyske Bank* was a case where, in the absence of the Irish Court's intervention, the court was seeking to afford an effective remedy to the victim who had been defrauded in order to give effect to the policy underlying the court's powers under section 423 as described in *Paramount* (above).

1348. The present case is very different from those three cases. In this case the parties agree that Thai law is applicable to the asset stripping claims. The case is different from *Jyske Bank* where the court was not called upon to apply the Irish law equivalent to section 423, and so if the court did not grant relief under section 423 the fraudster would not be subject to any court order setting aside the transaction which defrauded creditors. This court is called upon to decide whether the Claimants have established their claim under section 420 TCCC and section 350 of the Thai Penal Code. Either they have or they have not (I have held that they have done so). I agree with Mr Penny KC that it is not then appropriate, if they fail to prove their cheating against creditors claim under Thai law, for the Claimants to invite the court to apply English law to afford them relief under section 423 of the Insolvency Act. That is particularly true in a case where, as here, there are no connecting factors with England at all.

1349. Furthermore, the transfer to Kasem took place in 2016, long before these proceedings were commenced in 2018, under a contract (the Kasem SPA) governed by Thai law with a Thai non-exclusive jurisdiction clause. This is not a case concerned with an alleged attempt by defendants to frustrate a judgment of an English court or arbitral tribunal (cp. *Dornoch Ltd v Westminster International BV* [2009] 2 CLC 226 (Tomlinson J), considered by Lewison LJ in *Orexim* at [60], and *Integral Petroleum SA v Petrogat FZA* [2021] EWHC 1365 (Comm) at [30] (Calver J)).[913] Indeed, the Kasem transfer is already the subject of review by the Thai courts in proceedings brought by three of the same Claimants in Thailand. On 23 January 2018 in *Black Case 157/2561*, which involves an allegation of cheating against creditors, Mr Suppipat's Companies told the Thai court that they believe the alleged criminal offences were committed (i.e., all the material facts took place) in Bangkok, Thailand.

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[913] Similarly, *Jyske Bank Gibraltar Ltd v Spjeldnaes* [2000] BCC 16 was a case involving enforcement of an English judgment.

1350. In any event, since I have found that the section 420 claim succeeds by reason of the breach of section 350 of the Thai Penal Code, there is no need to go on to consider the merits of any section 423 Insolvency Act claim in any event. There are further difficulties with the section 423 claim which the Defendants addressed in their written and oral closing submissions but I do not consider it is necessary for me to address them in view of the foregoing.

(2) Impossible to get a fair trial in Thailand?

1351. There is one other matter that I do wish to address. The Claimants also contend that a further factor which supports the exercise of the discretion by this court under section 423 is that it is impossible for Mr Suppipat to get a fair trial in Thailand because (they say) a court trying a commercial claim of Mr Suppipat would be biased against him because of their sworn allegiance to the king. This issue was the subject of expert evidence. Professor Hewison provided two reports on behalf of the Claimants and Khun Praphan Subsaeng, a former Supreme Court judge, provided two reports for the Defendants together with written responses to certain further questions posed in writing upon his cross-examination being cut short due to problems with the server on day 36 of trial.

1352. Professor Hewison gave expert evidence from the perspective of an independent individual who has dedicated his professional career to studying politics in Thailand and South East Asia. He readily conceded that he did not have any judicial experience or expertise, but he gave evidence about what he suggested were barriers to a fair trial that Mr Suppipat would face as a litigant in a commercial claim brought in Thailand involving the same issues as those being heard in the English proceedings.

1353. I accept the submission of the Defendants that not only do the Claimants bear the burden of persuading the court on this issue, but the cogency of evidence required to make out the allegation is significant. The editors of *Dicey & Morris, 16th Edition,* at 12-046, summarise the law as follows where such issues arise in *forum conveniens* cases (emphasis added) and I consider the same standard of proof is required in this case:

> *"A stay may be successfully resisted on the basis of cogent evidence that there is a real risk that the claimant will not receive substantial justice in the foreign court. Such an allegation requires a deeper level of scrutiny, not least because of the risk that such a finding may offend international comity. ... [W]here the claimant is able to persuade the court that there is a risk that the foreign court will single out the claimant or the claim for flagrantly unjust treatment, or that the foreign court is generally and seriously unreliable, the court will not generally order a stay of proceedings. The evidence required to support this contention need not be particular to the claimant or the individual claim (though it may be more persuasive if it is), but may be based on more general evidence of judicial failure or misconduct in relation to claims of the type advanced by the claimant. This factor has been of particular importance in cases in which*

there may be said to be a State interest in the outcome of the litigation, but the modern statement of the principle is not confined to such cases."

1354. I also accept the submission of the Defendants that the Claimants' evidence, essentially based upon Professor Hewison, does not meet this required threshold. Indeed, Professor Hewison's theoretical/statistical evidence (as to the risk of Mr Suppipat not receiving a fair trial in Thailand) is belied by the actual course of events in this case:

a. Arising out of the facts of this case, Mr Suppipat's Companies have instituted 4 separate claims in Thailand, comprising a civil claim which was voluntarily withdrawn, 2 cheating against creditor claims and a civil claim to enforce an arbitral award in their favour, in each case represented by Thai lawyers. There have been a number of rulings in their favour at first instance (including, for instance, subpoenas granted in Aor.157/2561 permitting Mr. Suppipat's companies to obtain documentary evidence from WEH) and on appeal. Mr Suppipat confirmed in evidence that, in relation to all of these proceedings, the Thai courts were well aware that he was the owner of the plaintiff companies — indeed Case 751/2564 is an action to enforce the First Partial Awards which are exhibited — and he has had no reason to complain about the nature of justice received by his companies to date.[914]

b. Professor Hewison had no first hand working knowledge of the Thai civil courts. However, in his reports he cited numerous statistics concerning his thesis that persons charged with a s.112 offence of *lèse-majesté* are routinely denied a fair trial, and he addressed how that might affect Mr Suppipat's prospects of obtaining justice in his commercial claims in the Thai civil courts. However, these generalisations were contradicted by the fact that in the s. 112 criminal trial of Mr Suppipat's alleged accomplices, namely Commander Parinya and Sergeants Theerapong and Nattakorn, 2 of the 3 of them (including Commander Parinya) were acquitted and the third pleaded guilty and received a sentence which was by no means unduly harsh.

c. Mr Suppipat himself invoked his confidence in the Thai justice system to suggest that, had he not settled his embezzlement charges which formed the subject matter of his section 112 criminal proceedings, he would have succeeded before the Supreme Court of Thailand[915].

1355. The Claimants adduced no cogent evidential basis whatsoever to support Professor Hewison's theoretical evidence.

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914 Day 6/58:3–10.

915 Day 6/16:19–25 and Day 6/17:1–8 ("*I'm pretty confident that I should get justice from the Supreme Court …*").

1356. Professor Hewison referred to the fact that Mr Suppipat's case involves (i) allegations against SCB (with the Crown as a 23% shareholder), (ii) a link to Princess Srirasmi and (iii) allegations about Khun Nop's involvement with the Crown Prince. However, Khun Praphan's evidence was that in all his years he has never experienced pressure from the Monarch, and he made the valid point that SCB is a regulated public company. He gave examples of cases where companies part-owned by the Crown, including SCB itself, had lost cases and had orders made against them in Thailand[916]. Professor Hewison accepted that the pressure he was speaking about was not any actual influence being brought to bear by the Monarch, and was nothing more than '*a social, cultural or institutional link*' to the Monarchy.[917] He was unable to identify a single actual instance in which the presence of SCB (or any other part Crown-owned company) as a party had affected the outcome of a case. His evidence was speculative and tenuous.

1357. Moreover, the possibility that Mr Suppipat could institute and run his civil claim from France without returning to Thailand was not considered in either of Professor Hewison's reports. When questioned about this possibility, he said he was unaware of whether it had ever happened; accepted that there was no reason to think that Mr Suppipat and his companies would not receive legal representation; and he seemed unaware of the concept of an attorney-in-fact to represent an absent defendant and the role such a person could play — despite the fact that (i) the materials before the Court show that Mr Suppipat himself, Dr Kasem and one of the New REC Directors have utilised that procedure in various Thai proceedings, and (ii) NS accepted that evidence can be given through an attorney in fact[918] . He also seemed unaware of whether Mr Suppipat would be entitled to give evidence via video-link,[919] despite section 120/4 of the Thai Civil Procedure Code which provides for that procedure.[920]

1358. In summary, there is no positive, cogent evidence whatsoever to support Mr Suppipat's submission that he would be treated unfairly or harshly or that he would be denied a fair trial even of his s.112 charge, let alone his commercial claims in the Thai civil courts. I do not consider that there is any merit at all in such allegations.

Quantum

1359. Had the misrepresentation claims in Part I been successful, the claim for damages would have been for the value of the Relevant WEH Shares (and therefore effectively the REC shares) at the time of the REC SPAs. The

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916 Praphan Second Report, [69(b)]

917 Day 36/66:9.

918 Day 6/58:24–59:1.

919 Day 36/23–39.

920 See Praphan Second Report, [27] and his further written answers to questions 2 and 3.

Claimants' case at paragraph 162 of their RAPOC pleads that but for the Global Transaction and Watabak Representations, Mr Suppipat would not have transferred his REC shares under the REC SPAs. The case with regard to the Payment Representations is that but for them, Mr Suppipat would have been able to rescind the REC SPAs (and get back his REC shares). Although I have heard extensive expert evidence on the question of valuation of the WEH shares, this point becomes moot in light of my findings that the Part I misrepresentation claims fail.

1360. The position with regard the Part II asset stripping claims is more complicated. As analysed above, I have held that: (1) Khun Nop, Khun Nuttawut, Khun Weerawong and the WEH Managers are each liable under s. 420 TCCC pursuant to a Thai Penal Code s. 350 criminal offence in respect of their transferring, removing and concealing the Relevant WEH Shares under the asset stripping sequence; (2) Khun Nop, Khun Nuttawut, Khun Weerawong and the WEH Managers are also liable as joint wrongdoers under s. 432(1) TCCC or as assisters/ instigators under s. 432(2) TCCC to the primary s. 350 offence (viz the entire asset stripping sequence); (3) Madam Boonyachinda, Golden Music, Cornwallis, the WEH Managers' Companies Colome, Keleston and ALKBS, Dr Kasem and Khun Pradej are only liable under s. 432 for their assistance/ instigation of the asset stripping sequence.

1361. In other words, I consider the primary participants to the asset stripping sequence, which is the subject of the s. 420/ s. 350 claim, to be Khun Nop, Khun Nuttawut, Khun Weerawong and the WEH Managers (although I have also found in the alternative that they are liable under s. 432). By contrast, Madam Boonyachinda, Golden Music and Cornwallis, the WEH Managers' Companies Colome, Keleston and ALKBS, Dr Kasem and Khun Pradej are, I consider, secondary participants as assisters/ instigators under s. 432(2). So far as the question of damages is concerned, it is accordingly logical first to examine the position of the primary participants under the main s. 420/ s. 350 claim and then to move on to the secondary participants, who are only liable under s. 432(2) TCCC.

(1) The primary participants (under s. 420 TCCC (based on s. 350 TPC))

(a) The applicable Thai law

1362. s. 420 provides:

> "*a person who, wilfully or negligently, unlawfully injures the life, body, health, liberty, property or any right of another person, is said to commit a wrongful act and is bound to make compensation therefor.*"

1363. The experts are agreed that the power to grant compensation for wrongful acts is found in s. 438 TCC. s. 438(1) TCCC provides:

> "*The Court shall determine the manner and the extent of the compensation according to the circumstances and the gravity of the wrongful act. Compensation may include restitution of the property of which the injured*

person has been wrongfully deprived or its value as well as damages for any injury caused".

1364. Dr Munin in his first Expert Report said at paragraph 311 that the determination of damages under s. 438 is "*subject to the broad discretion of the Court*." However, he went on to confirm that the "*the guiding principle under s.438 CCC is that damages are compensatory.*" Professor Suchart agreed with that.

1365. Professor Suchart's evidence was then that the starting point is that compensatory damages are assessed on a but-for basis (which seems to be what he means when he refers to the "*direct result from the wrongful act*"):

> "*Commentaries commonly agree that 'compensation' for the purposes of s. 438 is to restore the injured party to the position he would have in had the wrong not been carried. The late Professor Jitti (at 589) clearly explains that s. 438 purports to compensate the injured party by restoring him back to the position as if the wrong had never been occurred, for example, if the injured party's property was taken, then such property is to be returned to him. This principle is supported by the late Professor Peng (at p.295). Professor Waree (at 121) also submits in her commentary on tort that such compensation must be in proportion to the damage occurred in order to be in consistence with the object of the law on tort*. […]
>
> *The purpose of an award of damages is to compensate the plaintiff by requiring the defendant to pay money which will, in effect, reverse the plaintiff's recoverable loss in so far as money is capable of doing so*." (Suchart first Expert Report, paragraph 443-444)

1366. However, the but-for compensatory principle is circumscribed by a rule of remoteness:

> "*Further, not only must the damage be the direct result from the wrongful act, it must also not be remote from the wrongful act. So, the theory of causation must be taken into account to determine how direct damage has resulted from the act. In* ***SCD 519/2477/AD1934****, the court held that in a trademark infringement case, the expenses incurred by the plaintiff in a press release describing the event and preventing further damage that may have occurred were expenses directly resulting from the wrongful act of the defendant and were claimable. However, in another supreme court decision,* ***SCD 2680/2528/AD1985****, the costs of investigation of the person who committed the wrongful act were denied by the court as too remote pursuant to s. 438. There are further examples of losses being irrecoverable as too remote in* ***Supreme Court Decisions No. 1358–1369/2506*** *and* ***Supreme Court Decision No. 4546/2540***." (Suchart first Expert Report, paragraph 445)

1367. By contrast, although Dr Munin accepted that compensation is the guiding principle under s. 438, he went on to emphasise the "*very broad nature of s. 438 CCC*". I accept that the court retains some discretion under s. 438. In the end, however, it seems his position is only different as a matter of emphasis. I

prefer Professor Suchart's way of phrasing the issue, supported by academic and judicial authority, which is that:

> "*As to Dr Munin's [312], [313] and [319], I do not agree that Thai courts and scholars repeatedly affirm that the Court has a broad discretion to award damages in tort. In my opinion, the ultimate aim of s. 438 is always compensation, but within that 'compensatory principle' the court has a discretion (i.e. exercise the judgment) to make as to what amount of damages (or what other remedy) will achieve the compensatory purpose*." (Suchart first Expert Report, paragraph 446)

1368. In other words, I find that under s. 438, the guiding principle is to compensate the claimant by putting them in the position they would have been in but for the wrong (unless the loss is too remote). The court nevertheless retains a discretion to assess (per Suchart) "*what amount of damages (or what other remedy) will achieve the compensatory purpose*." This accords with Dr Munin's understanding of the law.

1369. There was also a debate about the date of assessment of damages. Here the disagreement between the experts was more significant. Dr Munin asserted at paragraph 324 of his First Expert Report that:

> "*it is erroneous for anyone to claim that it is the 'starting point' in Thai law that loss is assessed at the date of the wrongful act. It is also incorrect to suggest that future loss which can be crystallised after the wrong is not claimable because loss must be assessed at the date of the wrong only*."

1370. In support of this proposition at paragraph 341 Dr Munin cited *SCD No 6988/2545*:

> "*The Supreme Court Decision No 6988/2545 (2002) confirms that future loss is recoverable. In that case, the defendant extended structures on to the plaintiff's land. The Supreme Court ordered the removal of the extension and awarded the plaintiff an amount of damages on a monthly basis until the removal was complete. My observation is that the plaintiff was compensated for the loss of a chance to fully utilise the property although it was not certain whether he would be able to fully utilise it and to earn the same amount of money awarded by the Court*."

1371. Professor Suchart does not address this case in his Expert Report. Rather, he maintained at paragraphs 487-489 that:

> "*I have not come across any Supreme Court decision where the Court has discussed whether, and if so how, to take into account a counterfactual scenario in order to assess damages.*
>
> *In my experience, a Thai court would not consciously assess compensation by comparing the plaintiff's 'actual' situation with an alternative hypothetical counterfactual situation where the wrongful act had not taken place. Instead, if the claim is for damage to or loss of a property, the*

> *starting point for the assessment of damages will be the value of the property on the date of the wrongful act*. […]
>
> *The Thai court has not (as far as I am aware) ever been asked to look at what happened after the wrongful act in quantifying the Claimant's loss*."

1372. It is noteworthy that his evidence in this respect was phrased in a significantly more hesitant manner than when say he addressed the compensatory principle. At paragraph 496 of his report, when asked "*Does the Thai Court use hindsight (i.e. in determining what would have happened, to have regard to what did subsequently happen)? In particular, would it do so in determining (A) whether and when the debtor's contractual obligations would have fallen due, and (B) whether the debtor would have had sufficient assets to pay the debt on that date?*", Professor Suchart's answer was:

> "*Generally, use of hindsight is not directly provided or suggested in the civil procedural code. In determining the issues in dispute, the court will more rely on the evidence adduced by the parties. There is a possibility that the court may use hindsight in the determination if it is so presented to the court that way, though in practice it is unlikely*."

1373. There is therefore a disagreement between the experts here which I must resolve. I prefer the evidence of Dr Munin on this issue, which is to say that there is no strict rule that damages must be assessed on the date of the wrong with the effect that future events that crystallise the claimants' loss cannot be claimed for. This is for several reasons.

1374. First, the only authority cited between the experts on this issue (*SCD No 6988/2545*) tends to support Dr Munin's evidence.

1375. Second, Professor Suchart himself accepted that "*within that 'compensatory principle' the court has a discretion (i.e. exercise the judgment) to make as to what amount of damages (or what other remedy) will achieve the compensatory purpose*." This is contrary to his assertion of a strict bar against compensating but-for losses that crystallised after the wrongdoing, especially in circumstances where (as in the present case) the defendants <u>intended</u> to cause "future" losses.

1376. Third, it is impossible to reconcile Professor Suchart's view with a s. 420 TCCC/ s. 350 TPC case such as this. As I have noted above, s. 350 TPC expressly criminalises the removal, concealment and transfer of property to defeat a debt "*which has been <u>or will be</u> claimed through the Court*", and there is express Supreme Court authority to say that s. 350 can be the foundation of a s. 420 TCCC claim. On Professsor Suchart's view, no damages can be claimed in such a case because at the point in time when the property was removed, concealed and transferred, the debt had not yet been claimed and had not yet crystallised. That cannot be right and does not accord with the compensatory principle of s. 438 (as Professor Suchart himself accepted).

(b) Applying the law to the facts

1377. In their RAPOC, the claimants pleaded at [162.7(d)]:

> "*Further, had the Defendants not carried out the acts set out above pursuant to the Conspiracy:* […] *NN's Companies would have complied with their obligations to pay NS's Companies under the REC SPAs*;"[921]

1378. Similarly, at [163.1]:

> "*by reason of the Defendants' acts in furtherance of the Conspiracy, the Claimants or NS's Companies lost*: […]
>
> *the payments that would have been made under the REC SPAs;*
>
> *the ability to enforce their rights under the First Partial Awards against the assets of NN's Companies and/or REC, and under any future award made in favour of NS's Companies in the 2021 Arbitration or any arbitration arising out of the REC SPAs,*"

1379. "Conspiracy" was defined in [41] of their RAPOC:

> "*The Defendants have conspired to injure the Claimants by unlawful means. On various unknown dates, in the period from May 2015 to date, the Defendants and/or any of them agreed or combined together (and/or with Fullerton, KPN EH and/or REC) with a common intention, that being to injure the Claimants by unlawful means:*
>
> *41.1 by depriving them of any interest, legal or beneficial, direct or indirect, in REC and/or WEH, and/or the value of those interests; and*
>
> *41.2 by ensuring that they cannot obtain and/or enforce any right to payment or compensation to which they would be or are entitled, contractually or as damages or equitable compensation or otherwise, as a result of being so deprived.*"

1380. I consider that the relevant counterfactual, which the Claimants have adequately pleaded, is: but for the asset-stripping sequence, Fullerton's and KPN EH's REC shares would have retained their value (because REC would have held on to the Relevant WEH Shares), with the result that Fullerton and KPN EH[922] would have been able to, and would have met the monetary arbitral awards when made (whereas now they cannot).

1381. Amongst the defendants, the most substantial objection to this approach is to be found at [229] of D11 & D13's closing submissions:

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[921] RAPOC, [162.7(d)]

[922] The focus is upon Fullerton and KPN EH as the relevant parties to the REC SPAs, and not upon Khun Nop personally (who was not a party to the REC SPAs).

"*Sixth, Cs assert the alleged loss of "the ability to enforce their rights under the First Partial Awards against the assets of NN's Companies and/or REC, and under any future award made in favour of NS's Companies in the 2021 Arbitration or any arbitration arising out of the REC SPAs": RAPOC ¶163.1(d). The premise of this claim is that, but for the alleged Conspiracy, "NS's Companies would have been able to enforce their right to that payment [under the REC SPAs] against NN's Companies": RAPOC ¶162.7(e). As to this:*

229.1. An ability to enforce rights under an arbitration award is a 'relative' and not an 'absolute' right. It is therefore not a right protected by s.420 TCCC.

229.2. In any event, so far as concerns any claim regarding rights under the First Partial Awards, Cs have been paid the principal sum awarded, and their only claim now is for interest. There is a dispute ongoing in the Thai and BVI courts as to whether they are entitled to enforcement of the Tribunal's award of interest. If the answer is 'no', then Cs will have lost nothing (because they never had any right to enforcement). If the answer is 'yes', then the likelihood on a balance of probabilities is that Cs will successfully enforce that award (or otherwise receive the sums awarded due), either because NN will voluntarily procure payment or because SCB will enforce NN's undertaking and/or threaten to call default under its lending arrangements with WEH and its subsidiaries.

229.3. It is Cs' own evidence in these proceedings (on the security for costs application) that there is in fact a likelihood of any future awards being paid (whether in whole or in substantial part). It has not been established that REC has no assets; among other things, it has receivables corresponding to the amounts lent to KPN EH. Accordingly, any asserted 'loss' under this heading is speculative (and would at best be a future contingent loss, which is irrecoverable).

229.4. So far as concerns claims "under any future award made in favour of NS's Companies in the 2021 Arbitration", the same points apply, with the difference only that there is even less certainty as to whether the relevant contingency (non-payment of and subsequent inability to procure satisfaction of potential arbitration awards which have not yet been rendered) will ever occur, and even less likely that there has been any relative right injured for the purpose of a s.420 claim."

1382. I will address each of these objections after outlining the three arbitral awards in Mr Suppipat's Companies' favour that are relevant to their claim for damages in this case.

1383. Two of the awards were handed down on 22 September 2017 in relation to the payment of the First Instalments under the Fullerton and KPN EH SPAs respectively. In relation to *Symphony v Fullerton*, the Tribunal found that, although Symphony's claim to rescind the REC SPAs failed,

> "*the Fullerton First Instalment was due by 30 December 2015, and that by failing to pay on that date Respondents breached the Fullerton SPA as of 30 December 2015*." ([227])

1384. Thus, Symphony's alternative claim for payment of the First Instalment succeeded. The Tribunal therefore awarded:

a. The First Instalment under the Fullerton SPA, namely $85.75m

b. Interest at a rate of 15% on $85.75m "*until payment in full*":

> "*Claimant is granted interest. on the First Instalment amount, under the Fullerton SPA from 23 October 2015 on the basis of a 15% per annum rate, compounded annually as from 30 December 2016, until payment in full*;" ([345(c)]

1385. In relation to interest, the Tribunal awarded 15% simple interest from 23 October 2015 (the date when the Fullerton First Instalment was due) to 30 December 2016 on the basis that this was the rate provided for in article 12.9 of the Fullerton SPA for default in payment. Further, it awarded a compounded rate from 30 December 2016 onwards on the basis that:

> "*Respondents have been considered to be in default of its payment obligation from 30 December 2015. From 23 October 2015 until 30 December 2016, the applicable interest rate was a matter of a separate agreement and not a contractual default in payment*." ([290])

1386. The compound interest element of this award was, however, subsequently set aside in BVI proceedings on the basis that it was illegal under Thai law (see below).

1387. On 12 June 2019, the $85.75m that was held at the ICC pursuant to the Escrow Condition was released to the Claimants in partial satisfaction of the Fullerton Award.

1388. The second award in Mr Suppipat's Companies' favour was the claim for the First Instalment under the KPN EH SPA: *NGI and DLV v KPNEH*. In that case, unlike the Symphony Arbitration, the Tribunal dismissed NGI and DLV's claims for the payment of shortfalls under the KPN EH SPA First Instalment. They nonetheless awarded the claimants interest on the First Instalment amount under the KPN EH SPA "*from 25 September 2015 on the basis of a 15% per annum rate, compounded annually as from 25 September 2016, until payment in full*". No payment has been made pursuant to this award.

1389. As mentioned both arbitral awards on the First Instalments under the REC SPAs (collectively, the "***First Partial Awards***") were handed down on 22 September 2017. Mr Suppipat's Companies then proceeded to enforce these awards in proceedings in Thailand and in the BVI before Wallbank J on 27 January 2023 and 27 February 2023 ("***BVI Enforcement Judgment***").

1390. With respect to the Thai enforcement proceedings, the court has been informed that Mr Suppipat's Companies have successfully obtained an enforcement order of the Thai court. This was apparently appealed against on 27 March 2023. Khun Nop has not disclosed a copy of the appeal documents or translations in these proceedings, but the Claimants understand from local lawyers that the grounds of appeal relate primarily to the interest provisions, and inconsistencies in the terms of the Awards. It is not likely that the appeal will be heard in Thailand until next year.

1391. With respect to the BVI proceedings, there were three issues before the court which were decided in the following way:

a. **Firstly**, the compound interest element in both First Partial Awards was overruled:

> "*The first issue to be decided in respect of the Set Aside Application before this Court was the Compound Interest Issue. The Court's decision in respect of that issue was that the Enforcement Order should be set aside in so far as it related to the Tribunal's award of compound interest, on the basis that that award was illegal under Thai law, a fact that this Court could and should have regard to out of comity and in order to preserve the integrity of this Court's processes*." ([34])

b. **Secondly**, Wallbank J rejected KPN EH's argument that "*all this Court can do is to enforce the award as it stands: it cannot amend the award*" ([36(1)]) by enforcing only the simple interest element of it:

> "*In sum, the Court determines the Consequentials Issue by allowing enforcement to proceed of the simple interest part of the Awards and by disallowing the compound interest part. Thus, this Court will permit enforcement of the awards of simple interest at 15% per annum from 23rd October 2015 until payment in full in respect of outstanding principal amounts pursuant to the* [Fullerton] *Award and similarly from 25th September 2015 in respect of the* [KPN EH] *Award*" ([70])

Before me no suggestion was made by the Claimants that the compound interest rate was appropriate.

c. Thirdly, Wallbank J held that the 12 June 2019 payment of the $85.75m was to be allocated first to interest, and only after that to the principal sum outstanding.

1392. Fullerton's BVI lawyers have had the Judgment dismissing the application in draft since 13 March 2023 and the final Judgment was handed down on 21 April 2023. No appeal against that Enforcement Judgment has been made.

1393. Most recently, and two weeks after this hearing concluded, on 17 March 2023, the Remaining Sums under the REC SPAs were ordered to be paid to Mr

Suppipat by the arbitral tribunal ("***Remaining Sums Award***"). The tribunal ordered Fullerton and KPN EH to pay:

a. The Remaining Amounts (US$525,000,000) due under the REC SPAs ([321] of the Judgment); plus

b. 15% simple interest from each relevant milestone payment date until payment in full ([340] of the Judgment).

1394. In respect of this award, no payment has been made and nor has an enforcement order yet been sought.

Objections to counterfactual

1395. The Defendants' objections to the Claimants' counterfactual were attractively developed in closing submissions by Ms den Besten KC on behalf of Khun Arthid and Khun Weerawong (**D11 and D13**). Her first objection at paragraph 229.1 of the written closing of D11 and D13 is echoed in paragraph 601.3 of the HP Defendants' written closing as follows:

> "*… damage to Cs' contractual or contractually-derived rights under or in respect of the REC SPAs would be to relative not absolute rights, and would not give rise to a cause of action under s.420. In particular, impairment of the ability to enforce an arbitral award would be an injury (if at all) to a relative right, as accepted by Dr Munin:*
>
> > *"Q: Would you accept this: a right to enforce an arbitral award is a relative right, isn't it?*
> >
> > *A: It is a relative right."*
>
> *Dr Munin was not aware of a single instance of a s.420 claim being brought to compensate for an alleged loss of ability to enforce rights under a future arbitration award*."

1396. I reject this argument for the same reasons I gave above. I consider *SCD 648/2513* is clear authority that a s. 350 offence (which is necessarily based on a creditor-debtor relationship, as in a right to enforce an arbitral award) can be the basis for liability under s. 420 TCCC.

1397. The second objection of D11 & D13 (at paragraph 229.2 of their closing submissions) has been overtaken by recent events – the judgment of Wallbank J confirms that the arbitral award can be enforced without its compound interest element (which element was illegal under Thai law).

1398. The third objection of D11 and D13 (at paragraph 229.3 of their closing submissions) that "*there is in fact a likelihood of any future awards being paid*" must also be rejected, not least because the First Partial Awards were handed down on 22 September 2017 and have still not been satisfied even after Thai and BVI enforcement proceedings 5 years later. More fundamentally, Fullerton and KPNEH simply do not have the resources to satisfy the arbitral awards. The

removal of the companies' resources or assets was, as I have found, the very point of the asset stripping sequence. As Khun Nop realised, Fullerton and KPNEH would be the subject of any subsequent arbitral awards as they were the parties to the REC SPAs. He therefore devised a plan to strip those companies of their value by having them transfer the Relevant WEH Shares to his nominees Dr Kasem, Madam Boonyachinda, Golden Music and Cornwallis (thereby himself retaining control of the WEH shares).

1399. I reject D11 & D13's suggestion that "*It is Cs' own evidence in these proceedings (on the security for costs application) that there is in fact a likelihood of any future awards being paid (whether in whole or in substantial part)*." First, that was not the Claimants' evidence. The footnote to the Claimants' evidence supported a much narrower proposition as follows:

> "*See Burrell 10th at ¶90-¶91 and ¶103 {K1.44/1/36-42}, including (i) at ¶90.1 "Value should be ascribed to the Awards (…) The Awards might or might not be capable of being enforced – but in the absence of evidence of certainty in this regard, plainly they should be treated as having some enforcement value"; and (ii) at ¶90.3, "the Defendants [sic] have a track record of selling packages of the WEH shares received from Nick to raise funds when it suits them to do so"*."

1400. Second, I find as a fact that it is not the position today. There is no evidence to suggest that Fullerton and KPN EH have any means or (through Khun Nop) intention of honouring the awards and no evidence to suggest that Khun Nop has any intention to honour them personally, having dissipated his companies' assets to ensure that they could not honour them (indeed, the reverse is true).

1401. I also reject the suggestion that REC had assets in the form of "*receivables corresponding to the amounts lent to KPN EH*". I assume that D11 & D13 are referring to payments under the Kasem SPA where, as I have found, REC lent monies to KPN EH who then funded the REC Payors to pay for the Relevant WEH Shares to be transferred to Kasem. This was an entirely circular and dishonest transaction, not a *bona fide* sale. I therefore find as a fact that KPN EH is not going to repay the loan to REC, especially given that both are Khun Nop's companies. In reality the only assets of REC were the Relevant WEH Shares and, having been stripped of them, the REC shares are today worthless.

1402. Finally, the fourth objection of D11 and D13 (at paragraph 229.4 of their closing submissions) has been superseded by the Remaining Amounts Award. That award must also be considered as final and conclusive: laws of Singapore require that any application to set aside the Remaining Amounts Award had to be made by 17 June 2023 and no application was made by Fullerton and KPN EH by that date.

1403. Finally, a separate objection might be detected in a letter dated 17 May 2023 from Clyde & Co, D11 & D13's solicitors, to Willkie Farr & Gallagher (UK) LLP, the claimants' solicitors:

> "*SCB has served notices on Mr Narongdej and on relevant WEH subsidiaries, recording its expectation that payments due from Fullerton Bay Investment Limited and KPN Energy Holding Co., Ltd should "be settled as soon as possible", and noting and reserving the right to rely on the default provisions of the relevant facilities agreements if payment is not promptly made "…once the arbitral award regarding such payment obligation and the final court judgement to enforce such arbitral award are rendered".*"

1404. The argument here seems to be that Khun Nop's Companies will pay under the arbitral awards because otherwise SCB will trigger events of default under the relevant facilities agreements. However, as I have said, the evidence concerning SCB does not support this assertion; and Khun Nop's Companies simply do not have the assets to satisfy the arbitral awards. As to the argument that because Khun Nop still owns the Relevant WEH Shares via his nominees he could transfer them back to his companies to enable them to make payment, that is belied by the elaborate and dishonest steps which he has taken to transfer the shares away in the first place.

1405. I therefore reject the defendants' submission that it is inappropriate to award as damages the sums outstanding under the three arbitral awards.

1406. In addition, given that the counterfactual assumes that these awards would have been satisfied by Fullerton and KPN EH on the date when they were handed down, it follows that the claimant must also be entitled to interest on those amounts outstanding under the arbitral awards. It is unfortunate that this issue was not addressed by the parties in any detail during the course of the 20-week trial. At the court's request, there was however some recent written correspondence which set out the parties' positions on the appropriate rate to use.

1407. By a letter dated 6 July 2023 to the Commercial Court, the Claimants have argued for a 15% simple interest rate to be applied on the basis that this "*reflects Wallbank J's Order on the First Partial Awards which orders the Respondents to pay simple interest at 15% per annum from the accrual date until such sums are paid in full; and the Remaining Amounts Award which states that the Respondents shall pay 15% simple interest on the unpaid amounts and post-award interest at the same rate until the sums are paid in full.*"

1408. However, as the correct counterfactual assumes that the arbitral awards were satisfied on the date they were handed down, the Claimants' reasoning cannot be right.

1409. Indeed, as Mr. Davies-Jones KC for SCB pointed out, in their oral reply closing submissions the Claimants conceded that a lesser rate applied:

> "*I accept Mr Davies-Jones' comment that if your Lordship finds that what would have happened is that Mr Suppipat would have been bought out because there would have been a 10.3 sale of the REC shares, the 700 million or the balance of 525 million, etc, will only accrue interest at 5%, and we can do the calculation if your Lordship comes to it, but I do say that*

he is entitled to be put into the position where he gets the full benefit of his contractual promises, and that's what's been stripped away from him." (Day 55/138-139) [emphasis added]

1410. The Claimants attempted to maintain their position in light of this passage on the basis that Mr Fenwick KC referred to the fact that the Claimants were "*entitled to be put into the position where he gets the full benefit of his contractual promises, and that's what's been stripped away from him*", and the REC SPAs provided for the 15% default interest rate. But the relevant loss is not payment under the REC SPAs but under the subsequent arbitral awards (which have already assessed the interest rate on the amount outstanding at 15%). There is therefore no reason in principle why the *contractual* default interest rate should apply.

1411. The Claimants did not explain the basis for their selecting a 5% interest rate and I prefer SCB's suggestion (in an email to the Court dated 7 July 2023) that an appropriate US$ rate of interest should be adopted, namely US Prime rate for the relevant period. I leave it to the parties to calculate, for the relevant period post the date of the award in each case, the monetary amounts for interest based upon US Prime rate.

1412. My conclusions on the issue of damages are therefore as follows:

a. The relevant counterfactual is that but for the wrong committed under s. 420 TCCC/ s. 350 TPC, Fullerton and KPN EH would have had sufficient value in their REC shares to pay under any arbitral awards <u>at the dates on which they were made</u>.

b. In relation to the Fullerton First Instalment Award, that amounts to:

i. First Instalment under Fullerton SPA = US<u>$85.75m; plus</u>

ii. Interest on $85.75m calculated at the 15% simple interest rate from 23 October 2015 to 22 September 2017 = <u>US$ 24,667,808;</u>

iii. Making a total of US$110,417,808m; <u>plus</u>

iv. Interest on US$110,417,808m calculated at the US Prime Rate from 22 September 2017 to 12 June 2019 (parties to calculate)

<u>Less</u>:

v. Credit for sums paid on 12 June 2019 = US<u>$85.75m</u>;

<u>Leaving:</u>

vi. A sum on which interest is payable calculated at the US Prime Rate from 12 June 2019 to the date of this judgment (parties to calculate).

c. In relation to the KPN EH First Instalment Award, that amounts to:

i. Interest on First Instalment under KPN EH SPA calculated at the 15% simple interest rate from 25 September 2015 to 22 September 2017 = $1,532,921; plus

ii. Interest at the US Prime Rate on $1,532,921 from 22 September 2017 to the date of this judgment (parties to calculate).

d. In relation to the Remaining Amount Awards, that amounts to[923]:

i. Remaining Amounts under the REC SPAs = US$525m; plus

ii. Interest on $525m calculated at the 15% simple interest rate from the relevant milestone dates to 17 March 2023 = US$279,030,649;

plus

iii. Interest on the relevant sum calculated at the US Prime Rate from 17 March 2023 to the date of this judgment (parties to calculate).

1413. Moreover, applying section 438 TCCC as I must to the question of compensatory damages, I consider that in the light of the circumstances and gravity of the wrongful acts of the defendants in this case, recovery of these sums is indeed appropriate under the broad discretion which the court has under section 438 TCCC.

1414. One final issue to be addressed - which none of the parties has addressed - is the need to prevent double recovery. Since the damages award effectively assumes that the First Partial Awards and the Remaining Amount Awards were paid at the date they were handed down, the claimants must not be allowed to then separately claim these sums under the BVI Enforcement Judgment and any subsequent proceedings to enforce the Remaining Amount Awards. They have to give credit for the sums received under this judgment and cannot make double recovery. This may best be dealt with by way of an undertaking from the Claimants which is incorporated into the Order which this court makes as a result of this judgment. I leave it to the parties to formulate the terms of a suitable undertaking.

(c) Ceiling for damages claimable

1415. The counterfactual assumes that the value of Fullerton and KPN EH's REC shares (in circumstances where REC still owned the Relevant WEH Shares) would have exceeded the value of the arbitration awards as at 22 September 2017 and 17 March 2023 respectively. Indeed Khun Nop and Khun Nutttawut submitted as much in paragraph 638 of their closing submissions.

[923] The Tribunal also awarded costs of all the arbitration proceedings (including the First Partial Award Proceedings) in Mr Suppipat's Companies' favour. That amounted to EUR 3,057,484.12 plus GBP 226,765.00 ([352] of the 17 March 2023 Judgment). The claimants do not however claim for this sum in these proceedings.

1416. It follows that in order to recover the losses set out in paragraph 1412 above, the Claimants must show two things.

1417. **Firstly**, that as at 22 September 2017, the value of the Relevant WEH Shares, ie 59.46% of WEH, and therefore the value of Khun Nop's REC shares (essentially the sole asset of REC being the Relevant WEH Shares), exceeded $85.75m + $24,667,808 = $110,417,808.

1418. **Secondly**, that as at 17 March 2023, the value of the Relevant WEH Shares minus USD $110,417,808, exceeded US$804,677,910.

1419. I find that the Claimants have done so.

1420. So far as the value of the Relevant WEH shares on 22 September 2017 is concerned, Mr Caldwell (the Defendants' valuation expert) considers that as at 9 August 2017 the value of the Relevant WEH Shares was between USD 258m-465m. Mr Schumacher (the Claimants' valuation expert) valued the shares at that date at USD1.044bn. It follows that the value easily exceeded US$110,417,808.

1421. So far as the value of the Relevant WEH shares on 17 March 2023 is concerned, Mr Caldwell considers that as at 31 July 2022 the value of the Relevant WEH Shares was USD 828m. That is the latest point in time at which the experts have valued the Relevant Shares. Mr Schumacher, the Claimants' expert valued the shares at that date at USD1.273bn.

1422. Both experts – whom I find did their best to assist the court - agreed that the shares' value was on an upwards trajectory the closer the valuation date was to trial because Watabak has been funded and the five further projects – the "Developing Projects" as Mr Caldwell calls them, "*have become operational and de-risked*"[924]. Moreover, "*another distinctive feature is that legal risk was resolved by the arbitral tribunal's rejection of Mr. Suppipat's recission claim in the Symphony Arbitration*"[925]. There is every reason to believe that the Relevant WEH Shares would have increased further in value after 31 July 2022; but there is in any event nothing to suggest that they would have fallen in value between that date and 17 March 2023. I consider therefore that using the value of the Relevant WEH Shares as at 31 July 2022 is accordingly a cautious approach to assessing their value at 17 March 2023 and likely a significant under-value.

1423. So far as the value of the shares on 31 July 2022 is concerned, I generally prefer the evidence of Mr Schumacher to that of Mr Caldwell, whose valuation I consider to be excessively cautious.

1424. In particular, I accept the evidence of Mr Schumacher that a *terminal value* should be included. The terminal value of existing projects refers to what will

[924] Caldwell First Report, [90].

[925] ibid

be done with each of the wind farm projects when they reach the end of the first cycle of operation, which typically corresponds with the life expectancy of a turbine or the expiry of a land lease. A terminal value assumes that turbines and certain other equipment will be replaced or overhauled at the end of their useful life ("repowering"). The assumptions regarding terminal value, and whether and for how long the wind farm continues, will have an impact on its value. I accept Mr Schumacher's evidence that from a modelling perspective, DCF ("Discounted Cash Flow") valuations typically have this discrete forecast period (the useful life of the turbines or the duration of the land leases) which is usually followed by a terminal value.

1425. I find that including a terminal value in this case is consistent with the approach taken by:

a. WEH management[926], as WEH's financial wind farm models which set out a DCF value assume a terminal value after the initial project lifetime valuation standards. This is strongly supported by the emails dated 2 January 2017 and 5 January 2017 from Khun Thun to Gunkul Engineering Public Company Limited which expressly refer to the inclusion of a terminal value in WEH's DCF calculation in particular on the basis of a likely rolling over of the lease at the end of its life. In cross examination Mr Caldwell agreed that the WEH Managers had attributed a very substantial terminal value to the projects. The fact that, as Mr Caldwell pointed out, Gunkul and Orix pushed back against the assigning of terminal value is to be expected in any negotiation. The point remains a good one.

b. International Valuation Standards support a terminal value for long-lived or indefinite-lived assets at the end of the explicit production period[927].

c. Industry practice is frequently to calculate a terminal value for company valuations and there is a current global desire to significantly expand renewable sources of electricity generation[928].

d. Thai stakeholders have an interest in extending the life of existing wind farms, particularly in order to meet the Thai Government's target for renewable energy which increases into the future.[929] I do not consider that EGAT would have any interest in terminating the existing supply relationship with WEH and its wind farms. Mr Caldwell accepted in cross examination that the PPA with EGAT renews automatically every 5 years and that is what he assumed for the first 25 years of the forecast.

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[926] Schumacher First Report, [6.3]

[927] Ibid, [6.4].

[928] Ibid, [6.5].

[929] Appendices to Schumacher 2 A5.1.3

Nor do I consider that EGAT would have any interest in refusing to extend the lease with WEH under its long-standing relationship with it. These were standard ALRO leases and there is no reason to consider that they would not have been extended (with the corresponding benefit of continued lease income, the price paid for the use of the land for electricity generation being greater than for agricultural use of the land) and the PPA renewed. Indeed, the latest ALRO leases include price increases into perpetuity.

e. Terminal Value was added in the valuations not only of WEH but also of other relevant companies as follows:

   i. In the Thanachart Securities analysts' report produced for Absolute Energy.[930]

   ii. Bank material, and in particular SCB; BAML; Morgan Stanley; Jefferies.

   iii. FTI Report of Richard Hayler.

   iv. Baringa valuations between February 2015 and May 2015.

1426. I accordingly accept that a terminal value should be included in the valuation of the Relevant WEH Shares as at 31 July 2022. I do not consider it to be too speculative, as suggested by Mr Caldwell. It assumes that WEH will continue wind farm operations beyond the 25 year planned life of the existing projects. I consider that assumption to be well founded and consistent with the proven appetite in Thailand for renewable energy in the future. This issue was explored on Day 45 of the trial, especially at pp.71-78 of the transcript and what emerged is that, unsurprisingly, a competitor for one of the wind farms at the end of the first 25 years would be in a less favourable position than an operator with an existing lease. Continuity of supply by an established operator such as WEH would be of benefit not just to WEH but also to EGAT and the Thai Government.

1427. Moreover, to account for the inherent uncertainties and future risks in making this calculation, Mr Schumacher conservatively reduced expected future cash flows.

1428. I do not consider that Mr Caldwell's criticisms of Mr Schumacher's terminal value calculations are justified, for the reasons set out by Mr Schumacher in his second report at section 4.4.

1429. I also consider that the terminal value should be computed by using the same discount rate as for the first 25 years (using Mr Schumacher's Gordon Growth model) rather than an increased rate (as Mr Caldwell suggests). I accept Mr Schumacher's evidence that "r", the discount rate for terminal value calculations, should equal the WACC (weighted average cost of capital, used to

[930] See Schumacher 1 Exhibit KFS 10

discount individual cash flows) and that this is standard practice in corporate finance. I do not accept Mr Caldwell's suggestion that Mr Schumacher's WACC reflects only operating projects or cash flows related to the first 25 years of operation. I note that Mr Caldwell did not himself independently estimate the appropriate discount rate for a repowering.

1430. I also accept Mr Schumacher's evidence that the vast majority of the value in the terminal value is to be attributed to the first repowering by reason of the discount factor to cash flows which would be derived further in the future. It follows that whilst he allows for repowerings effectively in perpetuity, this does not materially affect his terminal value.

1431. As for the further detailed points of disagreement between the experts concerning terminal value which are summarised in their Joint Memorandum at paragraph 8.3.3 to 8.3.7, I prefer the evidence of Mr Schumacher; I am firmly of the view that a terminal value should be included in the valuation.

1432. This is obviously not an exact science and in view of the way in which the experts have gone about this exercise, necessarily a broad brush approach to such a valuation issue must be adopted by the court. I accept Mr Schumacher's opinion that terminal value should be included and I accept his figure of USD552m less USD227m representing the terminal value of overheads in the terminal period, resulting in a figure of USD325m.

1433. It follows that even if Mr Caldwell's cautious assessment of the Relevant WEH Shares of USD828m is taken, and USD325m is added to that, making a total of USD1.153bn less the (assumed) payments to date of USD $110,417,808, the figure of US$804,677,910 is easily exceeded.

1434. A platform value reflects the future opportunities available to the company as a market leader. I consider that Mr Schumacher is correct to ascribe a platform value of some nature (he ascribes a premium of 10% in the sum of USD205m) to the valuation of the Relevant WEH Shares, and that Mr Caldwell is wrong to ascribe no value at all to it. However, it is not necessary to analyse this further as the threshold (in terms of the company having sufficient value to enable Khun Nop to meet his monetary obligations under the arbitration awards) is already easily exceeded.

(2) Against the secondary participants

(a) Applicable law

1435. s. 432(1) provides:

> "*If several persons by a joint wrongful act cause damage to another person, they are jointly bound to make compensation for the damage. The same applies if, among several joint doers of an act, the one who caused the damage cannot be ascertained.*"

1436. I have found that the damages for the principal wrong, viz the asset stripping sequence based on s. 420 TCCC/ s. 350 TPC, which was committed by Khun Nop, Khun Nuttawut, Khun Weerawong and the WEH Managers, consist of the sums which remain unpaid by Fullerton and KPN EH pursuant to the arbitral awards under the REC SPAs. These wrongdoers are liable in the same sum under s. 432(1) TCCC (or indeed (2), other than Khun Nop).

1437. Section 432(2) TCCC further states: "[p]*ersons who instigate or assist in a wrongful act are deemed to be joint actors.*"

1438. The next question is, therefore, whether the secondary participants (viz Madam Boonyachinda, Golden Music and Cornwallis, the WEH Managers' Companies (Colome, Keleston and ALKBS), Dr Kasem and Khun Pradej) are liable for this same sum as well, given that I have found their participation was limited to assistance or instigation under s. 432(2), rather than commission of the principal s. 350 offence or as a joint wrongdoer under s. 432(1). Their participation was of a more secondary nature than the primary participants.

1439. Under Thai law, if liability is made out under s. 432(1) or s. 432(2), then, the general position is that joint tortfeasors are jointly and severally liable for the loss caused under s. 291 TCCC: Munin 1, paragraph 273 and 279.

1440. Section 291 TCCC provides as follows:

> '*If several persons owe an act of performance in such manner that each is bound to effect the whole performance, though the creditor is entitled to obtain the whole performance only once (i.e. joint debtors), the creditor may demand the performance at his option from any one of the debtors, in the whole or in part. Until the whole performance has been effected all of the debtors remain bound*.'

1441. However, the Thai law experts accepted that the court retains a discretion to decide otherwise, as is provided by s. 432(3):

> "*As between themselves the persons jointly bound to make compensation are liable in equal shares unless, under the circumstances, the Court otherwise decides.*"

1442. Dr Munin's evidence on Thai law was as follows:

> "*273. The extent of joint tortfeasors' liability is generally determined by s.291 CCC, which concerns the scope of liability of joint debtors. However, s.432 CCC gives the Court a discretion to divide liability of joint tortfeasors in accordance with the circumstances of the wrong. In this case, s.291 CCC does not apply to divided liability of joint tortfeasors.*
>
> *274. If the court chooses to exercise its discretion not to make the tortfeasors jointly liable (which it is entitled to do as explained in the previous paragraph) it can make one debtor liable for the entire damage or such percentage of the damage as it considers appropriate by exercising its discretion, which is very broad.*

275. However, it is more common for the Court to find all tortfeasors jointly liable under s.291 CCC than to divide liability for each tortfeasor.

276. Supreme Court Decision No 4978/2562 (2019) is a rare example of divided liability under s. 432 paragraph 3. In that case, the Court held that liability of each tortfeasor should be based on the degree of their involvement in killing the victim. The Court ordered the accomplices to pay more damages than the accessory."

1443. Dr Suchart agrees with Dr Munin: Suchart 1, paragraph 424. So does Khun Anurak: Anurak 1, paragraph 55.

(b) Applying the law to the facts

1444. I consider that so far as the accessories are concerned, (namely Madam Boonyachinda, Dr Kasem, Golden Music, Cornwallis, Colome, Keleston, ALKBS and Khun Pradej) they all played a significant part in the dishonest scheme and I see no reason to depart from the normal rule that they should be jointly bound to make compensation and as between themselves they should be liable in equal shares. Again, I consider that recovery of these sums is appropriate under the broad discretion which the court has under section 438 TCCC.

The ASA and related claims

1445. The ASA was entered into on 3 August 2015 (but dated 25 June 2015) between NGI and Ms Collins, Khun Thun and Ms Siddique (**the ASA Ds**). The ASA contains an English governing law clause, which is stated to apply to the ASA itself *"and any non-contractual obligations arising out of or in connection with it"*.

1446. The main claim under the ASA is made by NGI against the ASA Ds for breach of contract. The ASA Ds bring counterclaims for breach of NGI's payment obligations under the ASA, each seeking damages of US$10 million (i.e. the Service Fee payable under cl. 3.1). The ASA Ds contend that NGI repudiated the ASA by letters to them dated 28 January 2016 and 2 March 2016, and that they accepted that repudiation by their letter of 3 May 2016 terminating the agreement. The parties agree that English law applies to the claims of breach of the ASA and the ASA Ds' counterclaims.

1447. There are also other non-contractual claims being brought by Mr Suppipat and his Companies that are connected to the ASA. These are: (1) breach of fiduciary duty, (2) bribery and (3) unlawful means conspiracy. The breach of fiduciary duty claim is made against Ms Collins, Khun Thun and Mr Lakhaney. The bribery claim is made against Ms Collins, Khun Thun and Mr Lakhaney

1448. The parties are agreed that English law governs (1) as a result of the governing law clause above. The Claimants also maintain that (2) and (3) are governed by English law by virtue of articles 14(1)(b) and 4(3) of Rome II, namely that either these claims fall directly within the scope of the governing law clause or the ASA is a pre-existing contract between the parties that is closely connected with the tort. Although, in their written opening, the ASA Ds said that their "*primary position*" is that Thai law applies to the bribery claim arising from the ASA, they then proceed immediately in their closing submissions at paragraph 394ff to address the *English law* authorities on the components of the tort (likewise for unlawful means conspiracy). I shall therefore proceed, as the parties have, on the basis that English law governs these claims as well (which I consider to be the correct position).

1449. I should mention first that the Claimants have also advanced claims against the ASA Ds for inducing a breach of the ASA. The Claimants stated at [1019] of their closing submissions that the WEH Managers:

> "*(a) Were aware of the ASA and their and Ms Siddique's obligations to NGI thereunder.*
>
> *(b) Entered into the Oral Agreement with Khun Nop and Khun Weerawong on 17 March 2016, which entailed that the WEH Managers and Ms Siddique would receive Relevant WEH Shares (for no consideration) in lieu of payment under the ASA.*
>
> *By acting as they did and with such knowledge, the WEH Managers (together with Khun Nop and Khun Weerawong) wrongfully effected the transfer of the Relevant WEH Shares to themselves, knowing that they would, and wrongfully inducing themselves to, breach their obligations to NGI under the ASA as a result*."

1450. However, I do not consider that this claim is any different from the primary breach of ASA claim; it makes no sense to contend that the ASA Ds induced themselves to commit a breach of contract.

(1) The relevant obligations under the ASA

1451. Under the ASA, NGI required certain services to be provided to it in connection with the sale of its Assets. By virtue of section 2.1 ("**Provision of Services**") and Schedule 1 of the ASA, the ASA Ds were expressly required to provide the following services to NGI ("**the Services**") commencing from 6th April 2015 until the completion of the Transaction:

a. **Sch 1, Clause 5:** *"Evaluating proposals from prospective purchasers on behalf of [NGI] and providing guidance with respect to the structure of a Transaction".*

b. **Sch 1, Clause 11:** *"Co-ordinating, reviewing and negotiating all legal and related documentation including, but not limited to, term sheets, common terms agreements, sale and purchase agreements, shareholders' agreements, and ancillary documentation".*

c. **Sch 1, Clause 12:** *"Working with [NGI] to ensure that all the conditions precedent, covenants and undertakings contained in the Share Purchase Agreements are met and executed."* By recitals (C) to (D), "Share Purchase Agreements" were defined as the REC SPAs.

1452. "Transaction" is defined as follows:

> ***"Transaction"*** *means, the direct or indirect transfer of, the shares and other equity interests, directly or indirectly, in [REC] pursuant to the Share Purchase Agreements, together with the execution by the Purchasers of their obligations thereunder, including without limitation, the payment to the Sellers of the Purchase Price, payable pursuant to the Share Purchase Agreements…" (emphasis added)*

1453. It is common ground that the ASA remained in force until 2 July 2016.

1454. By clause 2.2 ("**Standard of Services**"), the ASA Ds were required to use their reasonable endeavours to:

a. Clause 2.2.1**:** ensure that the Services are provided *"(i) with reasonable skill and care…and (iii) in accordance with Good Industry Practice."*

b. Clause 2.2.2**:** carry out the Services effectively and *"properly supervise the carrying out of the Services, and adequately manage the performance of the Services."*

1455. Clause 2.2.3 imposed specific notification requirements on the ASA Ds, by which they were required promptly to notify NGI *"of any developments which may have a material adverse impact on the [ASA Ds'] ability to provide the Services or meet any other obligations under this Agreement. Following any such notice the Services providers shall promptly initiate such investigative and remedial measures as are appropriate to rectify such developments."*

1456. Clause 3 of the ASA provided as follows:

> ***3. Service Fee***
>
> *In consideration for the Services to be provided under Schedule 1, the Company shall, pay to the Service Providers a service fee (the "**Service Fee**"), as follows:*
>
> *3.1.1 A Service Fee in the amount of USD10,000,000 to each EC, TR, and KS, which is USD30,000,000 in aggregate (the "**Service Fee**") which will be payable in two or more tranches.*
>
> *3.1.2 The amount of USD6,000,000 will be paid to each EC, TR, and KS within 5 days after payment by the Purchasers to the Sellers in full of the USD [175,000,000] aggregate consideration payable pursuant to the Share Purchase Agreements by the transfer of cleared funds for the same day value to three individual accounts to be notified to be notified [sic] by EC, TR, and KS;*

> *3.1.3 The amount of USD4,000,000 will be paid to each of EC, TR and KS within 5 days after payment by the Purchasers to the Sellers in full of the first payment of the relevant Remaining Amount (as defined under the relevant Share Purchase Agreements) payable pursuant to the Share Purchase Agreements by the transfer of cleared funds for the same "day value to three individual accounts to be notified to be notified by EC, TR, and KS;*
>
> *3.1.4 Provided however, that if any portion of the Remaining Amount due pursuant to the Share Purchase Agreements is prepaid to the Sellers, then the Company shall pay to each of EC, TR and KS an amount equal to one sixth of such prepaid portion of the Remaining Amount (for the avoidance of doubt, up to a maximum amount of USD 4,000,000 each), which payment shall constitute a prepayment of the amount payable pursuant to Section 3.1.3 hereof, and thus reduce dollar for dollar the fee amount payable pursuant to Section 3.1.3 hereof; …"*

1457. "Sellers" and "Purchasers" are not specifically defined in the ASA, save that in recital C, Symphony is defined as "Seller". However, the definition of "Transaction" includes a provision that "*capitalised terms used and not defined herein shall have the meaning ascribed to them in the relevant Share Purchase Agreement*".

1458. "Share Purchase Agreements" are defined in recital (D) as the 19 June 2015 Fullerton and KPNEH SPAs "*together with all related agreements and undertakings*", and so would include the amended and re-stated REC SPAs.

1459. Clause 5.1 of the ASA provides as follows:

> "*This Agreement shall take effect on the date hereof and subject to earlier termination in accordance with this clause 5… and the terms set out in this Agreement, shall remain valid and operative unless one Party serves the other with a written notice of termination with a notice period of at least 60 days.*"

1460. Clause 5.3 then provides for termination for breach as follows:

> *"A Party may terminate this Agreement by giving 30 days advance written notice to the other Party if that other Party commits a material breach of its obligations under this Agreement and that breach has not been remedied within 30 days after receipt of notice giving full particulars of the breach and requiring the other party to remedy it."*

1461. And clause 5.4 further provides that:

> "*Termination or expiry of this Agreement shall not affect any rights or obligations which may have accrued prior to termination or expiry. The obligations of each Party set out in any clause intended to survive such termination or expiry, including clauses … 3 (Service Fee)…shall continue*

in full force and effect notwithstanding termination or expiry of this Agreement."

(2) The claim for breach of the ASA and the counterclaim.

1462. NGI contends that by reason of (i) their conduct in the negotiations of the call option/Part B of the Global Transaction; and (ii) their involvement in Khun Nop's companies' payment default under the REC SPAs (including through participating in the transfer of WEH shares to Kasem and onwards to themselves), the ASA Ds acted in breach of their obligations to NGI under the ASA.

1463. Mr. Dale KC for the ASA Ds takes issue with this. Instead he contends that the ASA Ds are each entitled to payment of $10m under the ASA by way of counterclaim. So far as their counterclaim is concerned, the ASA Ds assert:

a. By their letters of 28 January 2016 and 2 March 2016 NGI repudiated or renounced the ASA from June 2019 and/or evinced an intention no longer to be bound by it. NGI's subsequent failure to make payment under the ASA from June 2019 is evidence of NGI's intention in that regard. By their letter of 3 May 2016 the ASA Ds accepted such anticipatory or repudiatory breach and/or renunciation and were entitled to and did terminate the ASA. By reason of such breach and/or renunciation, the ASA Ds allege they have suffered loss and damage, being the loss of US$10m each of which they would have received under the ASA and which they claim as damages.

b. In the alternative, they contend that cl. 5.4 of the ASA provides that the obligations of NGI under cl. 3 continued in full force and effect notwithstanding termination or expiry of the ASA. Mr Suppipat's Companies received the full US$175m under the REC SPAs (the First Instalments) in or about June 2019. Accordingly, the ASA Ds claim US$6m as a debt under cl. 3.1.3 and/or as damages for breach of cl. 3.1.3.

(3) Is the ASA forward or backward looking?

1464. Before considering who is right on this issue, it is necessary to resolve the dispute as to whether the ASA is "forward looking" or "backward looking" in nature. During the trial the parties adopted this terminology to differentiate between the ASA being an incentive for the ASA Ds to commit to obligations *to be performed* ("forward looking") and the ASA being a reward for the ASA Ds' *past* services ("backward looking"). On the latter view, the ASA Ds did not commit to any fresh obligations by signing the ASA.

1465. On its wording, there was indeed a *limited* "backward" facing element to the ASA, namely that the ASA (entered into on 3 August 2015) stated in cl. 2.1

that the services were to be provided in the period *"commencing from 6th April, 2015 until the completion of the Transaction".*

1466. However, the ASA was mostly forward looking. On 3 August 2015 the ASA Ds agreed, by clause 2.1, to provide the Services to NGI commencing from 6th April 2015 until completion of the Transaction, being the sale of the REC shares and, in particular, the payment of the purchase price. It is clear from schedule 1 that the Services included (i) work leading up to the sale of the REC shares (and so the ASA was forward looking in that respect) and also (ii) once the REC SPAs were concluded, work to ensure that the conditions precedent, covenants and undertakings contained in the REC SPAs were met or executed (and so the ASA was forward looking in that respect also).

1467. That the ASA Ds were thereby agreeing to work with NGI to ensure the execution by the purchasers of their obligations generally under the REC SPAs, and certainly (at least) the purchasers' payment obligations, is reinforced by the fact that the definition of "Transaction", in respect of which the Services were to be provided until completion thereof, includes the "*execution by the Purchasers of their obligations thereunder including, without limitation, the payment to the sellers of the "Purchase Price" as defined payable pursuant to the [REC SPAs]*."

1468. Thus, payment of the purchase price to NGI is part of the very Transaction for which the Services were being provided.

1469. Nor do I accept the submission of Mr. Dale KC for the ASA Ds that the "*conditions precedent covenants and undertakings*" referred to in Item 12 were those of NGI under the REC SPAs. Item 12 of Schedule 1 is not so limited, and it is apparent from the REC SPAs themselves that conditions precedent, conditions and undertakings were imposed upon both the sellers and the purchasers: see for example clauses 4 and 10 of the REC SPA.

1470. Furthermore, consistent with the forward-looking nature of the ASA, the payment of US$10 million to the ASA Ds was to be a staged payment, with each payment triggered by the prior receipt by Mr Suppipat from Khun Nop's Companies of the amounts due under the REC SPAs at the relevant stages. I reject the ASA Ds suggestion that this was simply a cashflow mechanism to ensure that NS's companies received payment before the WEH Managers were paid under the ASA.

1471. A consideration of the ASA in its appropriate context also points towards its forward-looking nature. Prior to the execution of the REC SPAs:

a. Mr Suppipat was the beneficial owner of 97.94% of REC (9,727,564 shares);

b. Ms Collins held 1.06% of REC (139,930 shares);

c. Khun Thun and Ms Siddique each held 0.5% of REC (66,250 shares).

1472. Khun Thun and Ms Siddique also held c.0.14% and c.0.15% of WEH shares respectively.

1473. Under Part A of the Global Transaction, Khun Nop and Khun Nuttawut together acquired indirect legal and beneficial ownership of 100% of REC:

a. Mr Suppipat transferred his 97.04% REC shares to Khun Nop's Companies;

b. Ms Collins transferred her 1.06% REC shares to Khun Nuttawut; and

c. Khun Thun and Ms Siddique transferred their 0.5% REC shares to KPN EH.

1474. Khun Thun and Ms Siddique transferred their WEH shares to REC.

1475. As part of the Global Transaction, Ms Collins and Khun Thun also acquired a stake in REC indirectly, through ownership of 20% KPN EH shares each. No consideration was provided by them for this. I accept Mr Suppipat's evidence that it was anticipated that Ms Collins and Khun Thun would transfer the shares back to Mr Suppipat upon the exercise of the call option. As I said, the logic of this was that it provided protection for Mr Suppipat. As a result of this stake in REC, by virtue of the KPN EH SHA certain decisions, including the disposal of REC's WEH shares, could not take place without a vote in favour by either of Ms Collins or Khun Thun. That gave Ms Collins and Khun Thun the *power* to secure Mr Suppipat's interests in WEH and under the Global Transaction. The *obligation* to work with NGI to secure them (including payment under the REC SPAs) followed from the ASA. The USD $10m was the consideration for these services.

1476. As Mr Suppipat put it when describing the role of the WEH Managers, they were there "*to prevent Nop, from you know, defrauding me*." He explained "*They were there to be able to exert some level of negative control to protect my interests, plus, plus, they are supposed to return the KPN EH share to me when the call option is exercised*."

1477. Ms Collins in cross examination accepted that she and Khun Thun played the following role in the structure "*to raise financing, to give credibility to raise the financing, and ultimately for – you know, for the proposed call option, so we were there for those purposes*."

1478. I have found as a fact that both the ASA and KPN EH SHA were subsequently terminated by the WEH Managers to facilitate the asset stripping sequence; in return the WEH Managers were personally rewarded by *Khun Nop* with a 1.25% "incentive" or bribe in WEH.

1479. In addition to the protection of Mr Suppipat's interests, it had initially been considered that Ms Collins' and Khun Thun's indirect ownership of REC shares through KPN EH could also function as an incentive, in that in line with the structure agreed with Khun Nop, Mr Suppipat would make a payment to Ms Collins and Khun Thun upon the exercise of the call option, with a view to them

sharing in any increase in the value of WEH at that time. Specifically, Ms Collins and Khun Thun would each acquire 12.5% of the Call Option Consideration paid to Fullerton. This was expressly set out in the MoU of 24 August 2015 at clause 1.9:

> *"1.9 The Parties agree that WEH management will place a key role in the successful completion of the IPO and WEH Projects and should be properly incentivised in this respect. Accordingly, the Parties agree that:*
>
> > *1.9.1 upon payment of the first cash instalment of the Acquisition Price each of Emma Louise Collins and Thun Reansuwan will receive 12.5% of the price payable in respect of the Acquisition from Fullerton, including:*
> >
> > > *(i) 19.45% of any "Call Option Consideration" payments to Fullerton in excess of 50 million US dollars, pursuant to an advisory services agreement with Fullerton, a form of which is attached as* ***Annex H****; and*
> > >
> > > *(ii) 12.5% of the final "Purchase Price" payments to Fullerton, in the form of distributions from Fullerton."*

1480. Ms Collins/the WEH Managers described this as the "Third Incentive Scheme", with Ms Collins explaining in cross-examination:

> "…."
>
> *Then there was a third incentive scheme that was discussed which was related to the call option that Mr Suppipat was negotiating with Mr Narongdej … it was a call option fee payable when the call option was signed at the IPO, after the IPO, and then upside sharing on the value of the share increase that we created*

1481. However, I find as a fact that the ASA Ds ultimately did not wish their remuneration to be contingent upon such an uncertain future event. Instead, they were to be incentivised purely through the $10m fixed payment under the ASA.

1482. I therefore accept Mr Suppipat's evidence that the function of this $10m payment was to remunerate the ASA Ds for services to be provided to Mr Suppipat through NGI, including in particular ensuring that Khun Nop's Companies fulfilled their payment obligations under the REC SPAs – a structure which would work hand in hand with the KPN EH SHA to protect Mr Suppipat's interests.

1483. In response, Mr. Dale KC argued that the $10m was purely a reward for the REC shares which the ASA Ds transferred to Khun Nop's Companies pursuant to Part A of the Global Transaction (to allow Khun Nop to acquire 100% of REC). In other words, it was wholly backward-looking, and the Managers assumed no obligations under the ASA.

1484. However, that explanation of the ASA, apart from it not being what the ASA states (the payment was to be in consideration of the "*Services*" as defined), does not make commercial sense. Mr Suppipat stated in cross-examination that whilst $10m was "*in part*" backward-looking as compensation for the transfer of the REC shares, it could not be only for that not least because the shareholdings which the WEH Managers were being asked to transfer to Khun Nop were in different percentages, so "*How come the number, 10 million, is the same?*" "*And the reason is very simple. The reason is because it is not for the share alone, the share is part of it right*." I accept this evidence.

1485. Indeed, if it were purely backward looking, there would have been no sensible reason for the ASA Ds to have terminated the agreement on 3 May 2016 when they had apparently accrued a valuable right to payment under its terms by that stage. In cross-examination, Ms Collins could offer no sensible answer to this point.

1486. The ASA Ds' explanation for the (at least in part) forward looking wording of the ASA was that it was for *"tax efficiency reasons"*. Yet Ms Collins claims to have had no involvement in the ASA: *"I was not involved in the details of the proposed ASA and just left it for the others to deal with. I thought it was a simple form agreement and did not address my mind to it as I was busy working on other matters for the company."* No tax advice has been disclosed and I do not accept this evidence.

1487. Mr Lakhaney also claimed to have been disinterested in the terms of the ASA *"While this was originally drafted in such a way as to be in respect only of services already rendered, Mr Baker subsequently added some forward-looking statements, which I did not give much thought to at the time."* I do not accept this evidence.

1488. Furthermore, the contemporaneous documentary evidence shows that the ASA Ds realised at the time that they owed obligations to Mr Suppipat's Companies under the ASA, including working with him to ensure that he got paid by Khun Nop.

1489. Thus, on 24 September 2015 Mr Lakhaney texted Ms Collins and said: "*I am still expecting 10 from Nick as he will need us to make sure he gets paid.*".

1490. In response to an email dated 2 December 2015 from Mr Lakhaney to Mr Suppipat seeking to "*touch base…on the US$10 mn that we agreed to [or] us to sell our share what you are thinking",* Mr Suppipat said on 7 December 2015: *"It's actually 175M = 6M then, come IPO, you receive another 4M and in case I receive a prepayment between the 175M and the IPO then you will get a prorate…In any case - nominee or true sale or whatever* - ***this 175M USD will always have to be fulfilled***." (Emphasis in original).

1491. Last, when NGI sent the original notice of breach on 28 January 2016, the ASA Ds did not respond by disputing Mr Suppipat's interpretation and did not advance their "backward looking" case, but simply denied breach of the terms alleged and reserved their right to respond in due course.

1492. In the light of the foregoing, I also reject the ASA Ds' case that Ms Collins, Mr Lakhaney and Mr Suppipat met in Cannes in or around 7 May 2015 at which meeting it was agreed that the WEH Managers' REC shares would form part of the same sale of shares to any purchaser identified by Mr Suppipat and that the WEH Managers would receive $10m each; and that this recognized the WEH Managers' work done prior to and up to the point of sale of Mr Suppipat's stake in REC.

1493. I also reject the ASA Ds suggestion that Mr Suppipat was wrongfully seeking to make the amounts contingent on the occurrence of various events and that they felt that Mr Suppipat had them "*over a barrel*" and that they had no option but to agree to this in the concluded ASA.

1494. I accept NGI's submission that the truth of the matter is that during 2016 the ASA Ds and Mr Lakhaney realised that Khun Nop was unlikely to pay the amounts which he owed to Mr Suppipat's Companies and which would have triggered their legal right to payment from Mr Suppipat under the ASA. Accordingly they decided to terminate the KPN EH SHA and the ASA (meaning Mr Suppipat lost the protections afforded thereunder) and instead agreed to assist Khun Nop in his asset stripping scheme in exchange for the more attractive prospect of an immediate 1.25% stake in WEH. I reject Ms Collins evidence that the events were unrelated.

1495. It was during the Project Houdini meeting on 17 March 2016 that, as the WEH Managers accept, Khun Nop offered each of the WEH Managers a 1.25% stake in WEH shares. I reject the ASA Ds suggestion that this was a Fourth Incentive Scheme designed to incentivize the WEH Managers going forwards to continue working for WEH. Rather, I consider that it was a reward or bribe in exchange for the assistance of the ASA Ds and Mr Lakhaney in Khun Nop's asset stripping plan and for the ASA Ds giving up their blocking rights under the KPN EH SHA.

1496. Importantly, as Mr. Fenwick KC pointed out, if this were a legitimate employment incentive scheme, there would have been no reason for the 1.25% incentive to have been offered by *Khun Nop personally* rather than by WEH, their employer. Mr Lakhaney accepted in cross-examination:

> "***Q The truth was, on your evidence, that you had negotiated the deal on 17 March with Khun Nop, yes, your 1.25% shares?***
>
> *A. With Khun Nop, yes.*
>
> ***Q. And who else – with who else?***
>
> *A. Khun Nuttawut was there*."

(4) Breaches of the ASA

1497. The breach of ASA claim is advanced by NGI against each of Ms Collins, Khun Thun and Ms Siddique (but not Mr Lakhaney). In the light of the foregoing, I accept NGI's' case that by reason of their involvement in Khun

Nop's payment default under the REC SPAs, in particular by participating in the asset stripping scheme (which included the decision to transfer the WEH shares to a related party and onwards to themselves), the ASA Ds acted in breach of their obligations to NGI under the ASA. In particular, they:

a. Failed to work with NGI to ensure that KPN EH and Fullerton complied with their payment obligations under the REC SPAs, in breach of section 2.1 and Sch 1, clause 12;

b. Failed to notify NGI that the Kasem transfer or the transfer of WEH shares to themselves was being planned or thereafter that it had been effected with a material adverse impact on their ability to provide the Services in that those transfers had the purpose and/or effect of avoiding the satisfaction or enforcement of Khun Nop's Companies' payment obligations under the REC SPAs in breach of (i) section 2.1 and Sch 1, clause 12; and (ii) sections 2.2.1-2.2.3.

c. Failed to initiate appropriate or any investigative or remedial measures in order to prevent those transfers from taking place in breach of sections 2.2.1-2.2.3.

1498. I also accept that Ms Siddique's position, on the facts, sits somewhat apart from the other ASA Ds because she claimed never to have read the ASA and admitted she knew nothing of its contents:

"Q…*Did you not discuss the ASA with [Mr Lakhaney]?*

No, not at all.

Q. Did you read it?

A. No I didn't.

Q. Did you know what you were signing up to?

A. no, I just knew that this was part of whatever settlement they had just reached with Mr Suppipat on their recent trip.

Q. Have you ever read it?

A. No I have not.

Q. Even to this day you have not read it?

A. No I haven't.

Q. Did you understand that it imposed obligations on you?

A. No."

1499. As I mentioned, I accept that Ms Siddique was only included in the structure for the benefit of Mr Lakhaney (it appears to avoid tax). However, the claim for breach of the ASA is brought against Ms Siddique and not Mr Lakhaney.

1500. Ms Siddique confirmed she discharged none of the Services required under section 2.1 and Sch 1 of the ASA:

> "***Q. Did you know that you were meant to be doing any of those things?***
>
> *A. No, I did not*."

1501. The WEH Managers have not identified any basis on which Ms Siddique satisfied any contractual obligations under the ASA. In the circumstances, I agree that judgment for NGI against Ms Siddique for breach of the ASA must follow, as it does against Ms Collins and Khun Thun.

(a) Counterclaim

1502. The counterclaim under the ASA is brought by Ms Collins, Khun Thun and Ms Siddique (but not Mr Lakhaney).

1503. I agree with Mr Fenwick KC that the counterclaim of Ms Siddique is unsustainable in light of her evidence that:

a. She has never read the ASA;

b. She did not understand herself to have any duties under it;

c. She had never read the counterclaim; and

d. She was unaware that she had in fact brought a counterclaim.

1504. So far as the other ASA Ds are concerned, their claims also fail for each of the following reasons (and Ms Siddique's fails for the same reasons):

a. The short answer to their Counterclaim is that Mr Suppipat's Companies' letters of 28 January 2016 and 2 March 2016 did not amount to a repudiation/renouncement of the ASA or an intention not to be bound by it. On the contrary, they were premised on the ongoing existence of the obligations under the ASA on all contracting parties, as the express purpose of both letters was to remind the ASA Ds of their obligations pursuant to the ASA. No doubt for that reason, the ASA Ds' termination letter of 3 May 2016 made no reference to any breach on NGI's part and purported to serve notice of termination only pursuant to cl. 5.1 of the ASA under the *contractual termination* clause.

b. Whilst Mr Suppipat's Companies have been paid the sum of US$175m, they have not been paid the full sums due, including principal and interest (payments falling to be allocated to interest before the principal

debt). Accordingly, the trigger event for payment of US$6m under cl 3.1.2 of the ASA has not yet occurred.

c. In any event, the ASA was terminated by the ASA Ds on 3 May 2016. It is common ground that pursuant to the notice provisions of cl. 5.1, the ASA remained in force until 2 July 2016. Pursuant to cl. 5.4, *"Termination or expiry of this Agreement shall not affect any rights or obligations which may have accrued prior to termination or expiry."* As Mr Suppipat's Companies were not paid US$175m until 12 June 2019, no *right* to payment under cl. 3.1.2 had accrued by 2 July 2016.

1505. The Claimants further contended in their written closing that in any event no payment obligations arose in circumstances where the Services were not provided. However, (aside from Ms Siddique's position) this raises a number of different issues and since the Claimants did not advance the point in their oral closing and did not cite any authority I am not prepared to consider this point any further.

(b) Loss and damage

1506. At paragraph 162.6 of RAPOC, the Claimants plead:

"*Further, had Ms Collins, Mr Reansuwan and Ms Siddique carried out their obligations as required under the Advisory Services Agreement as set out at paragraph 160 above, or had NN, Mr Phowborom and/or the WEH Managers not induced those breaches of contract, or had the WEH Managers not breached their fiduciary duties as set out above:*

(a) Ms Collins, Mr Lakhaney and Mr Reansuwan would not have assisted in or enabled the transfer of the Relevant WEH Shares to Kasem, and/or would have taken steps to investigate and/or prevent that transfer, and REC would have retained the Relevant WEH Shares.

(b) The Claimants would have become aware that the transfer of the Relevant WEH Shares from REC to Kasem as set out above was in contemplation, or that steps were being taken to effect that transfer, as set out above. NS would have (i) caused NS's Companies to apply for and obtain an order in the Arbitrations preventing that transfer, (ii) informed Kasem and the New REC Directors of the nature of the proposed transfer and their potential civil and criminal liability, (iii) informed NN, the WEH Managers, Mr Phowborom and SCB that he was aware of their involvement in the proposed transfer and of their potential civil and criminal liability, and/or (iv) caused NS's Companies to inform Ms Collins, Mr Reansuwan and Ms Siddique of their potential liability under the Advisory Services Agreement. In any of those cases, REC would not have disposed of the Relevant WEH Shares as set out above."

1507. I accept these submissions. The primary obligation of all three ASA Ds was stated to be *"Working with [NGI] to ensure that all the conditions precedent, covenants and undertakings contained in the Share Purchase Agreements* [viz, the REC SPAs] *are met and executed."* They were obliged to use reasonable

skill and care to ensure this. They were also obliged to notify NGI *"of any developments which may have a material adverse impact on the [ASA Ds'] ability to provide the Services or meet any other obligations under this Agreement*".

1508. I find that had the ASA Ds performed these contractual obligations, they would not have assisted in the asset stripping sequence, stripping REC of its value and significantly diminishing Khun Nop's Companies' ability to pay under the REC SPAs and the arbitration awards. Moreover, they would have notified NGI of Khun Weerawong's proposed plan upon learning of it (at the meeting of 17 March 2016 and thereafter), and NGI would have been able to prevent the Kasem Transfer in the ways pleaded by the Claimants above.

1509. It follows that the loss thereby suffered by NGI, and to which it is entitled, is the difference between the sums recovered from Khun Nop's Companies to date and the sums which it has been determined by the arbitral tribunal were payable under the REC SPAs together with interest. The loss is accordingly no different to the loss which they have suffered in respect of their main asset stripping claim under Thai law.

(5) Breach of fiduciary duty

1510. This claim is brought by both Mr Suppipat and his company NGI against Ms Collins, Khun Thun and Mr Lakhaney. Ms Siddique is not included as defendant to this claim.

1511. The Claimants plead at paragraph 160A of their RAPOC (mirrored in paragraph 1175 of their closings) that: "*From the date of and by reason of the execution of the Advisory Services Agreement, Ms Collins, Mr Reansuwan and Mr Lakhaney (through contractual arrangements made by Ms Siddique, his nominee), were in a relationship of trust and confidence in which they undertook to act on behalf of NGI and/or NS in connection with the performance by NN's Companies of the REC SPAs*."

1512. The relationship between the WEH Managers and Mr Suppipat and NGI does not fall within one of the settled categories of fiduciary relationship, such as trustee and beneficiary, solicitor and client and agent and principal. The Claimants contend rather that the WEH Managers were *ad-hoc fiduciaries* for Mr Suppipat and/ or NGI.

1513. The classic statement of the circumstances in which a fiduciary relationship will arise is that of Millet LJ in *Bristol & West building Society v Mothew* [1998] Ch 1:

> "*a fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence*."

1514. A more recent formulation of the principle is provided by Leggatt LJ's judgement in *Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v Kent* [2018] EWHC 333 (Comm), [2018] 1 CLC 216 at [159]:

> "*fiduciary duties typically arise where one person undertakes and is entrusted with authority to manage the property or affairs of another and to make discretionary decisions on behalf of that person.*"

1515. At [163], Leggatt LJ clarified the dicta in *Mothew*:

> "*The inquiry, in other words, is an objective one involving the normative question whether the nature of the relationship is such that one party is entitled to repose trust and confidence in the other.*" (emphasis added)

1516. I accept the Claimants' submission that the WEH Managers owed fiduciary duties to both Mr Suppipat and NGI in relation to the protection of their interests under the REC SPAs, and in particular in relation to payment of the purchase price thereunder.

1517. Mr Suppipat realised that, given that the terms of the COA were not yet agreed at the time of entry into the REC SPAs, he was taking a significant risk when he parted with his REC (and WEH) shares. He was in a vulnerable position. As a result, he arranged for Ms Collins and Khun Thun to acquire 20% of the KPN EH shares for no consideration as part of the blocking mechanism to ensure that Mr Suppipat's (and NGI's) interests would be protected by them. The stake in KPN EH and the concluding of the KPN EH SHA gave Ms Collins and Khun Thun the power to prevent any onward sale of the WEH shares by REC. Mr Suppipat then procured NGI to enter into the ASA with the ASA Ds to oblige them to work with NGI to secure payment under the REC SPAs. These arrangements show that Mr Suppipat clearly trusted Ms Collins and Khun Thun to give effect to and protect his interests (including in receiving payment under the REC SPAs), and I have found that Mr Lakhaney understood that the same was expected of him. They were, as he said, his "*top lieutenants*". He was in a vulnerable position and (per Leggatt LJ in *Al Nehayan)*, he "*entrusted*" the WEH Managers "*with authority to manage the property or affairs of* [his] *and to make discretionary decisions on [his] behalf."*

1518. The position is somewhat complicated by the fact that it was Ms Siddique who was the contractual counterparty to the ASA, and Mr Lakhaney was neither a party to the ASA nor the KPN EH SHA. Nonetheless, I consider that he was in the same position as Ms Collins and Khun Thun. As I have stated above, Mr Lakhaney accepted that he was "*involved*" with the KPN EH SHA, and that Ms Collins and Khun Thun held their interest in KPN EH SHA partially on his behalf.[240] His wife, Ms Siddique, entered into the ASA on his behalf (apparently for tax reasons). He knew that, as one of the WEH Managers, Mr Suppipat was similarly entrusting him with authority to manage his property and affairs and to make discretionary decisions on his behalf. The factual background to the share stripping scheme, set out above, shows that Mr Lakhaney, Khun Thun and Ms Collins acted together in (supposedly) protecting Mr Suppipat's interests under the REC SPAs. There was no suggestion at all in the WEH Managers' Closing Submissions (paragraphs 381 to 388) that the three WEH Managers should be treated differently for the purposes of the fiduciary claim. Nor was there any suggestion by the Claimants that it was Ms Siddique who owed the

fiduciary duties instead of Mr Lakhaney. I consider these positions were rightly adopted; the contrary would have been unrealistic.

1519. Another complication is that it is true that, as the WEH Managers point out at paragraph 388 of their closing submissions, Mr Suppipat was not the counterparty to the ASA. However, I have already found that the ASA must be construed in a broader context, which is that it was a protection mechanism (alongside the KPN EH SHA) which Mr Suppipat put in place to protect his interests under the REC SPAs. Indeed, I have found that Mr Suppipat procured his company NGI to enter into the ASA. As I have said, his evidence (which I accept) was that he considered the purpose of NGI "*to hold [his] REC shares*". It is clear that, for whatever reason (tax or otherwise), Mr Suppipat chose to conduct his dealings under the REC SPAs by his Companies including NGI. The WEH Managers knew that that was so. There was no suggestion by the parties otherwise. Therefore, in my judgment the WEH Managers owed fiduciary duties to both NGI and Mr Suppipat.

1520. The WEH Managers challenge this in two ways. Firstly, at paragraph 382 of their written closing, they state that "*the relationship created by the ASA was a purely contractual one. If (as in this case), the relationship is regulated by a contract, then the terms of that contract between the parties is of primary importance and wider duties will not be lightly implied, especially in commercial contracts negotiated at arms' length between parties with comparable bargaining power*." To that end they cite *Ross River Ltd v Cambridge Football Club* Ltd [2007] 1 All ER 1004 [197] (referring to *Hospital Products Ltd v United States Surgical Corp* (1984) 55 ALR 417 at 454-455).

1521. I accept that the contractual terms of the ASA are of primary importance. However, my finding of a fiduciary relationship does not contradict the terms of the ASA. Indeed, the ASA arose out of the fiduciary relationship between Mr Suppipat/NGI and the WEH Managers.

1522. Secondly, at paragraph 384 of their written closing the WEH Managers state: "*fiduciary duties do not commonly arise in commercial settings outside the settled categories of fiduciary relationships because it is normally inappropriate to expect a commercial party to subordinate its own interest to those of another commercial party: Snell's Equity (34th ed.) [7-005]*."

1523. Although this is true, there is no bar to finding a fiduciary relationship in a commercial context, indeed the same passage in *Snell's Equity* goes on to state that "*It is clear that it is possible for fiduciary duties to arise in commercial settings*". The relationship between Mr Suppipat and NGI and the WEH Managers was always more than a purely commercial one after Mr Suppipat was forced to flee Thailand for France. He was entirely dependent upon their good faith and he trusted them to protect his interests in relation to the sale of his shares in REC.

1524. Indeed, it was Mr Suppipat's evidence (which I accept) that he trusted the WEH Managers: "*I trust them, because I hired them as top management…You*

can't run a business without trusting your top lieutenants"[931]. As he explained in his Witness Statement, "*The purpose of the KPN EH SHA and REC SHA was to empower the WEH Managers to protect my interests and to secure the call option in the transaction, because the agreements had provisions which prevented the sale of the KPN EH or REC shares without the approval of the shareholders (allowing Emma and Thun to block a sale of REC)*"[932]. As Khun Piphob put it, "*the situation is quite complex, so Mr Suppipat did his best effort to check, to check to put all the measure that he could do it, to protect himself*"[933]. Crucially, this meant that the disposal of REC's WEH shares could not take place without a vote in favour by either Ms Collins or Khun Thun. I find that the WEH Managers knew this: see for example the email from Ms Collins to Partners Group dated 7 July 2015 in which she referred to the fact that "*Nick will not have a pledge on the [REC] shares so he is relying on the parties although given that this includes management he is satisfied*." Despite this, the WEH Managers participated in the share stripping scheme, which as the 7 April 2016 Whiteboard demonstrates, included their removing and resiling from the protections which Mr Suppipat had put in place to ensure that he got paid under the REC SPAs.

1525. I therefore find that Ms Collins, Khun Thun and Mr Lakhaney were in a fiduciary relationship with Mr Suppipat and NGI.

1526. I also accept the Claimants' submissions at paragraph 1187 of their written closing (pleaded at paragraph 160A RAPOC) that, as a result of the fiduciary relationship, the WEH Managers owed Mr Suppipat and NGI the following duties:

a. To act in good faith in a way that would be most likely to promote the best interests of NGI and Mr Suppipat;

b. To avoid a situation in which they had or could have a direct or indirect interest that conflicted or might conflict with the interests of NGI and Mr Suppipat; and

c. Not to profit from the use of their fiduciary position or from any opportunity or knowledge resulting from it.

1527. The WEH Managers do not contest in their closing submissions (paras 381-388) that these were the relevant fiduciary duties owed by the WEH Managers, should a fiduciary relationship be found to have existed.

1528. I find that the WEH Managers were in breach of these duties. In summary, I have found as a fact that the WEH Managers each accepted their 1.25% "incentive" personally from Khun Nop, being the very person from whom Mr

[931] T11/20:7-14

[932] Suppipat WS [38]-[39]. See also Day 11/164:4-167:18

[933] Day 14/139:6-24

Suppipat required protection, in exchange for assisting with Khun Nop's plan to strip REC of its WEH shares. They provided that assistance by conspiring to terminate the KPN EH SHA and ASA and participating in the asset stripping scheme which enabled Khun Nop to avoid his payment obligations under the REC SPAs. The WEH Managers did the very thing which Mr Suppipat/NGI trusted them not to do.

1529. I therefore find that the 1.25% shareholding "incentive" was an unauthorised profit from their fiduciary position; by accepting these shares from Khun Nop, the WEH Managers brought about a situation in which they had a direct interest that conflicted with the interests of NGI and Mr Suppipat; and the WEH Managers failed to act in good faith in a way that would be most likely to promote the best interests of NGI and Mr Suppipat; indeed, they were not acting in Mr Suppipat's and NGI's best interests at all.

1530. It is notable that the WEH Managers do not contest the issue of breach of fiduciary duty, nor the issue of remedies (to which I turn next). By their closing submissions they only advanced a case that there was no fiduciary relationship at all, which I have rejected.

Remedies

1531. At paragraph 160C of their RAPOC the claimants plead:

> "*In the premises the WEH Managers hold all benefits they have received in breach of fiduciary duty, including any interest in the Relevant WEH Shares transferred to the WEH Managers and their Companies, on trust for NGI and/or NS*.

1532. Further, in paragraph 2 of their prayer for relief at page 161 of their RAPOC, the Claimants claim:

> "*Declarations that the WEH Managers and their Companies hold all benefits they have received in breach of fiduciary duty and/or as secret commissions, including any interest in the Relevant WEH Shares transferred to the WEH Managers and their Companies, on trust for NGI and/or NS, and orders for those benefits to be transferred to NGI or NS, and all necessary and consequential relief*."

1533. In support of this proposition in their written closing the Claimants cite at footnote 2482 *FHR European Ventures LLP Cedar Capital Partners LLC* [2014] UKSC 45 [2015] AC 250. There is no further discussion of *FHR* by the Claimants; but nor did the ASA Ds address the issue of remedies in respect of the breach of fiduciary duty claim.

1534. In *FHR European*, FHR bought a long lease for €211.5 million. Cedar Capital conducted the negotiations on FHR's behalf but also received a €10 million commission from the vendor. On becoming aware of this commission, FHR sought to recover it from Cedar Capital. As its negotiating agent, Cedar Capital owed fiduciary duties to FHR and had not obtained FHR's fully informed consent to the commission. Cedar Capital therefore had to account to

FHR for the commission. However applying the Court of Appeal's decision in *Sinclair Investments (UK) Limited v Versailles Trade Finance Limited* [2011] EWCA Civ 347, Simon J held that the remedy was purely personal; FHR could not assert a proprietary constructive trust over the €10 million: [2011] EWHC 2999. The Court of Appeal allowed an appeal as to remedy distinguishing the facts from those in *Sinclair v Versailles* but also casting some doubt on the correctness of that decision: [2013] EWCA Civ 17.

1535. On appeal to the Supreme Court, the Court was required to determine whether to follow *Lister & Co v Stubbs* (1890) 45 ChD 1 or *Attorney-General for Hong Kong v Read* [1994] 1 AC 324. The Supreme Court held that *Lister v Stubbs* was wrongly decided and overruled *Sinclair v Versailles* holding that "*where an agent acquires a benefit which came to his notice as a result of his fiduciary position or pursuant to an opportunity which results from his fiduciary position the equitable rule is that he is to be treated as having acquired the benefit on behalf of his principal so that it is beneficially owned by the principal*": [2014] UKSC 45 at [7]. It followed that the Court of Appeal had correctly held that FHR was entitled to a proprietary constructive trust over the €10m.

1536. Although there is some lingering uncertainty as to whether a proprietary remedy may be afforded for all breach of fiduciary duty claims following *FHR*, I consider that there is a sufficiently close analogy between the facts of the present case and *FHR* – namely that the subject matter of the proprietary remedy sought is a secret commission – such that the same approach should apply in the present case.

1537. I therefore find that, upon receipt, each of the WEH Managers held their 1.25% stake in WEH on trust for Mr Suppipat and NGI and continue so to hold it (or any part thereof) in so far as they have not divested themselves of it (or any part thereof).

1538. Subsequently under the SPV SPAs, the WEH Managers transferred half of their respective shareholdings to their offshore companies Colome, Keleston and ALKBS where, as far as the court is aware, the shares remain (the WEH Managers did not suggest otherwise). No consideration was paid by Colome, Keleston or ALKBS for the shares and none of them was a bona fide purchaser for value. In cross-examination Ms Collins accepted that the sales to the WEH Managers' companies were not genuine sales[934]. Mr Suppipat and NGI are accordingly entitled to trace their beneficial interest in each of the 1.25% stakes from the WEH Managers into their companies and claim a proprietary remedy over it: *Foskett v McKeown* [2002] UKHL 29.

(6) Tort of bribery

1539. Mr Suppipat and NGI, as principals in the fiduciary relationship, also contend that the WEH Managers committed the tort of bribery when they

[934] Cited at [1196] of the Claimants' written closing.

received the 1.25% stake in WEH from Khun Nop (paragraph 160CA, RAPOC).

1540. It is right to say that, as the WEH Managers point out at paragraph 391 of their written closing, this allegation was not put to Ms Collins and Khun Thun in precisely those terms (that is, by the use of the word "bribe").

1541. It *was* put to Mr Lakhaney in these terms (Day 26, p 31): "*I suggest that you asked for and accepted these shares as a bribe for terminating the arrangements which required you to support Mr Suppipat and enabled you to block the activities of Mr Nop, of Khun Nop, in relation to WEH and REC?*".

1542. However, I consider that Ms Collins and Khun Thun were under no illusion as to what was being alleged against them in this respect, viz that Khun Nop gave them a secret inducement (the 1.25% shareholding each) which put them in a position in which their duties to Mr Suppipat and their interests conflicted - and they had the opportunity fairly to respond to it: see Ms Collins' cross examination (Day 21, pp 113-114) and Khun Thun's cross-examination (Day 24, p 98).

1543. In the case of Ms Collins it was put to her that:

> "*you decided that you would terminate your agreement which protected Mr Suppipat, the shareholders' agreement, and your obligations to Mr Suppipat under the advisory services agreement and instead enter into an agreement with Mr Narongdej in exchange for 1.25% of WEH shares. That's a fact, isn't it ?*…
>
> ***Q. That was part of the overall structure or agreement under which you agreed to accept 1.25% of WEH shares as an incentive, was it not?***
>
> *A. No*.
>
> …
>
> ***Q. So why on earth would you terminate an agreement and give up your right to $10 million for no good reason?***
>
> *A. Again, I've explained why. You know, it was −− we were −− threatening emails and it was conflicting and we terminated the agreement.*
>
> ***Q. I suggest that is untrue and that the reason you terminated it was because you understood that it contained continuing obligations which you had effectively ignored by terminating the shareholders' agreement and permitting the sale of the WEH shares.***
>
> *A. I disagree*."

1544. In the case of Khun Thun it was put to him directly that:

> ***Q. "it was agreed [the 1.25% share payment] in March or April of 2016 in order to persuade you to allow the ring−fencing to take place?"***

A. No."

1545. I have rejected as false the WEH Managers' explanation of the payment of the benefit (the 1.25% shareholding) as a legitimate employment incentive.

1546. The classic requirements of the tort of bribery were stated by Slade J in *Industries and General Mortgage Co Ltd v Lewis* [1949] All ER 573 at p. 575:

> *"(i) the person making the payment makes it to the agent of another person with whom he is dealing; (ii)…he makes it to that person knowing that that person is acting as the agent of the other person with whom he is dealing; and (iii)… he fails to disclose to the other person with whom he is dealing that he has made that payment to the person whom he knows to be the other person's agent."*

1547. The WEH Managers also accepted[935] that the principles to be applied were:

a. A bribe consists in a commission or other inducement which is given by the third party to an agent (or fiduciary) as such[936], and which is secret from the principal: *Anangel Atlas Compania Naviera SA v Ishikawajima-Harima Heavy Industries Co (No 1)* [1990] 1 Lloyd's Rep 167, 171 (Leggatt J).

b. The test for whether a payment or other benefit or a promise of the same amounts to a bribe depends upon whether it puts the agent in a position in which their duties to the principal and their interests might conflict: *Fiona Trust v Privalo*v [2010] EWHC 3199 (Comm), [73] (Andrew Smith J).

c. The question is: "*whether the person receiving the benefit or the promise of a benefit was acting in a capacity which involved the repose of trust and confidence in relation to the specific duties performed rather than on some general basis and whether the payment to him in that capacity was such that a real position of potential conflict between his interest and his duty arose*": *Prince EZE v Conway* [2019] EWCA Civ 88, [43] (Asplin LJ)

1548. At paragraphs 44-45 of *Wood v Commercial First Business Limited* [2021] EWCA Civ 471 (not cited by the Claimants), David Richards LJ explained that:

> "*44. The vice involved in the payment of a bribe, for the purpose of civil remedies, is that it may induce the payee to depart, consciously or otherwise, from the duty he owes to another person".*
>
> *45. The circumstances in which such a duty may be owed will vary greatly. Some may involve persons who clearly owe fiduciary duties in any event,*

[935] [394] of their written closing submissions

[936] A relationship of agency is probably not necessary: see *Wood* (*infra*)

> *such as trustees, directors or employees. At perhaps the other extreme, a person may be retained for the purpose of giving a single piece of advice. In any of these cases, and in the many other cases that will arise somewhere between them, the person owing the duty is at risk of being suborned by a payment or offer from a third party as an inducement to favour the payer or others ."*

1549. I find that the 1.25% share transfers were bribes or secret commissions and that the WEH Managers knew that to be so.

1550. The WEH Managers' defence to the bribery allegation is summarised at paragraph 395 of their closing submissions. Their main contention is that the 1.25% did not amount to a payment, promise or inducement to, or other benefit or advantage conferred on the WEH Managers *qua* agents or fiduciaries of NGI but rather *qua* employees of WEH. In other words, they rely on the argument I have already rejected above that the 1.25% was a legitimate employment incentive designed to persuade the WEH Managers to continue working for WEH and develop its business. I find that it plainly was not. On the contrary, it was given *personally* by Khun Nop to induce the Managers to assist in the asset-stripping scheme (including by their terminating the ASA and KPN EH SHA).

1551. The other requirements of the tort of bribery (save for the remedy, which I address below) are also met. These payments were not disclosed to Mr Suppipat and NGI at the time; receiving the 1.25% shareholding clearly created a conflict between the duties owed by the WEH Managers' to Mr Suppipat and NGI and their own interests; and the receipt of the 1.25% shareholding was intended to and did influence the performance of their services in favour of Khun Nop, such that in exchange they terminated the very agreement which formed the setting for the fiduciary relationship with Mr Suppipat and NGI, namely the ASA (as well as the KPN EH SHA).

1552. Indeed, I accept the Claimants' submission (at paragraph 1194(b) of their closings) that the fact that the WEH Managers subsequently sought to recharacterise the nature of the 1.25% bribe by manufacturing the WEH Managers SPA and falsely recording that the WEH Managers purchased the 1.25% from Dr Kasem, is "*very compelling evidence that the shares were transferred on a corrupt basis and as bribes*".

Remedies

The Claimants' case

1553. In their pleaded case and their closing submissions the Claimants provided the court with scant analysis (including as to any authority) as to the appropriate remedy in this case for the tort of bribery.

1554. So far as their pleaded case is concerned, the Claimants state as follows (at paragraph 160CA of the RAPOC):

"*160CA.1 The WEH Managers are liable to account in equity, or to give restitution, to NGI for the value of the WEH shares received as secret commissions.*

160CA.2 The WEH Managers held the WEH shares so received on constructive trust for NGI, and transferred them to the WEH Managers' Companies in breach of trust […] *Accordingly, NGI is entitled to claim those WEH shares or their traceable proceeds.*"

1555. In paragraphs 1195-1196 of their written closing, the Claimants assert as follows:

1195. In the premises, the WEH Managers are liable to account to NGI in equity or give restitution for the value of the shares received as a secret commission. To the extent that the shares are now held by the WEH Managers' Companies, those companies are fixed with their beneficial owners' knowledge and were on notice of the circumstances giving rise to NGI's claim.

1196. The transfers were, further, not for value.[937] *The WEH Managers' Companies are therefore likewise liable to account to NGI for the shares in knowing receipt – as to this, by Ms Collins' own admission, the sales to the WEH Managers' companies were not real ones…"*

The Law

1556. In cases where, as here, a fiduciary relationship exists, the position is as set out by David Richards LJ stated in *Wood* at 48-49:

"*48. To ask in cases of this kind whether there is a fiduciary relationship as a pre-condition for civil liability in respect of bribery or secret commissions is, in my judgment, an unnecessarily elaborate, and perhaps inaccurate, question. The question, I consider, is the altogether simpler one of whether the payee was under a duty to provide information, advice or recommendation on an impartial or disinterested basis. If the payee was under such a duty, the payment of bribes or secret commissions exposes the payer and the payee to the applicable civil remedies. No further enquiry as to the legal nature of their relationship is required.*

49. This is not to say that, in the many cases in which a fiduciary relationship clearly exists, the remedies available cannot be analysed in terms of the consequences of a breach of fiduciary duty. If a fiduciary relationship exists, it is a breach of that duty for the fiduciary to accept a secret commission or the offer of a secret commission, and in such a case the payer or offeror will be procuring or assisting a breach of fiduciary

[937] No money at all was paid in respect of these transfers: WS1/EC §268 {E1.3/1/62}; Day 22/45:1-3 {I/22/13} (Ms Collins).

duty. Both will be liable to a range of remedies: accounts of profits, compensation for loss and rescission of transactions.

1557. It is the breach of fiduciary duty rather than the tort of bribery *per se* which is capable of generating a constructive trust in a case such as this.

1558. The tort of bribery generates two types of remedy: a claim for the value of the bribe and (if the loss exceeds the value of the bribe) a claim for compensation for the consequential loss suffered by the principal as a result of the bribe.

1559. The former claim is said to be the result of a 'presumption' that the principal suffered (in the underlying transaction) at least a loss of the value of the bribe in the contract price: *Hovenden & Sons v Millhof* [1900-03] All ER Rep 848 at 850, although it is curious that the rationalisation of the presumption (as being loss suffered under the transaction) becomes problematic if (i) there is no ultimate transaction between principal and briber, and/or (ii) if there is no actual payment to the bribee (as there need not be: a promise is sufficient).

1560. A claimant must elect between these remedies at the point when judgment is to be entered in his favour. The classic statement of principle (not cited by the parties) was stated by Lord Diplock in *Mahesan v Malaysia Government Officers' Cooperative Housing Society* [1979] AC 374, 383:

> "*the right of a plaintiff who has alternative remedies against the briber (1) to recover from him the amount of the bribe as money had and received, or (2) to recover, as damages for tort, the actual loss which he has sustained as a result of entering into the transaction in respect of which the bribe was given*;"

1561. If, however, the bribe is a shareholding in a company, but the value of those shares has not been proved (so a claim to the value of the shares cannot be sustained), the court may instead declare that the shares are held by the bribee on constructive trust for the principal and, in so far as the bribee has transferred the shares to the bribee's company (which is a knowing participant in the bribe) allow the principal to trace his beneficial interest in the shares from the bribee into the bribee's company (in so far as they have been so transferred) and claim a proprietary remedy over them: *Foskett v McKeown* [2002] UKHL 29.

1562. Mr Suppipat and NGI did not seek compensation for loss suffered as a result of the bribe. So far as restitution of the value of the bribe is concerned (which would appear to be the natural remedy in this case), in the Claimants' prayer for relief at page 161 of their RAPOC, there is no mention at all of restitution. Nor did they provide the court with any real analysis of this claim. It follows that there was no argument and no factual or expert evidence concerning the appropriate date of assessment of the value of the WEH shares for the purposes of the bribery claim. One might expect that to be the date when the bribe was received by the WEH Managers, but it is unclear when exactly that was (and there were no submissions made about it).

1563. The valuation experts focused on valuing the Relevant WEH Shares, namely a 59.46% stake in WEH, at different periods in time. However, the question of the value of a 1.25% stake in WEH (at the time the bribes were received, whenever that was) was not investigated, and it is unsafe for the court to attempt to extrapolate from the expert valuations of a 59.46% stake, not least because the Relevant WEH Shares represented a majority stake in WEH (whereas 1.25% does not). Accordingly the court has no means of ascertaining the value of the 1.25% shareholdings, received as secret commissions.

1564. However, applying *Wood* and *Foskett*, I consider that Mr Suppipat and NGI are entitled to the relief sought in paragraph 160CA.2 of their RAPOC as follows:

> *The WEH Managers held the WEH shares so received on constructive trust for NGI, and transferred them to the WEH Managers' Companies in breach of trust* […] *Accordingly, NGI is entitled to claim those WEH shares from the WEH Managers or their traceable proceeds from Colome, Keleson and ALKBS.*

1565. In other words, the relief in respect of this tort is the same, being based upon a breach of fiduciary duty, as is set out above in respect of the WEH Managers' breach of fiduciary duty. Upon receipt, each of the WEH Managers held their 1.25% stake in WEH on trust for Mr Suppipat and NGI and continue so to hold it (or any part thereof) in so far as they have not divested themselves of it (or any part thereof). Mr Suppipat and NGI are entitled to trace their beneficial interest in each of the 1.25% stakes from the WEH Managers into their companies (in so far as it has been so transferred) and claim a proprietary remedy over the stake: *Foskett v McKeown* [2002] UKHL 29.

(7) Unlawful means conspiracy

1566. The claimants have also pleaded that Ms Collins and Khun Thun are liable for an unlawful means conspiracy "*to harm the Claimants by failing to perform, or improperly performing, their obligations to NGI in exchange for the WEH shares transferred to them as a bribe.*" Curiously, Mr Lakhaney is not included in this claim and the reason why he is not included is not apparent.

1567. As I stated in *ED&F Man Capital Markets v Come Harvest* [2022] EWHC 229 at [465]-[467]:

> *A succinct statement of the essential elements of unlawful means conspiracy was provided by Nourse LJ in Kuwait Oil Tanker v Al Bader & ors.*[68]
>
> > *"A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as the result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so."*

I adopt Cockerill J's summary of the key elements of the cause of action in FM Capital Partners Ltd v Marino, [2018] EWHC 1768 (Comm) at [94] (which was in turn adopted by Butcher J in Iranian Offshore Engineering and Construction Co v Dean Investment Holdings SA [2019] EWHC 472 (Comm)):

"The elements of the cause of action are as follows:

i) A combination, arrangement or understanding between two or more people. It is not necessary for the conspirators all to join the conspiracy at the same time, but the parties to it must be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert at the time of the acts complained of: Kuwait Oil Tanker at [111].

ii) An intention to injure another individual or separate legal entity, albeit with no need for that to be the sole or predominant intention: Kuwait Oil Tanker at [108]. Moreover:

a) The necessary intent can be inferred, and often will need to be inferred, from the primary facts – see Kuwait Oil Tanker at [120-121], citing Bourgoin SA v Minister of Agriculture [1986] 1 QB: "[i]f an act is done deliberately and with knowledge of the consequences, I do not think that the actor can say that he did not 'intend' the consequences or that the act was not 'aimed' at the person who, it is known, will suffer them".

b) Where conspirators intentionally injure the claimant and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests: Lonrho Plc v Fayed [1992] 1 AC 448, 465-466, [1991] B.C.C. 641; see also OBG v Allan [2008] 1 AC 1 at [164-165].

c) Foresight that his unlawful conduct may or will probably damage the claimant cannot be equated with intention: OBG at [166]. iii) In some cases, there may be no specific intent but intention to injure results from the inevitability of loss: see Lord Nicholls at [167] in OBG v Allan, referring to cases where:

"The defendant's gain and the claimant's loss are, to the defendant's knowledge, inseparably linked. The defendant cannot obtain the one without bringing about the other. If the defendant goes ahead in such a case in order to obtain the gain he seeks, his state of mind will satisfy the mental ingredient of the unlawful interference tort."

[...]

v) Use of unlawful means as part of the concerted action. There is no requirement that the unlawful means themselves are independently actionable: Revenue and Customs Commissioners v Total Network [2008] 1 AC 1174 at [104].

vi) Loss being caused to the target of the conspiracy."

1568. It follows that the components of this cause of action are in summary as follows:

a. A combination or agreement between a given defendant and one or more others;

b. An intention to injure the claimant;

c. Unlawful acts carried out pursuant to the combination or agreement as a means of injuring the claimant;

d. Which cause loss to the claimant.

1569. As to requirement (a), I find that there was a combination between the WEH Managers, Khun Nop, Khun Nuttawut and Khun Weerawong to devise and implement the asset-stripping sequence. They acted in concert. This is particularly evident from the Project Houdini presentation and the 7 April White Board as described above.

1570. As to requirement (b), I have concluded above that the dominant intention of the conspirators was to injure Mr Suppipat's Companies by depriving them of payment under the REC SPAs, including via any subsequent arbitral award (although it is not necessary to show that the conspirators' intention to injure was their sole or predominant intention).

1571. As to requirement (c), pursuant to the combination Ms Collins and Khun Thun each received the 1.25% bribe from Khun Nop, terminated the KPN EH SHA and committed breaches of the ASA and their fiduciary duties owed to Mr Suppipat and his companies. Breach of contract and fiduciary duty constitute unlawful means: *Zenith Logistics Services (UK) Ltd v Keates* [2022] EWHC 1496 (Comm) at [175]. Where, as here, conspirators intentionally injure the claimant and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests, or indeed those of another (such as WEH).

1572. As to requirement (d), this combination caused loss to Mr Suppipat's Companies. It stripped the value from Khun Nop's Companies' REC shares such that Mr Suppipat's Companies became unable to successfully enforce their claims against them.

1573. Ms Collins and Khun Thun are accordingly liable, for the tort of unlawful means conspiracy, to Symphony, NGI and DLV for the outstanding sums which are owed under the relevant arbitral awards by Khun Nop's companies (by reason of the dissipation of the WEH shares).

SUMMARY OF FINDINGS

1574. In all the circumstances, I find in summary as follows:

Misrepresentation Claims

1575. **Findings of fact**.

a. The Global Transaction Representations were expressly made by Khun Nop and Khun Nuttawut on three occasions – the Skype Call on or around 17 May 2015, the First Paris Meeting on 29 June 2015 and the Bangkok Meeting on 16 July 2015 – and there was a dishonest failure to correct these representations subsequently;

b. The Watabak Representations were not made by Ms Collins on the phone call with Mr Suppipat on 24 August 2015 (still less were they made on behalf of Khun Nop);

c. The Payment Representations were not made at the Second Paris Meeting on 26 September 2015 or during the telephone call on 6 November 2015.

Thus the only claim that could have succeeded – had it not been time-barred - was the Global Transaction Misrepresentation claim.

1576. **Claims under Thai law**.

Thai law applies to the Global Transaction Representations claim (and the other Misrepresentation Claims). It is common ground that criminal offences are 'unlawful acts' for the purposes of a s. 420 TCCC civil claim. The Claimants have relied on two such offences to base their claim: section 341 (dishonestly asserting a falsehood to obtain property from the person deceived) and section 357 (receipt of property obtained through the commission of fraud) of the Thai Penal Code.

1577. **Limitation**. It is common ground that s. 341 TPC is a compoundable offence and s. 357 is a non-compoundable offence. Therefore, my conclusions on the limitation issue are that:

a. First, the s. 420 TCCC claim based on s. 341 TPC is time-barred because that is a compoundable offence and no complaint was lodged within the required three month period.

b. Second, the s. 420 TCCC claim based on s. 357 TPC is not time-barred because that is a non-compoundable offence (with a 10 year limitation period).

c. Third, the s. 420 TCCC claim based on s. 421 TCCC claim is time-barred by reason of s. 448(1) TCCC. That claim is not being brought on account of a criminal offence, and so the extended period afforded by s. 448(2) does not apply.

1578. **s. 420 TCCC based on s. 341 TPC**. Had this claim not been time barred as a matter of Thai law, it would have succeeded on the merits.

1579. **s. 420 TCCC based on s. 357 TPC**. Although this claim is not time-barred, it fails on the merits.

1580. **s. 420 TCCC based on s. 421 TCCC**. This claim fails on the merits and is time-barred in any event.

1581. **Abuse of process**. There is no abuse of process (or issue estoppel) in bringing the Misrepresentation Claims.

1582. **Conclusion on Misrepresentation Claims**. For those reasons, I find that none of the Misrepresentation Claims succeeds.

Asset-Stripping claims

1583. The Claimants rely on s. 420 and s. 432 TCCC to bring claims concerning the dissipation of the Relevant WEH Shares following the REC SPAs.

1584. **s. 420 TCCC**. On the s. 420 claim, the Claimants ultimately contended that the asset stripping sequence was carried out unlawfully in eleven respects, some of which apply to all defendants and some which only apply to specific defendants.

1585. Only the s. 420 TCCC claim based upon s. 350 TPC succeeds against Khun Nop, Khun Nuttawut, Khun Weerawong and the WEH Managers. The successful claim is, however, that of Symphony, NGI and DLV, not Mr Suppipat. This claim is not time-barred.

1586. **s. 432 TCCC**. I also find that the following defendants are liable to the same claimants as joint wrongdoers/ assisters/ instigators under s. 432 TCCC: **(**1**)** Khun Nop, Khun Nuttawut, Khun Weerawong and the WEH Managers (whom I have already found committed the s. 350 principal offence), **(**2**)** Madam Boonyachinda, **(**3**)** Golden Music and Cornwallis, **(**4**)** the WEH Managers' Companies Colome, Keleston and ALKBS, **(**5**)** Dr Kasem and **(**6**)** Khun Pradej.

1587. All of the asset-stripping claims fail against the following defendants: **(**1**)** Ms Siddique, **(**2**)** SCB and **(**3**)** Khun Arthid.

1588. **Damages for s. 420 TCCC (based on s. 350 TPC) and s. 432 TCCC**.

a. The relevant counterfactual is that but for the wrong committed under s. 420 TCCC/ s. 350 TPC, Fullerton and KPN EH would have had sufficient value in their REC shares to pay under any arbitral awards as at the dates on which they were made.

b. In relation to the Fullerton First Instalment Award Symphony is entitled to recover:

i. First Instalment under Fullerton SPA = US$85.75m; plus

ii. Interest on $85.75m calculated at the 15% simple interest rate from 23 October 2015 to 22 September 2017 = US$ 24,667,808;

iii. Making a total of US$110,417,808m; plus

iv. Interest on US$110,417,808m calculated at the US Prime Rate from 22 September 2017 to 12 June 2019 (parties to calculate)

Less:

v. Credit for sums paid on 12 June 2019 = US$85.75m;

Leaving:

vi. A sum on which interest is payable calculated at the US Prime Rate from 12 June 2019 to the date of this judgment (parties to calculate).

c. In relation to the KPN EH First Instalment Award, NGI and DLV are entitled to recover:

i. Interest on First Instalment under KPN EH SPA calculated at the 15% simple interest rate from 25 September 2015 to 22 September 2017 = $1,532,921; plus

ii. Interest at the US Prime Rate on $1,532,921 from 22 September 2017 to the date of this judgment (parties to calculate).

d. In relation to the Remaining Amount Awards, Symphony, NGI and DLV are entitled to recover:

i. Remaining Amounts under the REC SPAs = US$525m; plus

ii. Interest on $525m calculated at the 15% simple interest rate from the relevant milestone dates to 17 March 2023 = US$279,030,649;

plus

iii. Interest on the relevant sum calculated at the US Prime Rate from 17 March 2023 to the date of this judgment (parties to calculate).

1589. Since the damages award effectively assumes that the First Partial Awards and the Remaining Amount Awards were paid at the date they were handed down, the claimants must not be allowed to then separately claim these sums under the BVI Enforcement Judgment and any subsequent proceedings to enforce the Remaining Amount Awards. They have to give credit for the sums

received under this judgment. This may best be dealt with by way of an undertaking from the Claimants which is incorporated into the Order which this court makes as a result of this judgment. I leave it to the parties to formulate the terms of that undertaking.

1590. **s. 423 Insolvency Act**. I find that:

a. There is an insufficient connection between the claim and this jurisdiction. I would have declined to exercise the discretion to apply s. 423 in any event.

b. The argument that it would be impossible for the Claimants to get a fair trial in Thailand is unsustainable.

1591. **The ASA-related claims**. The ASA and non-contractual obligations "*arising out of or in connection with it*" are governed by English law. To summarise, I find that:

a. NGI's claim against Ms Collins, Khun Thun and Ms Siddique for breach of the ASA succeeds.

b. The counterclaim of Ms Collins, Khun Thun and Ms Siddique for non-payment of the $10m fee under the ASA fails.

c. The loss suffered by NGI for breach of the ASA is the same as the loss claimed in the main asset stripping claim.

d. Ms Collins, Khun Thun and Mr Lakhaney are in breach of the fiduciary duties which they owed to Mr Suppipat and NGI by assisting in the asset stripping scheme and for accepting the 1.25% bribe from Khun Nop. As a result, each of them held their 1.25% stake in WEH on trust for Mr Suppipat and NGI and continue so to hold it (or any part thereof) in so far as they have not divested themselves of it (or any part thereof). Mr Suppipat and NGI are also entitled to trace their beneficial interest in the 1.25% stake from the WEH Managers into Colome, Keleston and ALKBS (in so far as it has been so transferred) and claim a proprietary remedy over it.

e. Ms Collins and Khun Thun committed the tort of unlawful means conspiracy in respect of the asset stripping scheme and (once again) are liable to Symphony, NGI and DLV for the sums under the relevant arbitral awards against Khun Nop's companies which remain outstanding.

POSTSCRIPT

1592. Finally, I would like to thank all counsel (and their instructing solicitors) for their assistance on what was a very demanding case. This was a case which generated:

a. 780 pages of written opening submissions;

b. 250 pages of further written submissions during the course of the trial; and

c. A total of nearly 2,000 pages of written closing submissions from the Claimants and the various defendants.

1593. Despite the heavy burden that this case placed upon the court and the lawyers, and despite the gravity of the matters with which it is concerned, it was conducted skillfully and in good humour throughout and completed on time after a 20 week trial, which is a credit to all involved.