iTronic Holdings Pte Ltd
v
Tan Swee Leon and another suit

[2016] SGHC 77

High Court — Suits Nos 149 of 2013 and 982 of 2012
George Wei J
26–30 October; 2–5 November; 4 December 2015; 21 April 2016

Damages *— Liquidated damages or penalty — Convertible loan agreements provided for compensation sums to be paid upon failure to list — Whether penalty rule applied — Whether compensation sums extravagant or exorbitant*

Debt and Recovery *— Sham transactions — Parties entered into convertible loan agreements — Defendant claimed loans secretly repaid in cash — Whether convertible loan agreements were sham transactions*

Facts

The parties entered into convertible loan agreements ("the Convertible Loan Agreements") under which the plaintiffs agreed to extend loans to the defendant to assist the latter's bid to list his company ("the Company"). In return, the plaintiffs were granted the option of converting the value of the loan to shares in the Company after it was successfully listed. In the event that the listing did not take place by the stipulated date, the defendant was to repay the principal loans together with certain compensation sums. The listing did not take place and the plaintiffs commenced proceedings to seek repayment of the loans and the compensation sums. The defence was that the loans were secretly repaid in cash after they were disbursed and that these loans were part of an elaborate sham that was meant to make the Company more attractive for listing.

Held, allowing the claims:

(1) It was for the party asserting that he had repaid a loan to prove that he had indeed discharged his indebtedness. Beyond proving the fact of payments, the defendant also bore the burden of establishing the purpose of the payments: at [65] and [68].

(2) The Convertible Loan Agreements were genuine (as opposed to sham). The defendant's claim that the sham was intended to reward the plaintiffs for their assistance in the listing exercise was against the weight of the evidence. The evidence showed that the plaintiffs did not provide any assistance in relation to the listing exercise. Further, the preponderance of documentary evidence and the defendant's own concessions pointed towards genuine Convertible Loan Agreements: at [78], [112] and [122].

(3) The defendant did not discharge his burden of proving repayments that discharged his obligations under the Convertible Loan Agreements. First, while there might have been some payments (both in cash and cheque) made by the defendant to Eric, the evidence showed that they had nothing to do with the return of the loan monies. Secondly, the defendant's allegation of a set-off of

$100,000 was illogical and, therefore, rejected. Thirdly, the defendant did not manage to prove the authenticity of the payment voucher which recorded that the loans had been fully repaid: at [148] and [149].

(4) The penalty rule regulated remedies available for breach of a party's primary obligations (*ie*, secondary obligations), not the primary obligations themselves. Primary obligations were the legal obligations imposed on each party to procure whatever he has promised to do. A breach of the primary obligation led to a secondary obligation to pay monetary compensation for the loss sustained by the other party in consequence of the breach: at [164] and [167].

(5) The penalty rule did not apply. Since the Convertible Loan Agreements did not impose an obligation on the defendant (expressly or impliedly) to procure the Company's listing, the failure to list by the stipulated date was not an event of breach and the obligation to pay the compensation sums could not be a remedy for a breach of a primary obligation. Instead, the obligation to pay compensation sums was a conditional primary obligation which crystallised upon the occurrence of an event, that is, the failure of the Company to list by the stipulated date: at [172] and [173].

[Observation: Even if the penalty rule applied, the compensation sums were not so extravagant or exorbitant that they should be struck down as penalties. The compensation sums amounted to ten per cent of the corresponding loan amounts and there was no indication that such an "interest rate" was wildly out of proportion to those imposed on comparable loans. Further, the defendant's assertion that he was in a weaker bargaining power was unsubstantiated and the Convertible Loan Agreements were thoroughly negotiated with the advice of solicitors: at [174] and [178].]

Case(s) referred to

Alfred McAlpine Construction Ltd v Panatown Ltd [2001] 1 AC 518 (refd)

Britestone Pte Ltd v Smith & Associates Far East, Ltd [2007] 4 SLR(R) 855; [2007] 4 SLR 855 (folld)

Cavendish Square Holding BV v Makdessi [2016] BLR 1 (refd)

Chia Kok Leong v Prosperland Pte Ltd [2005] 2 SLR(R) 484; [2005] 2 SLR 484 (refd)

Chng Bee Kheng v Chng Eng Chye [2013] 2 SLR 715 (refd)

Chua Kok Tee David v DBS Bank Ltd [2015] 5 SLR 231 (refd)

Cooperatieve Centrale Raiffeisen-Boerenleenbank BA, Singapore Branch v Motorola Electronics Pte Ltd [2011] 2 SLR 63 (refd)

Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd [1915] AC 79 (refd)

Emjay Enterprises Pte Ltd v Skylift Consolidator (Pte) Ltd [2006] 2 SLR(R) 268; [2006] 2 SLR 268 (refd)

Export Credits Guarantee Department v Universal Oil Products Co [1983] 1 WLR 399 (refd)

Gimpex Ltd v Unity Holdings Business Ltd [2015] 2 SLR 686 (refd)

Koon Seng Construction Pte Ltd v Chenab Contractor Pte Ltd [2008] 1 SLR(R) 375; [2008] 1 SLR 375 (refd)

Lim Koon Park v Yap Jin Meng Bryan [2013] 4 SLR 150 (refd)
Murray v Leisureplay plc [2005] EWCA Civ 963 (refd)
National Westminster Bank plc v Jones [2001] BCLC 98 (refd)
Photo Production Ltd v Securicor Transport Ltd [1980] AC 827 (refd)
Sandz Solutions (Singapore) Pte Ltd v Strategic Worldwide Assets Ltd [2014] 3 SLR 562 (refd)
Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana [1983] 2 AC 694 (refd)
Sun Technosystems Pte Ltd v Federal Express Services (M) Sdn Bhd [2007] 1 SLR(R) 411; [2007] 1 SLR 411 (refd)
Tang Yoke Kheng v Lek Benedict [2005] 3 SLR(R) 263; [2005] 3 SLR 263 (refd)
TKM (Singapore) Pte Ltd v Export Credit Insurance Corp of Singapore Ltd [1992] 2 SLR(R) 858; [1993] 1 SLR 1041 (refd)
Wee Yue Chew v Su Sh-Hsyu [2008] 3 SLR(R) 212; [2008] 3 SLR 212 (folld)
Xia Zhengyan v Geng Changqing [2015] 3 SLR 732 (refd)
Young v Queensland Trustees Ltd (1956) 99 CLR 560 (refd)

Legislation referred to

Evidence Act (Cap 97, 1997 Rev Ed) s 104
Companies Act (Cap 50, 2006 Rev Ed)

Sim Chong and Alex Goh Wei Sien (JLC Advisors LLP) for the plaintiffs;
Pradeep G Pillai, Joycelyn Lin and Simren Kaur Sandhu (Shook Lin & Bok LLP) for the defendant.

[Editorial note: The defendant's appeal to this decision in Civil Appeal No 58 of 2016 is scheduled for hearing by the Court of Appeal in the week beginning 14 November 2016. (The hearing date is subject to change. For the most updated hearing dates, please refer to www.supcourt.gov.sg.)]

21 April 2016 Judgment reserved.

George Wei J:

Introduction

1 This is a simple claim for loans due and owing. The defendant resists the claim on the basis that the loans were part of an elaborate sham built on an intricate web of lies and pretences set up to assist the defendant in the listing of a company on Catalist, the sponsor-supervised board of the Singapore Stock Exchange.

Background

The parties

2 The plaintiffs, iTronic Holdings Pte Ltd ("iTronic") and PPS Capital Pte Ltd ("PPS"), are companies incorporated in Singapore. They are

represented by their directors, Poh Eng Kok (also known as Eric Poh) ("Eric") and Phua Chee Meng (also known as Derek Phua) ("Derek").

3 Tronic International Pte Ltd ("TIPL") is a Singapore-incorporated company that has since been wound up. Prior to its winding up, TIPL was in the business of providing technology solutions in various countries including Singapore, Taiwan and Russia.

4 iTronic's claim is premised on a loan that was initially extended by TIPL and later assigned to Tronic Holdings Pte Ltd ("THPL"). THPL later became iTronic by a change of name.

5 The defendant, Tan Swee Leon (also known as Kevin Tan), is the founder of the Mactus group of companies which includes Mactus Corporation Pte Ltd ("MCPL"), Mactus Leisure Pte Ltd ("Mactus Leisure"), Mactus Pte Ltd ("MPL"), and Carrindon Inc ("Carrindon"). For ease of narration, I will refer to these entities collectively as the Mactus Group. The Mactus Group is primarily in the business of organising entertainment events and providing event management and exhibition services. At all material times, the defendant was a director and the sole shareholder of MCPL.

The key events

6 Sometime in or around 2009, the defendant embarked on plans to list MCPL on Catalist ("the Listing Exercise"). He approached Ang Boo Hock Stephen ("Stephen"), a business consultant specialising in assisting and facilitating the listing of companies, to advise MCPL on its proposed listing. Apart from Stephen, the following professionals were engaged to assist in the Listing Exercise:

(a) Paul Wan & Co as the reporting accountant;

(b) KhattarWong LLP ("KhattarWong") and subsequently Shook Lin & Bok LLP as the solicitors advising on the Listing Exercise; and

(c) Prime Partners Corporate Finance Pte Ltd ("Prime Partners") as the sponsor ("Sponsor").

7 On 17 December 2009, Stephen introduced the defendant to Eric. On various other occasions in December 2009, the defendant, Stephen and Eric met to discuss the defendant's business plans. These discussions culminated in the execution of a series of transactions. Derek was present during some of these discussions. The genuineness of these transactions lies at the heart of the dispute.

The Body Show

8 The first transaction involved an asset belonging to the Mactus Group: the exhibits of the Body Show ("the Show Assets"). The Body Show was an exhibition showcasing actual preserved human bodies which were

dissected to display bodily systems. The defendant was looking to sell the Show Assets and lease the same back. This arrangement was calculated to enhance MCPL's listing prospects by improving the cash position of the Mactus Group.

9 It was subsequently decided between the parties that the Mactus Group would enter into agreements for the sale of the Show Assets to TIPL, which would lease the same to an entity within the Mactus Group.

10 Sometime after 21 December 2009, TIPL and Mactus Leisure entered into a sale and purchase agreement ("the TIPL-Mactus SPA") wherein TIPL bought the Show Assets from Mactus Leisure for S$2.8m.

11 Under cl 3.1 of the TIPL-Mactus SPA, TIPL granted Mactus Leisure the right of first refusal to purchase the Show Assets if TIPL wanted to sell the same. TIPL paid Mactus Leisure S$1.7m for the Show Assets in the following instalments (leaving a balance of S$1.1m unpaid):

(a) S$400,000 by way of a cashier's order dated 24 March 2010;

(b) S$400,000 by way of a cashier's order dated 30 March 2010; and

(c) S$900,000 by way of a cashier's order dated 4 June 2010.

12 Sometime after 12 May 2010, TIPL and Mactus Leisure entered into a lease agreement wherein TIPL leased the rights for the Show Assets to MPL for the sum of S$300,000 (being S$150,000 each for the exhibition in Malaysia and Indonesia respectively) ("the Lease Agreement"). The payment was made in the following instalments:

(a) S$60,000 by way of a cheque dated 14 May 2010;

(b) S$180,000 by way of a cheque dated 8 June 2010; and

(c) S$60,000 by way of a cheque dated 10 June 2010.

13 Subsequently, TIPL decided to sell the Show Assets. Mactus Leisure declined to exercise its right of first refusal and TIPL proceeded to sell the Show Assets to ARG International Ltd ("ARG"). It is apposite at this juncture to briefly describe the relationship between ARG and the parties in this dispute. In 2004 or 2005, Eric, Derek and one Anatoly Karmazin ("Anatoly") came together to form ARG. Eric and Derek each held 20% of the shares in ARG whereas Anatoly held the remaining 60% of the shares in ARG. Eric and Derek eventually divested their shares in ARG by selling them to Anatoly.

14 The sale and purchase agreement between TIPL and ARG ("the TIPL-ARG SPA") was dated 15 June 2010 and provide for a sale price of S$2.7m. The sale was structured such that ARG would pay S$1.6m to TIPL and the balance of S$1.1m to Mactus Leisure directly. A total of S$2m was paid by PPS on behalf of ARG. Of the S$2m, S$1.6m was paid to TIPL and S$400,000 was paid to Mactus Leisure.

15 Sometime in 2011, the parties decided to enter into agreements to reflect (a) a sale of the Show Assets from Mactus Leisure to Carrindon Inc (an offshore company linked to the defendant) and (b) a sale of the same assets from Carrindon to ARG ("the Carrindon Agreements"). It is common ground between the parties that the purpose of the Carrindon Agreements was to mask the reality of the sale and leaseback agreements which had been previously executed.

The convertible loan agreements

16 The parties also entered into a series of convertible loan agreements (collectively as "the CLAs"), the purpose of which is hotly disputed between the parties. The CLAs may be broadly divided into two categories: first, those between TIPL and the defendant; and second, those between PPS and the defendant. It would suffice for now to note that the defendant's case is that the entire series of CLAs that were executed between the parties were sham agreements that were designed to mislead third parties in connection with the hoped-for listing exercise.

17 On 4 June 2010, TIPL and the defendant executed a convertible loan agreement wherein TIPL agreed to extend to the defendant the Tronic Principal Convertible Loan, being the sum of S$1m ("Tronic CLA").

18 Later in the same month, on 23 June 2010, PPS and the defendant executed another convertible loan agreement wherein PPS agreed to extend the PPS Principal Convertible Loan, being the sum of S$500,000 ("PPS CLA").

19 Under the Tronic CLA and PPS CLA, the plaintiffs were entitled to convert the loans thereunder into MCPL shares worth twice the value of the loan amounts just before MCPL's listing. At that point in time, it was envisaged that MCPL's listing would be completed by 31 December 2010. Pertinently, in the event that the listing did not take place by 31 December 2010, the Tronic CLA and PPS CLA provided that *only* the compensation sums of S$50,000 and S$25,000 were to be repaid to TIPL and PPS respectively. I will refer to these sums as "Tronic Compensation Sum B" and "PPS Compensation Sum B".

20 I pause to note that the PPS Principal Convertible Loan was funded by PPS as well as two other investors. The sum may be broken down as follows:

(a) S$300,000 from PPS;

(b) S$50,000 from Tan Kheng Tiong; and

(c) S$150,000 from Yang Chi-Cheng.

21 On or about 5 August 2010, Eric was informed by Stephen that the listing would be delayed to March 2011 ("the First Delay"). This was confirmed by the defendant who assured Eric that there were no adverse

circumstances that would affect MCPL as a going concern or its listing plans.

22 In view of the delay, PPS and the defendant entered into a supplemental agreement on 16 September 2010 to extend the PPS Principal Convertible Loan to 30 June 2011 ("PPS SA"). PPS SA also corrected what was described by the plaintiffs as an error in the earlier PPS CLA. According to Eric, the understanding of the parties when PPS CLA was executed was that if the listing did not take place by 31 December 2010, the defendant would be obliged to return (a) TIPL, the Tronic Principal Convertible Loan and Tronic Compensation Sum B; and (b) PPS, the PPS Principal Convertible Loan and PPS Compensation Sum B. However, the CLAs stated that only the compensation sums would be returned if the listing did not take place by 31 December 2010 (as noted at [19] above). To correct the alleged error, the terms of the PPS SA provided, *inter alia*, that the defendant was to repay the PPS Principal Convertible Loan, the PPS Compensation Sum B plus a further compensation sum of S$25,000 ("PPS Compensation Sum C") in the event that the listing did not take place by 30 June 2011.

23 In early 2011, a supplemental agreement was also executed by TIPL and the defendant ("Tronic SA") to correct the same error. The terms of Tronic SA were along the same lines as PPS SA and provided, *inter alia*, that the defendant was to repay the Tronic Principal Convertible Loan, the Tronic Compensation Sum B plus a further compensation sum of S$50,000 ("Tronic Compensation Sum C") in the event that the listing did not take place by 30 June 2011.

24 On 8 April 2011, Eric was informed during a meeting with Stephen and the defendant that MCPL was unlikely to be listed by 30 June 2011 ("the Second Delay").

25 On 6 June 2011, a further supplemental agreement was entered into by PPS and the defendant to cancel PPS SA ("PPS 2SA"). Thereunder, PPS agreed to extend a further loan of S$100,000 to the defendant ("PPS Supplemental Convertible Loan"). According to the plaintiffs, the further loan was to expedite MCPL's listing. The listing deadline was unchanged and remained at 30 June 2011. In the event that the listing did not take place by 30 June 2011, the defendant was to repay to PPS the PPS Principal Convertible Loan, the PPS Supplemental Convertible Loan as well as the PPS Compensation Sums B and C – the total amount being S$650,000.

26 By 30 June 2011, the listing had not taken place and the sums that were due under the PPS and Tronic CLAs (as amended by the supplemental agreements) remained outstanding. Eric expressed his intention to call back both loans and the parties met to discuss the repayment of the Tronic Principal Convertible Loan.

27 Two days later, the defendant gave Eric the following cheques:

No	Date	Amount (S$)	Status
1	7 September 2011	100,000	**Cleared**
2	30 September 2011	250,000	Not banked in
3	30 October 2011	250,000	Not banked in
4	30 November 2011	250,000	Not banked in
5	30 December 2011	250,000	Not banked in

28 The purpose of the S$100,000 cheque (reflected in the above table) is disputed. The plaintiffs claim that this was the repayment of Tronic Compensation Sums B and C. The defendant claims that this was a partial repayment of the Tronic Principal Convertible Loan.

29 At this point, the plaintiffs appeared to be keen for a third party to buy out the TIPL and PPS Principal Convertible Loans, and were informed by the defendant that the Sponsor or one of its associated companies was willing to do so. At the same time, the parties discussed further supplemental agreements that were to be executed between (a) PPS and the defendant; and (b) TIPL and the defendant. Eric requested the defendant to settle payment of S$50,000 (being the PPS Compensation Sums B and C), and requested for the Sponsor's letter of offer to take over the loans.

30 On 16 November 2011, the defendant e-mailed Eric, *inter alia*, draft letters pertaining to the early redemption of the Tronic Principal Convertible Loan, the PPS Principal Convertible Loan and the PPS Supplemental Convertible Loan ("the Draft Offer Letters"). These Draft Offer Letters were drafted as an offer from the plaintiffs to the defendant. Pursuant to the Draft Offer Letters, the defendant was to (a) pay TIPL S$1m in return for TIPL agreement to rescind Tronic CLA and Tronic SA; and (b) pay PPS S$600,000 in return for PPS agreeing to rescind PPS CLA and PPS 2SA (which cancelled the PPS SA).

31 According to Eric, the Draft Offer Letters were not acceptable for two main reasons. First, neither TIPL nor PPS should have been the party offering the Draft Offer Letters to the defendant. Second, the Draft Offer Letters were drafted to limit the recovery by TIPL/PPS of the Tronic/PPS Principal Convertible Loans and PPS Supplemental Convertible Loan by omitting the PPS Compensation Sums B and C.

32 Thereafter, the parties commenced negotiations on further supplemental agreements to extend the deadline for the repayment of the TIPL/PPS Principal Convertible Loans, the PPS Supplemental Convertible Loan and the PPS Compensation Sums B and C.

33 By way of a supplemental agreement dated 1 October 2011 ("PPS 3SA"), the terms of PPS CLA (as amended by PPS 2SA) were again amended as follows:

(a) The defendant was to pay S$150,000 as an upfront settlement fee to PPS in consideration for PPS agreeing to vary/amend/alter the terms and conditions in relation to PPS CLA and PPS 2SA ("the PPS Upfront Settlement Fee").

(b) PPS was to grant a further convertible loan in the sum of S$150,000 to the defendant ("the PPS Further Convertible Loan"). The PPS Further Convertible Loan was to be set off against the PPS Upfront Settlement Fee.

(c) The total convertible loan that PPS granted to the defendant was in the sum of S$750,000 (being the aggregate sum of the PPS Principal Convertible Loan, the PPS Supplemental Convertible Loan and the PPS Further Convertible Loan) ("the PPS Total Convertible Loan").

(d) In the event that MCPL's listing did not take place by 30 June 2012, the defendant was to repay the PPS Total Convertible Loan together with an additional sum of S$75,000 ("the PPS Additional Sum") by 30 July 2012.

(e) All disputes were to be subject to the jurisdiction of the Singapore courts.

34 In a supplemental agreement that is also dated 1 October 2011 ("Tronic 2SA"), TIPL and the defendant agreed to vary the terms of Tronic CLA (as amended by Tronic SA). The terms of Tronic 2SA were as follows:

(a) The defendant was to pay S$250,000 as an upfront settlement fee to TIPL in consideration for TIPL agreeing to vary/amend/alter the terms and conditions in relation to TIPL CLA and TIPL SA ("the Tronic Upfront Settlement Fee").

(b) TIPL was to grant a further convertible loan in the sum of S$250,000 to the defendant ("the Tronic Further Convertible Loan"). The TIPL Further Convertible Loan was to be set off against the Tronic Upfront Settlement Fee.

(c) The total convertible loan granted to the defendant by TIPL was in the sum of S$1,250,000 (being the aggregate sum of the Tronic Principal Convertible Loan and the Tronic Further Convertible Loan) ("the Tronic Total Convertible Loan").

(d) In the event that MCPL's listing failed to take place by 30 June 2012, the defendant was to repay to TIPL the Tronic Total Convertible Loan together with an additional sum of S$125,000 ("the Tronic Additional Sum") by 30 July 2012.

(e) All disputes were to be subject to the jurisdiction of the Singapore courts.

35 To summarise, the agreements entered into were as follows.

(a) Between TIPL and the defendant:

(i) Tronic CLA dated 4 June 2010 under which the sum of S$1m was extended by TIPL to the defendant.

(ii) Tronic SA dated 26 January 2011 which amended the terms of the Tronic CLA. No further amounts were advanced under this agreement.

(iii) Tronic 2SA dated 1 October 2011 under which a further sum of S$250,000 was extended by TIPL to the defendant.

(b) Between PPS and the defendant:

(i) PPS CLA dated 23 June 2010 under which the sum of S$500,000 was extended by PPS to the defendant. The loan was disbursed by way of a cheque on or about 2 July 2010.

(ii) PPS SA dated 15 September 2010 which amended the terms of the PPS CLA. No further amounts were advanced under this agreement.

(iii) PPS 2SA dated 6 June 2011 under which a further sum of S$100,000 was extended by PPS to the defendant.

(iv) PPS 3SA dated 1 October 2011 under which a further sum of S$150,000 was extended by PPS to the defendant.

36 The listing did not materialise. The plaintiffs seek now the return of the loans that were extended, together with compensation sums payable under the supplemental agreements. In October 2014, the benefit of the Tronic CLA (as amended by the supplemental agreements) was assigned to THPL by deed.

Procedural history

37 Before delving into the legal and factual issues, it would be useful to begin with a brief summary of the procedural history.

38 The matter began life as two separate actions, and were consolidated in June 2014. Prior to the consolidation, the plaintiffs applied for summary judgment in their respective suits. Both applications were dismissed. The defendant was granted (a) conditional leave to defend the THPL Suit on provision of security of $300,000; and (b) unconditional leave to defend the PPS Suit.

39 On 27 July 2015, I heard the plaintiffs' application for a Mareva injunction to freeze the defendant's assets up to the value of $1.9m (*ie*, the balance after subtracting the $300,000 security that had been paid into court). The application was precipitated by the plaintiffs' realisation that

the defendant had transferred his entire shareholding in MCPL to one Tricia Ng, resulting in concern that the defendant would dissipate his assets to frustrate a judgment against him.

40 I granted the Mareva injunction (albeit in a limited form), compelling the defendant to procure forthwith the return of the entire shareholding of MCPL, and for those shares to be frozen until the conclusion of this trial or any further order.

The present suit

41 It will be more convenient to begin with the defendant's case because of the positive averments made by the defendant.

The defendant's case

42 The defendant does not dispute the fact that the loan agreements were executed. Instead, he rests his defence on the following grounds:

(a) The CLAs are fictitious agreements.

(b) The loan monies under the CLAs have been repaid.

(c) In any case, the compensation sums provided in the CLAs are unenforceable because they amount to penalties.

43 I note preliminarily that the defendant alleges that the plaintiffs were part of a larger "Tronic Group". However, the plaintiffs dispute the existence of the "Tronic Group" as alleged by the defendant. I will return to this point at the appropriate juncture.

Fictitious agreements

44 The central plank of the defendant's narrative is that the CLAs were executed to create the false impression that monies disbursed to the defendant as loans remained unpaid, thereby entitling TIPL and PPS to convert the loans into equity at listing. The shares were meant to reward TIPL and PPS for their assistance in the following matters in the Listing Exercise:

(a) The Mactus Group would enter into a sale-and-leaseback agreement with the Tronic Group wherein Mactus Leisure would sell the Show Assets to TIPL which would then lease the Show Assets to MPL.

(b) The Tronic Group would arrange for further investment into the Mactus Group prior to the listing of MCPL.

(c) The Tronic Group would provide assistance in the form of securing underwriters, lead managers, placement agents and other advisors for the proposed listing.

(d) The Tronic Group would source for potential subscribers for the proposed listed shares.

(e) The Tronic Group would provide strategic advice on the restructuring of Mactus Group's business and capital structure to make it more attractive for listing.

45 Under this plan, the "reward" was to be effected in the following manner. The parties were to enter into a series of convertible loan agreements to give the impression that monies were loaned to the defendant for the purpose of the listing and that the loans would remain unpaid. Monies were to be advanced by the plaintiffs and the loans under the CLAs were to be repaid immediately after they were disbursed, with the repayment not being recorded and/or reflected in the books and records of TIPL and PPS, thereby giving the impression on the books that the loans could be converted into equity upon the successful listing of MCPL.

46 The "equity" was fixed at S$3m worth of shares (*ie*, double the amount that was purportedly loaned). The defendant agreed to do all that was necessary to assure the auditors and/or investors of TIPL and PPS that the loans were indeed outstanding and would be repaid even though the said loans had effectively been repaid.

47 Further, since the sale and leaseback agreement involving the Show Assets was a part of the overall arrangement put in place between the parties, the defendant claims that the circumstances surrounding the Body Show transactions were inextricably linked to the execution of the CLAs and have to be considered when determining the underlying nature and purpose of the CLAs.

Alleged repayments

48 The defendant claims that the loan of S$1m under the Tronic CLA was repaid in the following manner:

Date	Amount	Mode of payment
10 June 2010	S$300,000	Cash
14 June 2010	S$300,000	Cash
22 June 2010	S$300,000	Cash
7 September 2011	S$100,000	Cheque

49 The defendant claims that the loan of S$500,000 under the PPS CLA was repaid in the following manner:

Date	Amount	Mode of payment
23 August 2010	S$400,000	Cash
-	S$100,000	Set-off against the sum due and owing by ARG to Carrindon

50 The defendant also claims that the additional loan of S$100,000 disbursed by PPS under PPS 2SA was repaid by the defendant by way of cash handed to Eric on 8 June 2011. As for Tronic 2SA and PPS 3SA, the defendant claims that there is no need to repay the "additional" sums loaned under those agreements since those monies were never disbursed to him or the Mactus Group.

Penalties

51 The defendant also contends that the further sums of S$125,000 and S$75,000 purported due under Tronic 2SA and PPS 3SA respectively are penalties that are unenforceable at law. To this end, the defendant argues that:

(a) the imposition of the compensation sums is arbitrary and therefore unenforceable;

(b) the additional sums are extravagant compared to the losses made by the plaintiffs;

(c) the plaintiffs were in a dominant position *vis-à-vis* the defendant and were more involved in determining and formulating the terms of the terms of the CLAs; and

(d) the additional sums are not commercially justifiable because their dominant purpose was to deter the defendant from breaching his obligation to procure MCPL's listing.

The plaintiffs' case

52 The plaintiffs' claim is S$2.2m in aggregate, and comprises two components:

(a) Tronic's claim for S$1,375,000 – the loan under the Tronic CLA (as amended by the supplemental agreements) as well as a further sum of S$125,000 as compensation pursuant to the terms of Tronic 2SA; and

(b) PPS' claim for S$825,000 – the loan under the PPS CLA (as amended by the supplemental agreements) as well as a further sum of S$75,000 as compensation pursuant to the terms of PPS 3SA.

Fictitious agreements

53 The plaintiffs' case is relatively straightforward. They argue that the CLAs are *bona fide* and genuine loan agreements. According to Eric, Stephen informed him that the defendant wanted to raise funds to "clear amount owed by [the defendant] to company and clear corporate taxes". The initial proposal was for TIPL to inject S$1m of funds by acquiring the defendant's shares in MCPL. However, Eric did not agree to the proposal because MCPL's audited accounts were unavailable then and he could not

ascertain its financial position. Further, if the listing failed, the shareholding in MCPL would most likely be illiquid.

54 The parties eventually decided to proceed by way of a convertible loan agreement under which the plaintiffs would extend loans to the defendant in his personal capacity. In return, the plaintiffs would be entitled to receive shares in MCPL worth two times the loan amount just before MCPL was about to be listed. If there was no listing, the plaintiffs would be entitled to seek repayment of the loans.

55 The plaintiffs dispute the defendant's assertion that the Body Show transactions were inextricably linked to the execution of the CLAs. In their view, whilst both deals were proximate in time, they were separate and independent transactions.

Alleged repayments

56 The plaintiffs dispute the defendant's allegations of repayment of the loans and take the position that the loans remain wholly unpaid. According to the plaintiffs, there was no such repayment as alleged by the defendant, either in cash or by way of set-off. In respect of the S$100,000 cheque dated 7 September 2011, the plaintiffs assert that the sum was for payment of the Tronic Compensation Sums B and C.

Penalties

57 The plaintiffs contend that the compensation sums were genuine pre-estimates of loss and thus do not amount to penalty clauses. To this end, they point to the following:

(a) There was every reason to believe that the defendant sought legal advice before he signed Tronic 2SA and PPS 3SA.

(b) The defendant conceded that he "d[id] have some choice" but chose to sign Tronic 2SA and PPS 3SA.

(c) The compensation sums were to compensate the plaintiffs for the repeated delays in the listing of MCPL.

Issues raised

58 I shall address the issues raised in this order:

(a) whether there is a "Tronic Group" as alleged;

(b) whether the CLAs were fictitious loan agreements;

(c) whether the loan monies were repaid; and

(d) whether the compensation (or further) sums stipulated in Tronic 2SA and PPS 3SA constitute penalties.

Burden and standard of proof

59 Given the considerable dispute between the parties over the true nature of the agreements and the events which took place, a brief review of the burden and standard of proof will be helpful.

60 It is hornbook law that the court's decision in every case will depend on whether the party concerned has satisfied the particular burden of proof imposed on him. As explained by V K Rajah JA (as he then was) in *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 ("*Britestone*") at [58], there are two kinds of burden in relation to the adduction of evidence. The first is the *legal* burden of proof which describes the obligation to persuade the trier of fact that, in view of the evidence, the fact in dispute exists. This *legal* burden always rests with the plaintiffs, unless a legal presumption operates. The second is the *evidential* burden to produce evidence since, whenever it operates, the failure to adduce some evidence will mean a failure to engage the question of the existence of a particular fact or to keep this question alive. This *evidential* burden can and will shift.

61 It also well-established that he who asserts must prove. The legal burden of proof is placed on the party who asserts the existence of any fact in issue or relevant fact: *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA, Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63 ("*Rabobank*") at [30]. In civil trials, the pleadings are central in determining the burden of proof because they state the material facts establishing the legal elements of a claim or defence. For example, the legal burden of proving a pleaded defence rests on the proponent of the defence, unless the defence is a bare denial of the claim: *Rabobank* at [31].

62 The party asserting a fact must raise sufficient evidence to prove the fact to the standard required. The other party succeeds in so far as it raises sufficient evidence to ensure that the asserting party is unable to prove the fact to the standard required: Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 5th Ed, 2015) ("*Evidence and the Litigation Process*") at para 12.006. The standard of proof required in civil trials is that of a balance of probabilities. Using a mathematical analogy, it is often said that this means proving the case on the basis of a 50+% standard: *Evidence and the Litigation Process* at para 12.091. Whilst a mathematical analogy may provide some help in articulating the standard, the essential question remains whether the plaintiff has shown that his case is more probably true than it is false. This is a matter of judgment for the court. The scales of justice applied to evaluating the evidence and the burden and standard of proof is not a mathematical exercise.

63 The party alleging that a document is a sham bears the burden of proving that the parties intended the document to be a pretence: *Chng Bee Kheng v Chng Eng Chye* [2013] 2 SLR 715 ("*Chng Bee Kheng*") at [51]. The

crux of a sham is a common intention to mislead. However, there is a strong presumption that parties intend to be bound by the provisions of agreements which they have entered into. The reasons for this presumption are summarised in the following statement by Neuberger J (as he then was) in *National Westminster Bank plc v Rosemary Doreen Jones* [2001] BCLC 98 at [59]:

> … Because a finding of sham carries with it a finding of dishonesty, because innocent third parties may often rely upon the genuineness of a provision or an agreement, and because the court places great weight on the existence and provisions of a formally signed document, there is a strong and natural presumption against holding a provision or document a sham.

64 More evidence is required to prove an allegation of fraud or dishonesty in civil proceedings even though the standard of proof remains the civil standard of proof on a balance of probabilities. In *Gimpex Ltd v Unity Holdings Business Ltd* [2015] 2 SLR 686 at [183]–[184], the Court of Appeal endorsed the following statement in *Tang Yoke Kheng v Lek Benedict* [2005] 3 SLR(R) 263: "[T]he more serious the allegation, the more the party, on whose shoulders the burden of proof falls, may have to do if he hopes to establish his case." Likewise, the learned author of *Evidence and the Litigation Process* said at para 12.094 that there are cases where the court may require more cogent or forceful evidence before it finds that the civil standard has been met. He goes on further to say at para 12.096 that where the court singles out fraud or other serious wrong as requiring proof based on more cogent and/or additional evidence, it is doing nothing more than applying its normal judicial reasoning to a particular situation.

65 It is for the party who asserts that he has repaid a loan to prove that he had indeed discharged his indebtedness. In *Wee Yue Chew v Su Sh-Hsyu* [2008] 3 SLR(R) 212, the plaintiff claimed for unpaid amounts in relation to a share transfer. The defendant asserted, *inter alia*, that she had paid for the shares by way of her remittance of the contract price to the plaintiff's order. The court held that the defendant bore the legal burden to prove payment of the contract price and cited with approval the following statement from the Australian High Court in *Young v Queensland Trustees Limited* (1956) 99 CLR 560 at 569–570:

> The law was and is that, speaking generally, the defendant must allege and prove payment by way of discharge as a defence to an action for indebtedness in respect of an executed consideration.

66 In *Chua Kok Tee David v DBS Bank Ltd* [2015] 5 SLR 231, a claim was brought in respect of a fixed deposit placed with the bank back in 1983. In 2012, the customer claimed to uplift the deposit. In respect of the burden of proof, Vinodh Coomaraswamy J, after citing s 104 of the Evidence Act (Cap 97, 1997 Rev Ed), held at [25]–[27]:

> [I]t is a debtor who admits having borrowed money from a creditor who bears the burden of proving that he is not, at the time of the suit, indebted to the creditor. The defendant admits that it borrowed money from the plaintiff. The defendant accepts that the initial fixed deposit receipt issued for the 9246 account is genuine and accepts that it accurately records the terms of the initial fixed deposit placement on the 9246 account. The defendant thus accepts that, at least as at 13 March 1983, it was indebted to the plaintiff in the sum recorded in that receipt together with the interest accruing on it.
>
> …
>
> Section 104, applied in the light of these admitted facts and in the light [of] its second illustration, places the burden of proof in this suit on the defendant. If the admitted facts were taken alone, they would make a finding that the defendant's debt to the plaintiff existed and continues to exist inevitable. In other words, if there were no evidence adduced on either side in this suit, the admitted facts mean that the defendant would fail.

67 It bears noting the defence in the present dispute consists of positive averments such as: (a) that there was a "Tronic Group"; (b) that the CLAs were fictitious loan agreements; and (c) that the loans under the CLAs were secretly repaid. It is not disputed that the defendant bears the legal burden of proving the existence of such facts, on a balance of probabilities. However, in respect of the cash payments, the defendant argues that the evidential burden shifts upon his adducing evidence of cash payments. He further argues that the plaintiffs' case fails as long as there is sufficient evidence to prove on a balance of probabilities that at least S$100,000 was paid in cash by the defendant to the plaintiffs, since the plaintiffs' case is that not a single cent was received by way of cash.

68 I disagree. The plaintiffs' case is that they never received any cash repayments *of the loans extended under the CLAs*. Whilst the plaintiffs have similarly asserted that there were no secret cash repayments for the Show Assets, this issue is, strictly speaking, irrelevant to the central question of whether the loans had indeed been repaid by the defendant. That said, the cash payments for the Show Assets, if established, will go towards the general credibility of the plaintiffs' witnesses. Put simply, beyond proving the fact of payments, the defendant also bears the burden of establishing the purpose of the payments. Were they repayments of the loans extended under the CLAs?

69 The core of the defence is that there never was any loan: the agreements were entered into to create the impression of loans. They were sham agreements entered into with the common intention to deceive third parties. The burden of proof rests on the defendant. It is in this context that the issue of alleged payments of cash to the plaintiffs by the defendant arises. These payments (if made) are said to establish that there *never* were any genuine loans intended. The passing of monies to the defendant and back to the plaintiff was "the device" used to create the false impression.

This is not a case where the defendant admits that there is a loan or debt owing. His case is that there never were any loans: the passing of monies on top of the table and the almost immediate return under the table (so to speak) was for purposes of creating the sham. Bearing in mind that the defendant has the burden of establishing the sham, even if the court accepts that some payments were made to the plaintiffs, it is still necessary to consider the purpose for those payments. In short, although proof of some payments by the defendant is helpful to his case, this court must still assess the evidence in its totality in deciding whether on a balance of probabilities the defence of sham has been made out.

Whether there was a "Tronic Group" as alleged

70 The defendant's pleaded case is that iTronic, TIPL, PPS, Tronic Technocrystal Pte Ltd ("Technocrystal") and ARG were part of a group of companies under the Tronic banner ("Tronic Group").

71 Companies having a common source of control and which act as a single economic entity are usually described as a corporate group. That said, the terms "group of companies" or "corporate group" do not appear in the Companies Act (Cap 50, 2006 Rev Ed). Instead, the Companies Act uses terms such as holding, subsidiary and related companies to describe inter-company relations.

72 In the present case, whilst it appears that the Mactus Group comprises entities which were effectively owned or controlled by the defendant, the evidence as to whether there was a Tronic Group is far less clear. The entities in the alleged Tronic Group have different shareholders. Eric did not have overall control of TIPL, iTronic and Technocrystal. Indeed, before iTronic started this action against the defendant, Eric had to discuss it with iTronic's board of directors which comprised of him, Derek and a third party called Lin Hung Yi. That said, Eric maintained under cross-examination that he did not have overall control, even if accepted that there were some direct and indirect relationships between some of the entities.

73 Against this, the defendant conceded under cross-examination that there is no such thing as the "Tronic Group" after he was brought through all the shareholdings of the different entities:

> Q: So I brought you through all these shareholdings, right, I'm telling you my client's position, so I'm now putting my clients' case to you, to suggest that there is no such thing as the Tronic Group of companies. Do you agree or disagree? Can you agree with me?
>
> A: Okay, no problem.

74 Therefore, even though a "corporate group" is not a term of art and may mean different things in different contexts, the appropriate conclusion is that there was no "Tronic Group" as alleged and certainly not in the sense that Eric exercised *de facto* control over the entities said to be in the alleged

Tronic Group. In any event, the question as to whether there is a Tronic Group is not the crux of the issue. Its main relevance is in connection to the background issues as to whether the Tronic Group was to provide assistance to the defendant in the Listing Exercise.

Whether the CLAs were fictitious loan agreements

The purpose of the alleged fictitious loan agreements

75 I begin by examining the purpose of the alleged fiction. The defendant asserts that the object of the CLAs was a scheme to ultimately enable the plaintiffs to receive shares worth S$3m in MCPL. The shares were intended to reward the plaintiffs (especially Eric) for their assistance in the following aspects in the Listing Exercise. The defendant contended that the parties' scheme ("the Scheme") was to be implemented as follows:

(a) The parties would enter into a sale-and-leaseback agreement wherein Mactus Leisure would sell the Show Assets to TIPL which would then lease the same to MPL.

(b) The Tronic Group would arrange for further investment into the Mactus Group prior to the listing of MCPL.

(c) The Tronic Group would provide assistance in the form of securing underwriters, lead managers, placement agents and other advisors for the proposed listing.

(d) The Tronic Group would source for potential subscribers for the proposed listed shares.

(e) The Tronic Group would provide strategic advice on the restructuring of Mactus Group's business and capital structure to make it more attractive for listing.

76 The defendant claimed that he relied exclusively on Stephen and Eric to assist him with the listing of MCPL and without their input, there was no way that MCPL could even consider a listing. Against that, it is significant that, at the trial, the defendant made several concessions that effectively destroyed his own case. He conceded under cross-examination that TIPL, iTronic, PPS, Eric and Derek did not in fact:

(a) arrange for further investment into the Mactus Group prior to listing MCPL;

(b) provide assistance in the form of securing underwriters, lead managers, placement agent and other advisors for the proposed listing; or

(c) source for potential subscribers for the proposed listed shares.

The defendant also conceded that he did not have any documents showing that the alleged Tronic Group (which I have found did not exist as such) performed any work in relation to the Listing Exercise.

77 Notwithstanding these concessions, the defendant maintained that the alleged Tronic Group had provided "strategic advice on the restructuring of Mactus Group's business and capital structure to make it more attractive for listing". The nature of the "advice" was curious to say the least. The defendant seeks to recharacterise as "strategic advice" TIPL's purchase of the Show Assets (in order to dress up the books of MCPL with the ultimate goal of making it more attractive for listing). According to him, the plaintiffs were assisting the Mactus Group by buying the Show Assets so as to help the revenue stream of the Mactus Group. This assistance amounted to "strategic advice" from an investor's perspective.

78 I find the defendant's assertion as to the purpose of the fiction to be against the weight of the evidence which showed that the plaintiffs did not provide any assistance in relation to the Listing Exercise and that they were genuine pre-IPO investors. Any "assistance" if at all was primarily in providing funds to the defendant (under the CLAs) in furtherance of the Listing Exercise, which is precisely the plaintiffs' case.

79 *First*, the defendant never needed Eric's input because he had been in touch with the relevant professionals even before he met Eric. The defendant had already approached Stephen who specialised in assisting and facilitating the listing of companies. Further, the defendant had been in discussions with Prime Partners since June/July 2009, approximately half a year before he first met Eric in December 2009. The defendant, whilst keen to stress that Prime Partners was only formally appointed in January 2010, eventually agreed that when Eric was approached in December 2009, Prime Partners had already been approached in connection with the Listing Exercise. This is independently corroborated by Stephen who stated that he attended a meeting with Prime Partners before he approached Eric/Tronic to seek out funding for listing exercise.

80 It was wholly unnecessary for the defendant to enlist the plaintiffs' assistance in matters for which he had engaged professional advisors. In particular, the mandate letter for the Sponsor states that Prime Partners was appointed to "advise MCPL on its *corporate restructuring*", the very same matter that the plaintiffs were allegedly supposed to advise on. When cross-examined, the defendant conceded that there were indeed professionals who were engaged to handle the same or similar tasks:

> Q: You agree with me that the roles and responsibilities of all these people, people like Stephen Ang, Prime Partners, Paul Wan & Co and the solicitors, these roles and responsibilities are very similar, if not exactly the same, as what you say the alleged Tronic Group was supposed to do under the alleged arrangement. Yes?

…

A: Okay, the answer is yes.

81 *Second*, the defendant's assertion that TIPL's purchase of the Show Assets amounted to "strategic advice" is inherently incredible. He had conceded that the sale and purchase of the Show Assets was a genuine transaction. There was thus no reason to reward the plaintiffs for entering into those transactions. The assertion also flies in the face of the evidence of the Prime Partners' chief operating officer, Mark Liew, who testified that the plaintiffs played no role or any part during the entire Listing Exercise, save for being represented as pre-IPO investors by the defendant. Pertinently, Mark Liew's evidence was admitted unchallenged as the defendant elected not to cross-examine him at trial, and was corroborated by Stephen's evidence that the loans were genuine pre-IPO investments and that the alleged Tronic Group never did any of the things that the defendant alleged they were supposed to do.

82 *Finally*, I note that it was impossible for the plaintiffs to provide substantive assistance because they were kept out of the loop *vis-à-vis* the progress of the Listing Exercise. Eric had consistently chased the defendant for updates on the progress of the Listing Exercise as well as for audited accounts and other financial statements. The defendant conceded that these were genuine requests, not made for show. These are completely inconsistent with the defendant's assertion that the plaintiffs had provided substantive assistance in the Listing Exercise.

83 For the foregoing reasons, I find that the plaintiffs did not assist in advancing the Listing Exercise in the manner alleged by the defendant. In view of this, it defies logic and common sense that the defendant would reward the plaintiffs so handsomely (that is, with S$3m worth of shares). The only logical explanation as to why the defendant would reward the plaintiffs with S$3m worth of shares is that the loans were genuine and unpaid and provided by way of financial support to the defendant in his attempt to list MCPL. As will be seen, this conclusion is further reinforced by the contemporaneous documents.

E-mails

84 Numerous contemporaneous e-mails demonstrate that the loans extended under the CLAs were genuine pre-IPO investments. It would suffice to set out briefly the contents of some of these e-mails.

85 As a starting point, there are several e-mails that suggest the parties discussed a pre-IPO investment. On 1 April 2010, Stephen explained in an e-mail the reason why the defendant needed to raise funds. In his words:

Dear Eric,

Attached is the very brief term sheet and a brief company outline.

> Purpose of this sale of vendor shares is to raise funds for kevin to clear amount owed by him to company and clear corporate taxes.
>
> The investor can negotiate for more terms but best to go straight to agreement stage from this brief term sheet.
>
> Thanks and take care.
>
> Stephen

Notably, the "brief term sheet" attached to the above e-mail referred to "[a] pre-IPO investment of S$3m … through the sale of vendor shares".

86 On 22 April 2010, there were exchanges of e-mails between Stephen and solicitors from KhattarWong concerning the draft pre-IPO investment. Barely ten minutes after Stephen ended his e-mail discussion with KhattarWong, he forwarded the "draft pre-IPO draft agreement" to Eric, together with KhattarWong's explanation on the same.

87 On 30 April 2010, Stephen wrote to the defendant to inform him that the agreement had to be adjusted into "a convertible loan structure" and that the discount was 50%. The interest rate would be 5% per annum if the conversion did not happen by December.

88 When it was clear that the listing would not take place by the end of 2010 (*ie*, the First Delay), the plaintiffs became nervous about their investment.

(a) On 5 August 2010, Eric e-mailed the defendant and Stephen, asking the defendant for (i) the reasons for the delay; and (ii) the defendant's thoughts concerning the CLAs.

(b) On 4 October 2010, Eric e-mailed the defendant to chase for MCPL's audited report for 2009 and for "the latest management account to satisfy [TIPL's] auditor".

(c) On 24 November 2010, Eric e-mailed Stephen to state, *inter alia*, that he would:

> need the fund to be returned to Tronic by Dec if the list co's audited account of 2009 still pending at this stage
>
> Please look into this matter seriously as [he did not] want to jeopardize the whole exercise.

(d) On 29 November 2010, Eric e-mailed Stephen to express his doubts that the defendant could come up with audited accounts and report for 2009 by November 2010 because of the holiday season in December. At the end of the e-mail, Eric asked Stephen to "have a thought for a[n] exit plan for Tronic".

89 After the Tronic and PPS SAs were executed, the defendant informed Eric that MCPL was unlikely to be listed by 30 June 2011 (that is, the

Second Delay). The plaintiffs expressed their concerns about the situation in a series of e-mails that followed this development.

(a) On 9 April 2011, Eric e-mailed Stephen and Kevin, requesting for an early redemption of the loan or for a third party to buy over the loan agreement.

(b) On 18 April 2011, Eric e-mailed the defendant and Stephen to enquire (i) whether there was any update in relation to the buying over of the loan extended by TIPL; or, alternatively, (ii) whether the defendant would be able to honour his promise to redeem the loan extended by TIPL by 30 June 2011.

90 Thereafter, the parties entered into PPS 2SA which provided for a further S$100,000 loan from PPS to the defendant. The listing did not take place by 30 June 2011. The correspondence between the parties showed the plaintiffs becoming increasingly frustrated and nervous about their investments.

(a) On 6 July 2011, Eric wrote to the defendant, copying Stephen and Derek, stating:

> [a]s per agreement and supplemental agreement of the subject matter, since Mactus's IPO is [*sic*] not taken place by June 30, 2011, we shall request for the payment of S$1,100,000 to be paid within 45 days from July 1, 2011.

(b) On 23 August 2011, Kevin suggested that the loan be paid in ten instalments between 26 September 2011 and 26 June 2012.

(c) On 24 August 2011, Eric replied saying:

> [p]lease show your sincerity to resolve this issue and please note that the due date for you to settle the S$1.1m loan was August 15, 2011. Your proposed schedule is totally unacceptable.
>
> I urge you to quickly find a reasonable solution to settle the loan or I will have to table to my board for further action.

Shortly after this e-mail was sent, Eric e-mailed Stephen separately to tell him: "[i]f this is Kevin's attitude for settlement of Tronic's loan, I am afraid that I will want to call back PPS's loan as well".

91 Subsequently, the parties entered into Tronic 2SA and PPS 3SA which further extended the deadline for MCPL's listing to 30 June 2012. Whilst the defendant promised to make payment of S$50,000 for the PPS Compensation Sums B and C, he eventually paid only RMB10,000 (approximately S$2,000) after repeated chasing by Eric. Eric preferred to have the S$50,000 in Singapore dollars by way of cheque, but the defendant insisted on transferring the monies from a Chinese bank account because he said it was the only mode of payment available to him.

92 At this point, the relationship between the plaintiffs and the defendant appeared to be rather strained given the defendant's failure to pay the S$50,000 and the repeated delays in the Listing Exercise. It will be useful to set out some examples of such chaser e-mails:

(a) On 3 April 2012, Eric e-mailed the defendant to chase him for payment of the PPS Compensation Sums B and C:

> Hi Kevin,
>
> If you can't do it in China, please settle in S$ and issue a S$50K cheque to PPS Capital Pte Ltd, we have been talking [about] this issue since last year and you promised me several times before and after Chinese New Year, Now, I am facing my investors, please give me a definite date of payment and I hope you will treasure the relationship and your reputation.
>
> I look forward to your positive reply.
>
> Regards,
>
> Eric

(b) On 4 April 2012, the defendant replied: "Eric, either way we will get it sort out and get it done. Will revert to you next week."

93 The plaintiffs' position is simple: all the e-mails between the parties (including the ones set out above) are genuine. Stephen agrees with the plaintiffs' position. On the other hand, the defendant challenges the genuineness of the e-mails and alleges that the contemporaneous documents showing that the loans were genuine and unpaid were deliberately created as a document trail because he had agreed to do all that was necessary to maintain the façade that the loans were outstanding and repayable. There is no independent evidence to corroborate his allegation. At the trial, the defendant took the position that there are four categories of e-mails that have been adduced: (a) genuine; (b) sham; (c) partly genuine and partly sham; and (d) e-mails that were solely between Eric and Stephen, on which the defendant said he could not comment.

94 The plaintiffs have referred me to the following comment made by the Court of Appeal in *Lim Koon Park v Yap Jin Meng Bryan* [2013] 4 SLR 150 at [76]:

> … It is always important to test witnesses' evidence against the objective facts and independent evidence. On the instant factual matrix, the e-mail correspondence between the parties is particularly persuasive because it is an objective record of the parties' respective positions and intentions prior to their wrangle.

95 However, it must be emphasised that every case turns on its own facts. Whether or not the contemporaneous e-mail records in each case is an accurate record of the parties' respective positions and intentions prior to their wrangle must depend on the facts of each case.

96 In the present case, it is particularly significant to bear in mind that there is an allegation of an overall sham that is said to have been set in motion right at the beginning of the parties' commercial relationship. It is in this context that the significance of the slew of contemporaneous e-mails showing TIPL and PPS as pre-IPO investors is to be assessed. The paperwork, according to the defendant, was part of the mechanism to create the façade of outstanding convertible loans.

97 In *Chng Bee Kheng* ([63] *supra*), Chan Seng Onn J cited with approval earlier authorities which held that the true question is whether the documents represented the true relationship between the parties. This in turn depends on whether the documents were intended to create legal relationships and whether the parties did actually act according to the apparent purpose and tenor of the documents. The authorities surveyed in *Chng Bee Kheng* include the decision of G P Selvam JC (as he then was) in *TKM (Singapore) Pte Ltd v Export Credit Insurance Corp of Singapore* [1992] 2 SLR(R) 858 and Belinda Ang Saw Ean J in *Koon Seng Construction Pte Ltd v Chenab Contractor Pte Ltd* [2008] 1 SLR(R) 375.

98 It follows that the court must be careful to avoid over relying on the objective intention as gleaned from the words of the documents in determining the question of sham. After all, if the sham is to be effective, the objective appearance must be taken as the reality. It follows that the test of whether the parties intend their agreement to be sham is subjective. What did the parties actually intend? For this reason, I agree with the comment of Chan Seng Onn J in *Chng Bee Kheng* case that the court may have regard to a wider category of evidence (beyond the documents themselves) such as the parties' subsequent conduct.

99 The key question is whether the e-mail exchanges are part of an elaborate and lengthy masquerade in which the plaintiffs were participating as part of the charade that was agreed upon at the outset.

100 I find that the sheer volume of contemporaneous e-mails between Eric, Stephen and the defendant as well as the subsequent conduct of the parties support the plaintiffs' case that the loans are genuine and unpaid. In particular, the subsequent conduct of the parties (including the engagement of debt collectors) also supports the objective impression created by the loan agreements as it strains belief that the engagement of debt collectors was also part of the façade.

101 In contrast, the defendant's evidence was uncorroborated, inconsistent, illogical and sometimes contradictory. When the flaws in his reasoning were pointed out, his explanations often appeared contrived and ill-founded. I will give a few examples.

102 On some occasions, the defendant appeared to be unsure, or even worse, lying about whether an e-mail was genuine or a sham. For instance, he claimed initially that his e-mail to Eric on 29 December 2010 was a

sham. In that e-mail, he said that he had issued a cheque drawn on his account with the Australian and New Zealand Bank ("ANZ Bank") for S$50,000 ("the ANZ Cheque") as Compensation Sum B and that in the event of a redemption, "KW" (presumably KhattarWong) advised that they needed to "follow documentation and time frame". Under cross-examination, he recanted his position and admitted that it was a genuine e-mail. It is clear from the e-mail that the defendant had spoken to KhattarWong about an event of redemption. There would be no need to discuss an event of redemption if the loans had already been repaid.

103 On other occasions, the defendant's position on whether the e-mail in question was genuine or sham was remarkably contrived. On 2 September 2011, Stephen e-mailed the defendant stating:

> Dear Kevin,
>
> *I want to be clear but fair with you. If Tronic and/or PPS extend their loan agreement for $1m and/or S$600k respectively, with 25% more upside, then the commission will be 7% of the S$1m and/or S$600k. If they extend the loans with 25% more upside and require more guarantor, the commission will be 5%.*
>
> I would also like you to reinstate the 3K per month retainer for all the time I have been spending in managing Tronic and PPS, from Nov 2010 when you stopped paying retainer. I have had to make time for you and your issues and will also be dealing with the XYY structuring. You will be getting my invoice soon, on this before I spend more time on XYY and other funding avenues.
>
> I think you do not have time and expertise to juggle between managing your listing and doing operations. I propose you to get me in as short term pre-IPO consultant for a minimum period of 6 months extendable until the end if [*sic*] the month if [*sic*] your listing date. My charge will be 12k a month (6months = 72k). And I will go into office two weekday afternoons a week to manage your listing. You have to provide me a private room with a confidential fAx [*sic*] so that I can do my job effectively to manage your listing with the professionals. I do not like to be tied down like this but I am offering you my time and freedom to manage your listing schedule. Please think carefully and don't be pennywise pound foolish.
>
> Thanks and take care
>
> Sent from iPhone
>
> Stephen B. Ang
>
> [emphasis added]

104 The defendant insisted that the first paragraph of the e-mail was sham and the rest of the e-mail was genuine. He claimed that this was Stephen's attempt to take advantage of him and to get more fees by asking him to knowingly enter into another fictitious agreement. His insistence on this position is unsurprising because if he conceded that the entire e-mail was genuine, it would be tantamount to an admission that the loans were genuine and unpaid. The defendant accepted that the entire e-mail talks

about Stephen's commissions and remuneration. He also agreed that his explanation that Stephen was attempting to get him to enter into another fictitious agreement did not make sense.

105 There is no reason why an e-mail that talks about one general theme of commissions and remuneration would be partly sham and partly genuine. The more reasonable explanation is that this entire e-mail is genuine. By genuine, what is meant is that the e-mail was not "created" as part of an elaborate masquerade to deceive third parties.

106 Another example of an e-mail that was said to be partly genuine and partly sham is the following e-mail that he wrote in response to Eric's request for MCPL's audited accounts for the last financial year and written confirmation from the Sponsor with regard to the delay of the listing:

> Yes we do have these. Let me obtain clearance from them before sending out to you.
>
> PS
>
> FYI your e-mail account has been classified as 'Spam' so some of your e-mail may not get thru, you may want to check with your service provider on your e-mail account.

107 The defendant initially classified the above e-mail as a sham. But he later admitted upon questioning that the second part of the e-mail (that is, the part alerting Eric to the spam mail classification) was genuine. It has been said that in time of war, the truth must be protected with a bodyguard of lies. It appears that the defendant in classifying some e-mails as comprising a mix of genuine and sham statements is trying to do the reverse: to protect the sham statements by dressing them up with genuine statements. In my judgment, looking at the e-mail and bearing in mind the number of e-mails, it was inconceivable that the e-mail was partly genuine and partly sham as alleged by the defendant. This would take the alleged sham to a new level of detail and sophistication where the recipient of the e-mail can identify with accuracy which parts of the e-mail were sham and which parts genuine and, thereafter, to act on those parts that were genuine.

108 In any case, the defendant went on to make the following concessions that effectively sounded the death knell for his case.

109 On 17 May 2012, the defendant wrote to Stephen and stated that the "total redemption sum should be S$2,025,000". Stephen replied to say:

> … Exactly. Can you pay these amounts without external funding by those dates? No dragging because when he redeems he has no more interest in Mactus listing and then if u don't pay in time he will have to act on it legally as he had other investors – then your listing is affected …

110 The defendant conceded that this was a genuine e-mail. I now set out his concession in full:

Q: Isn't this a genuine e-mail, Mr Tan?

A: Yes, yeah.

Q: Clear reference to you having to pay amounts of money to Tronic and PPS, correct?

Yes?

A: Yes.

Q: Express reference to the fact that when the loans are redeemed, Eric Poh will have no more interest in Mactus listing, which is true, correct?

A: Yes.

Q: Clear reference to the fact that if you don't pay in time, Eric Poh will have to act on it legally, correct?

A: Yes.

Q: Which is what my clients are doing in this consolidated action, yes?

A: Yes.

111 Likewise, he conceded that the following e-mail dated 29 May 2012 from Eric to the defendant was genuine:

> This is to confirm our discussion last Friday at our office as follows:
>
> 1 Mactus is not ready for IPO by June 30, 2012;
>
> 2 Kevin Tan is going to redeem both convertible loans from Tronic Holdings and PPS Capital;
>
> 3 The convertible loan amount from Tronic Holdings is S$1.25M plus S$125K = S$1.375M, from PPS Capital is S$750K plus S$75K = S$825K, both loan agreements add up = S$2.2M;
>
> 4 Take note that you have 30 days to make payment after June 30, 2012;
>
> 5 Kevin Tan will arrange S$50K outstanding compensation sums to PPS Capital, however, since the loan is going to be redeemed and this amount is long overdue, please settle it soonest before the redemption or addition % interest will be applied.

112 The concessions are clear evidence that the loans were genuine and unpaid. Having made these concessions, the defendant's case that the loans were fictitious falls apart instantly. Furthermore, from 29 May 2012 onwards, by the defendant's evidence, the relationship between the parties had already broken down and there was no longer a need to maintain any façade. Eric continued to chase for payments and even appointed debt collectors for that purpose. However, there was complete silence on the defendant's part. Had he believed that the loans were fictitious and were fully repaid, he would presumably have responded by saying so. He did not.

113 For the above reasons, I am inclined to believe the plaintiffs' case that there exist genuine loans that remain outstanding to date.

Contractual agreements

114 The CLAs are *prima facie* evidence that genuine loans exist. That said, a point of contention arose between the parties as to whether the omission of the repayment of the Tronic and PPS Principal Convertible Loans from the Tronic and PPS CLAs respectively was a genuine omission, or one intended to facilitate the operation of the scheme alleged by the defendant.

115 The said omission was found in cl 5.1A of the Tronic and PPS CLAs which provides:

> Further, in the event that the Company obtains a listing on Catalist pursuant to the IPO, the Borrower shall pay to the Lender the Compensation Sum A, within 45 days of the date of listing on the Catalist. *For the avoidance of doubt, the parties agree that no Compensation Sum A* [ie, the principal loan amount] *shall be payable should the Company not obtain a listing on Catalist.* [emphasis added]

116 The defendant seeks to persuade this court that contrary to Eric's claims that the CLAs had erroneously failed to provide for the defendant's obligation to repay the loans upon failure to list by 31 December 2010, the converse is true. The loan amount was to be repaid (secretly) immediately upon payment as part of the sham.

117 To this end, the defendant argues first that the loans were thoroughly negotiated and given the substantial sums involved, it is hard to believe that the solicitors on the file would inadvertently "miss out" the crux of the CLAs, *ie*, the repayment of the loans. The defendant also argues that it would be illogical for the plaintiffs to continue engaging the same solicitors to assist in the drafting of the supplemental agreements if the solicitors had made such a grave error in the drafting of the Tronic and PPS CLAs.

118 The solicitors in question were not called to give evidence at the trial.

119 On balance, I am not inclined to place much weight on the omission. For a start, whilst the words of cl 5.1A are clear – that there will be no repayment of the principal loans in the event that the listing does not succeed – it is undisputed that the parties later executed supplemental agreements to rectify the omission. This, in my judgment, negates the significance of the omission. There would be no reason for the parties to rectify the omission if they had intended the omission from the very beginning. Further, an express provision that the principal loan would not be paid runs against a recurring theme in the defendant's case – the need to avoid detection of the alleged scheme. It would certainly have raised eyebrows if the auditors or the stakeholders in the plaintiff-companies realised the implication of what was provided in cl 5.1A.

120 In short, I am of the view that the existence of cl 5.1A in the original agreements does not undermine the plaintiffs' case that the loans are genuine and unpaid.

Third-party guarantee

121 It is undisputed that the defendant procured third parties to act as guarantors *vis-à-vis* the CLAs. I agree with the plaintiffs' submission that it would have been completely unnecessary to have a third-party guarantor if there was no loan and the alleged Tronic Group was supposed to get the shares simply for assisting MCPL in the Listing Exercise. The more reasonable explanation as to why Eric requested for a third-party guarantor is that the parties were discussing a genuine transaction.

Concluding remarks on whether the loans were fictitious

122 Besides the documentary evidence referred to above, clear evidence that the loans are genuine and unpaid may also be found in various audit confirmations signed by the defendant confirming the existence of genuine and unpaid loans, as well as the parties' financial statements. In my view, the preponderance of documentary evidence strongly points towards the existence of loans that are genuine and unpaid.

Whether the loans were repaid

123 Leaving aside the basic defence that the loan transactions were shams, the crux of the defence is that the monies owed under the CLAs were in fact paid by the defendant on the occasions that he claimed he did. The strongest evidence in favour of the defendant's case are: (a) a payment voucher which states that the loan extended by TIPL had been fully returned; and (b) an SMS exchange between Stephen and the defendant suggesting that there was an exchange of monies between the parties in relation to the alleged repayment of the PPS Supplemental Convertible Loan.

124 I turn now to assess the veracity of the defendant's assertions of repayment in view of the evidence that was elicited at the trial.

Cash repayments

125 The defendant adduced bank statements which show cash withdrawals corresponding with the sums that he allegedly repaid on the relevant dates. The defendant also points to Stephen's evidence which suggests that the latter bore witness to more than one such cash payment. In particular, the defendant has adduced evidence of an SMS sent by Stephen to him dated 4 June 2011 stating:

> On Monday, PPS will give you a cheque for 100k and you give Eric a cash cheque for 100k. On wed or thur u give him 100k cash and he returns u the cash cheque. This is for the pps side agreement to be signed on Monday.

126 According to the defendant, this SMS shows that PPS 2SA was fictitious because the S$100,000 (being the PPS Supplemental Convertible Loan) was repaid shortly after it was disbursed by PPS. Notably, the SMS

was sent on 4 June 2011 and the "Monday" that was referred to in the SMS was 6 June 2011, the date on which PPS 2SA was signed. The defendant alleges that S$100,000 in cash had indeed changed hands from the defendant to Eric on 8 June 2011, the Wednesday that was referred to in the same SMS and cites, in support of his assertion, Stephen's evidence that S$100,000 of cash was handed over by the defendant to Eric on 8 June 2011. The defendant has also adduced evidence of a secret recording in which Stephen was allegedly shocked to learn of Eric's denial that the defendant had made cash repayments to him.

127 Against that, the plaintiffs contend that the bank statements are insufficient to prove that the cash that was withdrawn on those dates was indeed applied for the purposes of discharging the defendant's repayment obligations under the CLAs. For instance, there is evidence of a S$300,000 cash deposit into another bank account belonging to the defendant on the same day that the defendant claims to have withdrawn and paid S$300,000 in cash to Eric. The plaintiffs also rely on Stephen's evidence that the cash repayments, even if they were made, had nothing to do with the CLAs. Pertinently, in relation to the alleged repayment of S$100,000 on 8 June 2011, Stephen's evidence is that the arrangement is not for the redemption of any of the loans.

128 Whilst I accept that some cash payments may have been made by the defendant to Eric, it does not necessarily follow that those payments were related to the CLAs or that similar cash repayments on the various other occasions were made. In saying this, I note that the evidence on the cash payments was "thin". Stephen had difficulty in recalling with precision the specific details concerning each cash payment made between 2010 and 2011. It appeared that his answers to questions posed by the defendant's counsel were rather tentative and guided primarily by the documents that were placed before him.

129 Further, Stephen's evidence did not unequivocally point to the conclusion that the cash was handed over for the purpose of repaying the loans. It is unclear whether the cash repayments mentioned in the secret recording were for the Show Assets or the CLAs. Also, even though Stephen agreed with the suggestion that he had accompanied the defendant to pass cash to Eric on various occasions, he maintained throughout his evidence that these cash payments were not in any way connected with the CLAs. He then confirmed that the CLAs were genuine loan agreements that were unpaid:

> Q: … If you look at paragraph 9 of this defence, Kevin Tan pleaded that pursuant to this scheme – so its linked to this convertible loan – a sum of S1 million was repaid by him to TIPL, and then he pleads for this when the S$1 million was repaid.
>
> My instructions are that none of these alleged repayments took place. Do you agree or disagree? …

A: You mean – repayment to the convertible loan?

Q: Yes.

A: I agree, yes.

…

Q: My client's position is that all these loan agreements are genuine agreements and the loans are genuine and unpaid. Do you agree or disagree?

A: Yes, I agree.

130 Stephen's evidence that he witnessed cash passing between the defendant and Eric – when Eric completely denied these cash payments – is a point which I found troubling. At the very least, it raised a question over Eric's credibility. Nevertheless, looking at the evidence as a whole, I prefer the position of the plaintiffs and Stephen that there were no cash repayments made for the purpose of discharging the defendant's repayment obligations under the CLAs.

Cheque repayment of S$100,000

131 It is common ground between the parties that the defendant gave Eric an OCBC cheque dated 7 September 2011 for S$100,000 together with other cheques that were not banked in. Further details of these cheques were set out above. Eric claims that the S$100,000 cheque was for payment of the Tronic Compensation Sums B and C whereas the defendant says that the S$100,000 cheque was part of the repayment of the Tronic loan.

132 I do not accept that the cheque was part of the repayment of the Tronic loan. For a start, the defendant's assertion that the cheque was intended as repayment of the Tronic loan is contrary to his entire case which is that the alleged repayments were deliberately made in cash so as to avoid leaving behind any "paper trail" which would jeopardise the scheme. Critically, he consciously chose not to document those cash repayments. It thus beggars belief that the defendant would later effect a partial repayment of the Tronic loan by way of a cheque since the cheque itself would form a "paper trail" that he so desperately wanted to avoid.

133 During re-examination, the defendant explained that the payment was made by cheque to give confidence to TIPL's auditors that he (the borrower) had the ability to pay. I find it extremely difficult to accept his explanation. Had the parties intended the S$100,000 cheque payment to reduce the defendant's loan obligations to paper, there must have been a corresponding written record stating that TIPL would be entitled to a reduced value of shares upon MCPL's listing. Otherwise, TIPL would still be entitled to S$3m worth of shares upon MCPL's listing (notwithstanding the S$100,000 repayment) and this would have unnecessarily aroused the suspicion of the relevant parties. There was no such record.

134 Therefore, I prefer Eric's evidence on this point and I accept that the S$100,000 cheque was intended as payment of the Tronic Compensation Sums B and C.

Set-off

135 The defendant asserts that S$100,000 of the PPS Principal Convertible Loan was repaid by way of a set-off against a debt of S$150,000 owed by ARG to Carrindon.

136 I do not accept his assertion. First, I have found that there was no "Tronic Group" as alleged by the defendant. It would be illogical to set off part of the PPS Principal Convertible Loan against a debt owed by ARG to Carrindon. Second, the defendant admitted that TIPL could not sell the Show Assets to Carrindon because the Show Assets had been sold to ARG. It necessarily follows that the sale of the Show Assets from Carrindon to ARG was a sham transaction. If that is so, it is inconceivable that ARG would end up owing Carrindon S$150,000 for a sham purchase of the Show Assets.

137 I note also that the defendant does not even know when the parties agreed to this alleged set-off and when that alleged set-off was performed. Further, he had no real answer when asked why he would have voluntarily given up S$50,000 in the process of an alleged set-off.

Payment voucher

138 Finally, the defendant also has adduced evidence of a payment voucher ("the Payment Voucher") which bears the following description: "loan already fully returned. Cheque for show only to support Tronic audit trail. (Do not post entry)". This Payment Voucher was allegedly signed by one Goh Kim Hock who collected the ANZ Cheque that was made in favour of TIPL.

139 According to the defendant, he passed the ANZ Cheque to his employee, Eilyn Chen, and informed her that someone from the alleged Tronic Group would collect the said cheque. He then left the arrangements relating to the delivery of the ANZ Cheque to Eilyn Chen and believed that Eilyn Chen subsequently passed the ANZ Cheque to Guo Pei Pei, the receptionist of Mactus and instructed her accordingly.

140 The ANZ Cheque was provided pursuant to an e-mail exchange between the defendant and Eric on 28 December 2010. The defendant agreed under cross-examination that he could only have told Eilyn Chen about the arrangement regarding the ANZ Cheque after that e-mail exchange on 28 December 2010. Prior to that exchange of e-mails, arrangements had not been made for the collection of any cheque and the defendant did not know who from the alleged Tronic Group was going to pick up the cheque.

141 The plaintiffs have filed a notice of non-admission of authenticity disputing the authenticity of the Payment Voucher, the consequence of which is that the defendant is put to strict proof. The plaintiffs contend that the Payment Voucher was manufactured or caused to be manufactured to support the defendant's false case about repayment of the loans.

142 There are a few irregularities in the Payment Voucher. First, the date of the Payment Voucher is 7 December 2010. The defendant claims that his staff could have forgotten to change the date. Arguably, his staff may have forgotten to change the date on the Payment Voucher whilst modifying a previous payment voucher. However, it is strange that the defendant never thought to raise this point in his pleadings or AEIC and his explanation only surfaced at the trial.

143 Second, the payment voucher was from MPL and the defendant conceded that he did not explain why it was so when the ANZ Cheque was a personal cheque from him.

144 Third, whilst Guo Pei Pei may have filed an interlocutory affidavit to attest to the authenticity of the Payment Voucher, I note that she was not called to give evidence in this trial in person or by affidavit. If the Payment Voucher is authentic, this is a critical piece of evidence that points strongly in favour of the defendant's case. But for reasons best known to him, the defendant did not call her as a witness despite bearing the burden to prove the authenticity of the Payment Voucher. To be fair, I note that the plaintiffs have not called Goh Kim Hock as a witness as well.

145 Finally, I note the plaintiffs' submission that the existence of the Payment Voucher went against the grain of the defendant's case which was that he was desperately trying to avoid leaving a paper trail in relation to the alleged full repayment of the loans. This was the defendant's explanation under cross-examination:

> Q: Let me bring you to the heart of the scheme. The heart of the scheme is to do all that was necessary to maintain this façade that the loans remained outstanding, correct?
>
> A: Yes.
>
> Q: And to do all that was outstanding, you went to the extreme extent of lying to your sponsors, your own lawyers, your in-house counsel, your financial controller. That's your position isn't it?
>
> A: Yeah.
>
> Q: So, assuming your assertion about doing all that was necessary to maintain the façade, then there would have been no reason why this Payment Voucher would be created, because this is the paper trail that you wanted so desperately to avoid, isn't it?
>
> A: Yeah, but that's December, you see, December we are – I think December that time I'm trying to get out already, this whole thing.

146 Significantly, this was the first time the defendant alleged that he wanted to get out of the whole scheme of things and that he was already slowing down on the Listing Exercise. This allegation was astonishing because it is completely at odds with the other aspects of the defendant's evidence. For one, the defendant was still continuing to reassure Eric that the Listing Exercise was progressing even in February 2011. This is evidenced by an e-mail that the defendant conceded to be genuine. Further, in his affidavit of evidence-in-chief, the defendant was still pushing for the Listing Exercise to proceed in June 2011. Under cross-examination, he admitted that his allegation that he wanted to slow down the Listing Exercise by the end of 2010 contradicted his own prepared evidence. In my view, the defendant appeared to be making up evidence as he went along and his explanation is thus rejected.

147 For the foregoing reasons, I find that the defendant has not sufficiently discharged its burden of proving the authenticity of the Payment Voucher and accordingly, I decline to place weight on the Payment Voucher.

Concluding remarks about the alleged repayments

148 To conclude, I have found that:

(a) Whilst there may have been some cash payments made by the defendant to Eric, there is no evidence that unequivocally points to the conclusion that the payments were made to discharge the defendant's repayment obligations under the CLAs. Indeed, it is noted that Stephen's evidence was that the payments had nothing to do with the CLAs.

(b) The cheque repayment of S$100,000 was for Tronic Compensation Sums B and C, and not a partial repayment of the Tronic Principal Convertible Loan as alleged by the defendant.

(c) The defendant's allegation of a set-off of S$100,000 was illogical and therefore rejected.

(d) The defendant did not discharge his burden of proving the authenticity of the Payment Voucher.

149 For these reasons, I find that the defendant has not discharged its legal burden of proving that there were indeed repayments to the plaintiffs that discharged his repayment obligations under the CLAs.

Overall evaluation of the witnesses

150 Before leaving this issue, I would like to make a few general comments about the evidence given by the witnesses at the trial, namely, Eric, Derek, Stephen and the defendant.

151 In making these comments, I am reminded of the dangers of relying excessively on the demeanour of witnesses. In *Sandz Solutions (Singapore) Pte Ltd v Strategic Worldwide Assets Ltd* [2014] 3 SLR 562, the Court of Appeal stated at [43]:

> Findings on demeanour often relate to the fluency (or hesitation) of a witness, his steady or shifting gaze, his body language and the like. *A great deal of caution should be exercised by the trial judge when placing reliance on these factors alone to find a witness untruthful.* In this regard, it is important to remember the context in which evidence is given in court – the witness is under intense scrutiny of the judge and is also under pressure to answer counsel's questions; even truthful witnesses may wilt and display discomfort in such circumstances. [emphasis added]

152 The Court of Appeal at [56] added that a witness should not be found to be less credible merely because of gaps in his memory especially where a long time has elapsed. The duty of the court is to consider the totality of the evidence in determining the veracity, reliability and credibility of a particular witness' evidence. The totality of the evidence will of course include contemporaneous objective documentary evidence.

153 Eric and Derek were forthcoming about the fact that they lied about the Carrindon-ARG agreements. That said, their complete denial of receiving cash payments from the defendant which was contradicted by documentary evidence (of the SMS sent by Stephen to the defendant on 4 June 2011) and Stephen's evidence in general has been noted earlier. This evidence whilst tending to undermine their general credibility has to be assessed in relation to the complicated dealings between the parties that started with the acquisition of the Show Assets that has been described above. To be clear, the defendant has not satisfied me that any payments in cash were in respect of the CLAs.

154 The defendant's demeanour was aggressive and bordered, at times, on rudeness to counsel. He claimed that it was his "commercial ignorance which led [him] to become a party to this Scheme without any formal documentation to record the true intentions of the parties" and that he "would never have thought that [Stephen and Eric] would take advantage of [his] naivety". This must be assessed against the backdrop of objective facts. Bearing in mind that the defendant has so many businesses and companies operating regionally, his plea of commercial ignorance strains his credibility. Even taking into account my observations on the evidence of Eric, the defendant's overall credibility was very poor. When asked when he first approached Prime Partners, the defendant answered: "Oh I know Prime for many years." When cross-examined on the role of Prime Partners and Mark Liew, the defendant agreed that he was not alleging that Prime Partners and Mark Liew were involved in the sham. Indeed, it bears repeating that the defendant had elected to accept Mark Liew's evidence without cross-examination. And yet when referred to Mark Liew's evidence

that the plaintiffs did not play any role or part at all during the entire listing process, save for being represented as pre-IPO investors by the defendant, his response was a terse: "He has to say like that, then what else you want him to say. Mark Liew is a professional, he has to say like that, that's the reality if things." Thereafter, in response to a direct question, the defendant stated that he (unreservedly) was not suggesting that Mark Liew was lying. After further questioning, the defendant agreed that based on his version of what had happened: they had all lied to Mark Liew and Prime Partners.

155 The defendant claims that he lied to Prime Partners, to his in-house counsel, to KhattarWong and to the financial controller. When he was cross-examined on an e-mail sent by a Mactus employee attaching an audited report for 2007, the defendant asserts that this e-mail was also sham and part of the elaborate paper trail. The defendant claimed that the employee who sent the e-mail was unaware of what was going on. His explanation was that "the whole façade is get as many people in the company to be aware of these things going on". The defendant added that whilst his claims sound unbelievable and incredible, they were true. He also admits to taking the benefit of the sham sale by TIPL to Carrindon and then to ARG to further dress up the books of MCPL.

156 One key plank of the defendant's case is that the deals could not have been genuine given that the Eric and the defendant had just met shortly before the plans for the deals were hatched. In the same tenor, why would the defendant, after meeting Eric for just a few weeks, be prepared to go into such a complicated series of fictitious deals? Further, why would he be prepared to pay S$3m to TIPL/PPS for the plaintiffs' or Eric's general help and advice on top of payments to the professional advisers that were already engaged for the Listing Exercise?

157 After the relationship between the parties broke down, the defendant made no attempt to articulate the "fiction" in the deals. He did not approach Eric directly to unwind the deal and protest the claims. Neither did he protest even when Eric appointed debt collectors to demand the repayment of the loans. How could he possibly have felt that the appointment of debt collectors was also part of the façade when he was already having so many doubts and the relationship between the parties had already deteriorated?

158 The defendant also appeared to be making things up as he went along to extricate himself from difficult positions. That much was clear from the inherent inconsistencies and the loopholes in his evidence. Bearing in mind the defendant's legal burden of proving that the CLAs were intended by the parties to be fictitious, his evidence was clearly insufficient to discharge that burden.

159 Overall, whilst some aspects of the evidence of Eric, Stephen and Derek were fuzzy and poor, their version of events on the whole was more

credible than the defendant's. All the contemporaneous documents and e-mails are consistent with the plaintiffs' case. The plaintiffs were prepared to concede that the Carrindon deal was improper. Stephen's evidence on the whole is consistent with the plaintiffs' save in respect of the cash repayments that he claimed to have witnessed. Mark Liew's evidence supports generally the plaintiffs' position that they were genuine pre-IPO investors.

160 Although the defendant has alleged that many of the e-mails were sham, or staged for the purposes of creating a "paper trail", his evidence was poor. The language and tone of many of the e-mails (some of which have been set out above) strongly ring true – if they were staged – the degree of coordination, planning and sheer dogged effort defies belief.

Whether the compensation sums amounted to penalties

161 Bearing in mind my finding that the monies owed under the CLAs have not been paid by the defendant, I now turn to the issue of whether the compensation sums prescribed thereunder amount to penalties.

162 It is a longstanding rule that clauses *providing for remedies upon breach* are unenforceable if they amount to penalties. The preliminary question that arises is whether the clauses provide for remedies upon breach (*ie*, secondary obligations). According to *Halsbury's Laws of Singapore* vol 7 (LexisNexis, 2014) at para 80.573:

> The inquiry whether a provision is penal is only relevant when it is a sum payable upon breach. Where the stipulated sum is payable upon other events (eg, exercise of a right to terminate), it is not susceptible to invalidation on the ground that it is a penalty clause.

163 I pause here to note the distinction between claims for payment of a debt and claims for damages – the former being a primary obligation and the latter being a secondary obligation that arises upon breach. The following passage from *Chitty on Contracts* vol 1 (Hugh Beale gen ed) (Sweet & Maxwell, 31st Ed, 2012) at para 21-041 explains the position:

> There is an important distinction between a claim for payment of a debt and a claim for damages for breach of contract. *A debt is a definite sum of money fixed by the agreement of the parties as payable by one party in return for the performance of a specified obligation by the other party or on the occurrence of some specified event or condition*; whereas, damages may be claimed from a party who has broken his primary contractual obligation in some way other than by failure to pay such a debt. (It is also possible that, in addition to a claim for a debt, there may be a claim for damages in respect of consequential loss caused by the failure to pay the debt at the due date.) The relevance of this distinction is that rules on damages do not apply to a claim for a debt, e.g. the claimant who claims payment of a debt need not prove anything more than its performance or the occurrence of the event or condition; there is no need for it to prove any actual loss suffered by it as a result of the defendant's

> failure to pay; the whole concept of the remoteness of damage is therefore irrelevant; *the law on penalties does not apply to the agreed sum*; and the claimant's duty to mitigate its loss does not generally apply. [emphasis added]

164 It thus follows that it is necessary to distinguish conditional primary obligations from secondary obligations before invoking the rule against penalties. The basic distinction between primary and secondary obligations is set out in the seminal decision of the House of Lords in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 ("*Photo Production*"). Primary obligations are the legal obligations imposed upon each party to the contract to procure whatever he has promised to do: that what is promised to be done, will be done. A breach of the primary obligation leads to the secondary obligation to pay monetary compensation for the loss sustained by the other party in consequence of the breach.

165 This distinction appears to have made its way into Singapore law subsequently. In *Chia Kok Leong v Prosperland Pte Ltd* [2005] 2 SLR(R) 484 at [29], the Court of Appeal endorsed Lord Millett's speech in *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 which applied the distinction between primary and secondary obligations. Further support for this distinction may be found in *Emjay Enterprises Pte Ltd v Skylift Consolidator (Pte) Ltd* [2006] 2 SLR(R) 268 at [13] in which the High Court accepted Lord Diplock's exposition on this point in *Photo Production*. In *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at para 20.048, it is noted that although the Court of Appeal has not directly and expressly dealt with the issue, the distinction was impliedly accepted as good law in *Sun Technosystems Pte Ltd v Federal Express Services (M) Sdn Bhd* [2007] 1 SLR(R) 411 at [20].

166 The importance of the distinction is that the penalty rule does not apply to a primary obligation to pay an agreed sum. The penalty rule strikes at clauses which provide that, upon *breach* of a primary obligation, a secondary obligation arises on the part of the party in breach to pay a sum of money that does not represent a genuine pre-estimate of the loss likely to be sustained as the result of the *breach* of the primary obligation but, rather, an amount that is substantially in excess of that sum: *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] 2 AC 694 at 702.

167 The distinction between a primary obligation to pay a sum of money and secondary obligations was considered in the context of the application of the penalty rule in *Cavendish Square Holding BV v Makdessi* [2016] BLR 1 ("*Cavendish*"). The UK Supreme Court at [13] underscored the principle that the penalty rule only regulated remedies available for breach of a party's primary obligations, not the primary obligations themselves. The following passage at [14] from the judgment is instructive:

> [I]n some cases the application of the penalty rule may depend on how the relevant obligation is framed in the instrument, ie whether as a conditional primary obligation or a secondary obligation providing a contractual alternative to damages at law. Thus, where a contract contains an obligation on one party to perform an act, and also provides that, if he does not perform it, he will pay the other party a specified sum of money, the obligation to pay the specified sum is a secondary obligation which is capable of being a penalty; but *if the contract does not impose (expressly or impliedly) an obligation to perform the act, but simply provides that, if one party does not perform, he will pay the other party a specified sum, the obligation to pay the specified sum is a conditional primary obligation and cannot be a penalty.* [emphasis added]

168 Whilst this point was not directly raised by the parties, the first issue must be whether the provision for repayment at hand is in the nature of a primary obligation or whether it is a clause that attempts to deal with the secondary obligation to pay damages for the breach of primary obligations.

169 Returning to the case at hand, these are loan agreements with an *option* to convert the loan into shares should the listing succeed. The relevant clause in the Tronic 2SA states:

> 2.3 In the event that the Company cancels its plans for the Listing or the Company is not listed by the further extended date of **30 June 2012** for any reason whatsoever, or suffers a Material Adverse Effect, the Borrower shall repay to the Lender the Convertible Loan of S$1,250,000 and an additional sum of Singapore Dollars One Hundred and Twenty-Five Thousand Only (S$125,000.000) within 30 days of the agreed cut-off date of **30 June 2012**.
>
> 2.4 If the Company proceeds to List, the Lender shall be entitled by notice to the Borrower at any time before the date of Listing to either elect for conversion of the Convertible Loan and the conversion shall take place in accordance with Clauses 3 and 8 of the Principal Agreement as amended herein under Clause 2.9 and 2.10, or to demand the repayment of the Convertible Loan and payment of an additional sum of Singapore Dollars One Million Two Hundred and Fifty Thousand Only (S$1,250,000.00) (hereinafter referred to as 'Compensation Sum D') whereupon the Borrower shall repay to the Lender the Convertible Loan within 30 days of the Lodgement Date and pay the Compensation Sum D to the Lender within 30 days of the Listing of the Company.
>
> [emphasis in original]

170 The relevant clause in the PPS 3SA states:

> 3.3 In the event that the Company cancels its plans for the Listing or the Company is not Listed by the further extended date of **30 June 2012** for any reason whatsoever, or suffers a Matter Adverse Effect, the Borrower shall repay to the Lender the Convertible Loan of $750,000 and an additional sum of Singapore Dollars Seventy-Five Thousand Only (S$75,000.00) within 30 days of the agreed cut-off date of **30 June 2012**.

> 3.4 If the Company proceeds to List, the Lender shall be entitled by notice to the Borrower at any time before the date of Listing to either elect for conversion of the Convertible Loan and the conversion shall take place in accordance with Clauses 3 and 8 of the Principal Agreement as amended herein under Clause 3.9 and 3.10, or to demand the repayment of the Convertible Loan and an additional sum of Singapore Dollars Seven Hundred and Fifty Thousand Only (S$750,000.00) (hereinafter referred to as 'Compensation Sum D') payment of whereupon the Borrower shall repay to the Lender the Convertible Loan within 30 days of the Lodgement Date and pay the Compensation Sum D to the Lender within 30 days of the Listing of the Company.
>
> [emphasis in original]

171 Put simply, the bargain between the parties was this. The plaintiffs were to loan the defendant the specified sum. In the event that the defendant succeeded in his attempt to list MPCL, the plaintiffs could elect to convert the loans into $3m of shares. Should they decline to do so, they could demand the repayment of the principal sum and Additional Sums (that were termed "compensation sums") that were specified in the CLAs.

172 Notwithstanding the use of the expression "Compensation Sum", I am of the view that the "compensation sums" were not stipulated as a remedy for a breach of a primary obligation. Listing on the stock exchange is a complex exercise and requires the sanction and approval of the regulators. There is a range of reasons behind the failure of each listing exercise and not all may be within the control of the parties. Here, the CLAs do not impose any obligation on the defendant (whether expressly or impliedly) to procure MCPL's listing by 30 June 2012. Since there is no obligation to list, it necessarily follows that MCPL's failure to list by 30 June 2012 is *not* an event of breach. Accordingly, the defendant's repayment obligation is not a secondary obligation since it does not arise upon an event of breach.

173 In my judgment, the defendant's repayment obligation under cll 2.3 and 3.3 of Tronic 2SA and PPS 3SA respectively is better characterised as a *conditional primary obligation* which crystallises upon the occurrence of an event, that is, the failure of MCPL to list by 30 June 2012. In the event that the Listing Exercise fails to take place by 30 June 2012, the CLAs revert to simple loan agreements under which the defendant is contractually obligated to repay what he has borrowed. Seen in this context, it is evident that the Additional Sums were intended as interest to compensate – even if rather generously – the plaintiffs for the loss of use of money (*ie*, the cost of money) between June 2011 and June 2012. Thus, the Additional Sums constitute part of the primary obligation of the defendant to repay the debt he owed to the plaintiffs. In the circumstances, the rule against penalties does not bite since the defendant's repayment obligations under cll 2.3 and 3.3 of Tronic 2SA and PPS 3SA are primary obligations.

174 Nevertheless, the parties did not raise the question as to whether the payment clause was a primary or secondary obligation. In the event that I am wrong (and the clauses do deal with payments for *breach* of primary obligations) I am not persuaded that the Additional Sums are so exorbitant or excessive that they ought to be struck down as penalties.

175 In *Xia Zhengyan v Geng Changqing* [2015] 3 SLR 732, the Court of Appeal at [78] affirmed that the basic principles applicable to the question whether a sum is void as being a penalty remain those set out in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 ("*Dunlop Pneumatic*"). Whilst I note that the UK Supreme Court has recently, in the case of *Cavendish* ([167] *supra*), re-defined the test for penalties, Lord Dunedin's four tests in *Dunlop Pneumatic* was said to be adequate and applicable in cases involving straightforward damages clauses: *Cavendish* at [32].

176 It is not necessary to set out or review in detail the principles in relation to the rule against penalties. It suffices to highlight some key points. The sum will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in comparison with the greatest loss that could reasonably or proved to have followed from the breach: see Edwin Peel, *Treitel: The Law of Contract* (Sweet & Maxwell, 13th Ed, 2011) at para 20-139. That said, it has been held that a clause will not become a penalty simply because it "results in overpayment in particular circumstances" and that "[t]he parties are allowed a generous margin" to determine the agreed damages to be payable upon breach: *Murray v Leisureplay plc* [2005] EWCA Civ 963 at [43].

177 More importantly, in a negotiated contract between properly advised parties of comparable bargaining power, the strong initial presumption must be that the parties themselves are the best judges of what is legitimate in a provision dealing with the consequences of breach: *Cavendish* at [35]. It is not for the courts to relieve a party from the consequences of what may prove to be an onerous or possibly even a commercially imprudent bargain: *Export Credits Guarantee Department v Universal Oil Products Co* [1983] 1 WLR 399 at 403.

178 In the present case, the defendant's assertion that he was in a weaker bargaining position *vis-à-vis* the plaintiffs was unsubstantiated. As pointed out by the plaintiffs, the loan agreements were thoroughly negotiated with the advice of solicitors. The Additional Sums are 10% of the corresponding loan amounts. The defendant has not placed before me any material suggesting that such an "interest rate" is wildly out of proportion to those imposed on comparable loans of such nature. Thus, I would not be prepared to accept the defendant's contention that the Additional Sums amount to penalties *even if* I had found earlier that they were remedies that were to be paid upon breach.

179 Indeed, it has to be said that if the defendant had succeeded in listing MCPL, the plaintiffs had a contractual option to convert the loans into shares of an amount that was double the value of the loans. When compared to the value of shares that the plaintiffs would have obtained had the listing succeeded, the Additional Sums required to be paid if the listing plans fell through are not extravagant and unconscionable.

Conclusion

180 For the foregoing reasons, the plaintiffs' claims are allowed with costs to be taxed if not agreed.

181 As a postscript, the court wishes to place on record its appreciation for counsel's helpful submissions.

Reported by Yeo Gek Min.