IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC(I) 14

Suit No 10 of 2018

Between

(1) Beyonics Asia Pacific Limited
(2) Beyonics International Limited
(3) Beyonics Technology (Senai) Sdn Bhd
(4) Beyonics Technology Electronic (Changshu) Co., Ltd
(5) Beyonics Precision (Malaysia) Sdn Bhd

… *Plaintiffs*

And

(1) Goh Chan Peng
(2) Pacific Globe Enterprises Limited

… *Defendants*

JUDGMENT

[Abuse of Process] — [*Henderson v Henderson* doctrine]
[Companies] — [Directors] — [Duties]
[Employment Law] — [Contract of service] — [Termination]

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Beyonics Asia Pacific Ltd and others
v
Goh Chan Peng and another

[2020] SGHC(I) 14

High Court — Suit No 10 of 2018
Simon Thorley IJ
13–17, 20–22, 28–30 January, 3–5 February, 20 March 2020

28 May 2020 Judgment reserved.

Simon Thorley IJ:

Background

1 Mr Kyle Arnold Shaw Junior ("Mr Shaw") is a successful private equity investor. He is a graduate of the University of Virginia and of the Wharton School of the University of Pennsylvania. Some 30 years ago, he was involved, together with two colleagues, Mr S. L. Choi and Mr Andy Kwei, in the purchase of the Asian business of a company called Flextronics. The chief financial officer of that business was Mr Goh Chan Peng, the first defendant ("Mr Goh"). Mr Shaw worked closely with Mr Goh and the business flourished. Mr Shaw concluded as a result that Mr Goh was a "straightforward guy".[1]

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[1] T1/206/5–207/5.

2 In early 2000, Mr Goh was approached by Mr Chay Kwong Soon ("Mr Chay"), the Chairman of the parent company of the Beyonics group of companies (the "Beyonics Group" or "Beyonics") of which the five plaintiffs are subsidiaries. Mr Chay invited Mr Goh to become the chief executive officer ("CEO") of the Beyonics Group. Mr Goh left Flextronics and on 1 May 2000 was appointed CEO of the Beyonics Group. He remained CEO until 30 April 2013.

3 The Beyonics Group consisted of two manufacturing divisions, the Precision Engineering Services ("PES") Division and the Electronic Manufacturing Services ("EMS") Division. Amongst other things, the PES Division manufactured and sold baseplates for hard disk drives ("HDDs") destined for end customers, such as Seagate, Hitachi and Western Digital. The dispute in this action concerns the PES Division, specifically, the baseplate manufacturing business.

4 At the time of the matters giving rise to the dispute, the parent company of Beyonics was called Beyonics Technology Ltd ("BTL"). The first plaintiff ("BAP"), the fourth plaintiff ("BTEC"), the fifth plaintiff ("BPM") and a further subsidiary, Beyonics Technology (Thailand) Co Ltd ("BTT"), were part of the PES Division. BTEC owned and operated a baseplate manufacturing facility in Changshu, China; BPM owned and operated a baseplate facility in Tampoi, Malaysia; and BTT owned and operated a baseplate facility in Ayutthaya, Thailand. BAP did not own or operate any such facility but was the sales company for the baseplates manufactured by BTEC, BPM and BTT. The second and third plaintiffs ("BIL" and "BTS") are also subsidiary companies of BTL but are not part of the PES division. I refer to these companies collectively as the "Plaintiffs".

5 By 2010, Mr Shaw had become a partner in an independent private equity fund manager, Shaw Kwei & Partners ("SKP"), based in Hong Kong. One of the managing directors was Mr Tsui Sung Lam ("Mr Tsui"), who had worked with Mr Goh at Flextronics. In late 2010 or early 2011, Mr Tsui and Mr Goh met and Mr Goh indicated that Beyonics was considering the sale of its business. Mr Tsui informed Mr Shaw and, as a result, SKP proposed that its investment vehicle, Bayport Capital Ltd ("Bayport") should consider acquiring the Beyonics Group through a BVI company, Channelview Investments Ltd ("Channelview"). This led to an Implementation Agreement dated 5 October 2011, followed by due diligence which resulted in a formal offer to take over the Beyonics Group. This was approved in a shareholders meeting on 30 December 2011 and the scheme was sanctioned by the High Court of Singapore and completed on 2 February 2012. Mr Shaw then became chairman of Channelview with both Mr Goh and Mr Chay being directors as well as not insubstantial shareholders.

6 As was apparent in the witness box, both Mr Shaw and Mr Goh are powerful personalities, used to being the directing minds of commercial operations and accustomed to being leaders rather than followers. Mr Shaw expected Mr Goh to follow his lead and Mr Goh expected Mr Shaw to allow him, with his more than ten years in the business, to continue to run Beyonics with the freedom he had been given by the previous board of directors. A falling out was perhaps inevitable and it duly occurred. I shall have to consider in some details the factual background leading up to the fall out. It is sufficient for present purposes to record that it occurred, with the result that on 9 January 2013 Mr Goh resigned his directorships in the various companies in the Beyonics Group. Resignation agreements (the "Resignation Agreements") were signed

with a number of those companies (including BAP, BIL and BTS) and Mr Goh ceased to be employed on 30 April 2013.[2]

7 Following Mr Goh's resignation in January, Mr Shaw became aware that he had left behind no documents relating to ongoing business at Beyonics and Mr Shaw informed me that he needed to understand more fully what the company's business was. He therefore asked Mr Goh to return the notebook computer he had been using and discovered that all files had been deleted before it was returned. The same was true of a desktop computer. Later in January 2013 Mr Shaw engaged FTI Consulting to carry out a full forensic investigation into the contents of the deleted files. During the course of a lengthy piece of cross-examination,[3] Mr Shaw emphasised that his motivation in ordering this investigation was not with a view to finding out anything he could in order to get back at Mr Goh but to find out what was going on in the business, as summed up during cross-examination:[4]

> … And I reiterate, the purpose was not to fish. The purpose was to -- he took all the records with him. There was nothing left. He was the only person. He did not have a personal secretary. There was no HR person. No chief operating officer. No chief marketing officer. He took everything with him.
>
> So we simply thought we need to basically reconstruct a filing of what's been going on, and our primary interest was customers and, in this case, you would be concerned are there customers that are asking for more business; are there customers saying they want to terminate business; are there customer complaints, and so on and so forth, so a variety of things and I think this was just actually the prudent thing that anybody would do in my case.

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2 Affidavit of evidence-in-chief ("AEIC") of Mr Goh ("Goh AEIC") 442–445.

3 T3/117/4–127/6.

4 T3/125/2–18.

8 Be that as it may, following a lengthy investigation, FTI identified a number of documents which gave Mr Shaw reason to believe that Mr Goh had not been acting in the best interests of the Beyonics Group in his dealings with a competitor, Nedec/Kodec (see below at [134(b)]), and indeed that he had accepted bribes from that competitor. In particular, three agreements between the second defendant, Pacific Globe Enterprises Ltd, a company owned and controlled by Mr Goh which, at the relevant time, was named Wyser International Ltd, ("Wyser"), and Nedec/Kodec were discovered which indicated that Wyser had been paid substantial sums by Nedec/Kodec.

9 FTI's final report[5] (the "FTI Report") was issued on 23 July 2013 and proceedings were brought on 25 July 2013 by BTL and one subsidiary company (Beyonics International Pte Ltd or "BIPL") against Mr Goh, his wife and Wyser in Singapore in High Court Suit No 672 of 2013. I shall refer to this action as "the 672 Action" and to the Plaintiffs in that action as BTL and BIPL or, together, as "the 672 Plaintiffs", and to Mr Goh, his wife, and Wyser as "the 672 Defendants".

10 The 672 Plaintiffs alleged that Mr Goh had breached various duties owed to them and further had engaged in a conspiracy with Wyser and Nedec/Kodec to injure the Plaintiffs. Mr Goh's wrongdoings were alleged to have resulted in the diversion of certain business from a customer of the Beyonics Group, Seagate, to Nedec/Kodec which culminated in the loss of its entire baseplate business with Seagate. For the role Mr Goh played, he allegedly received two payments from the Nedec/Kodec via Wyser, which dishonestly

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5 Defendants' Bundle of Documents Relating to the Defendants' Defence of Res Judicata and/or Abuse of Process Vol 1 ("1DRJB") 6–42; T1/127/1–10.

assisted in Mr Goh's breach of duties. BTL's claims related to the loss of the Seagate's business and it also sought an order that the payments be disgorged to BTL. Additionally, BIPL raised claims against Mr Goh for the return of unjustified expenses and salary.

11 Mr Goh denied that he was in breach of duties and maintained that he acted in the best interests of the 672 Plaintiffs at all times. He did not deny that he received payments from Nedec/Kodec, but claimed that they were legitimate payments for consultancy services. Hence, there was no conspiracy between Mr Goh, Wyser and Nedec/Kodec to injure the Plaintiffs and Wyser did not dishonestly assist in the breach of his duties. The loss of Seagate's business, in whole or in part, was not caused by them. Finally, Mr Goh contended that the expenses and salary were justified.

12 The action was heard by Hoo Sheau Peng JC (as she then was) ("the 672 Trial Judge") over a period of 19 days in August and September 2015 which, following written closing submissions, resulted in a judgment on 28 June 2016 ([2016] SGHC 120, reported as [2016] 4 SLR 472) ("the 672 Judgment"). The 672 Plaintiffs were almost entirely successful although the damages awarded for the loss of the Seagate business were less than those claimed. Mr Goh and Wyser appealed and, whilst the Court of Appeal did not reverse any of the findings of fact, by its judgment of 27 June 2017 ([2017] SGCA 40, reported as [2017] 2 SLR 592) ("the 672 Appeal Judgment") it held that BTL was not entitled to recover certain of the losses that it had claimed and which had been awarded by the 672 Trial Judge, as those losses had not been suffered by BTL, the parent company, but had in fact been suffered by various subsidiary companies which are now the plaintiffs in this action.

13 The Court of Appeal's reasoning was as follows:

70 The third point is the most important point. It appears from [37] of the [672 Judgment] that the Judge considered that the holding company in a group of companies could claim for loss suffered by a subsidiary in the group because as a holding company it was in a position to direct and control the application of the cash and profits of its subsidiaries. This, however, is not the law.

71 The well-established doctrine that each incorporated entity is a separate legal entity with separate legal rights and liabilities applies as much to companies within an ownership group as it does to companies that are unrelated to each other. As stated by Sundaresh Menon JC [as he then was] in *Public Prosecutor v Lew Syn Pau and another* [2006] 4 SLR(R) 210 ("*Lew Syn Pau*"), at [212], the doctrine of separate legal personality is not displaced simply by virtue of the fact that the companies in question are, as members of a group, organised as a single economic unit. Thus, between a parent or holding company and its subsidiary, the rights and assets of the related companies are treated as belonging to each discrete company, distinct from those of the other company. Further, in *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] 4 SLR 832 ("*Manuchar Steel*"), Lee Kim Shin JC observed at [101] that the single economic entity concept was not recognised by Singapore law or by the common law generally. This being the case, it is incorrect to say that BAP's loss of profits that were booked in BAP's accounts could be considered to be the loss of profits of its holding company, BTL, simply because consolidated accounts were prepared for the whole Beyonics Group [BAP, Beyonics Asia Pacific Ltd, was a subsidiary company of BTL and is the 1st Plaintiff in this action].

72 To amplify, Menon JC in *Lew Syn Pau* stated at [204] that "reliance upon the fact of control and of consolidation of group accounts is misplaced if it is thereby sought to be suggested that the doctrine of separate legal personality is something displaced in a group setting". Consolidated financial statements are required by financial reporting standards when an entity controls one or more other entities (see Financial Report Standard 110 on Consolidated Financial Statements as issued by the Accounting Standards Council Singapore, a standard which applies to BTL). *The mere fact that accounts are consolidated on a group basis for reporting purposes does not detract from the reality that the profits (and losses) of each separate company are still that company's own profits and losses.*

…

75 It was BAP that suffered the Diversion Loss and the Total Loss and these losses could not legally be transformed

> into BTL's losses whether by the preparation of consolidated accounts or in any other way. Accordingly, the Judge erred in awarding BTL damages based on such losses and Mr Goh's appeal on this point must be allowed. While this result may seem harsh to BTL given the egregious nature of the breaches by Mr Goh, the alternative – which would be to recognise the single economic entity concept – would be contrary to both principle and authority. It would critically undermine the doctrine of separate legal personality which is the bedrock of company law not just in Singapore but also throughout the common law world. The single economic entity concept is also difficult to reconcile with the restricted approach to the piercing of the corporate veil which is a feature of the common law (see *Manuchar Steel* at [96]). Generally, piercing the veil is justified by abuse of the corporate form or if it is necessary for the veil to be lifted to give effect to a legislative provision …; but neither situation exists here. BTL was not a wrongdoer. Hence, we cannot ignore the separate legal existence of BAP and BTL much though we deplore Mr Goh's conduct.
>
> [emphasis added; original emphasis and internal citations omitted]

14 Having suffered that reverse, this action was commenced on 21 August 2017 by the five subsidiary companies against Mr Goh and Wyser (the "Defendants") claiming both the losses which had been disallowed in the 672 Action as well as certain other alleged losses which had not been claimed in that action. The Plaintiffs accepted that they could not rely on the findings of fact made in the 672 Plaintiffs' favour in that action and that, in so far as the Defendants did not admit liability, the necessary evidence would have to be adduced afresh and the matter ruled upon at a subsequent trial.

15 The Defendants made no admissions. They contended that on the basis of subsequently obtained material the outcome of any later trial would be different and would result in findings in their favour. In addition, however, they contended that the bringing of this action by these Plaintiffs was an abuse of the process of the court as the claims now made in this action could and should have been made by them in the 672 Action. They rely on the well-known doctrine of

the extended form of *res judicata* having its origin in *Henderson v Henderson* [1843] 3 Hare 999 ("*Henderson v Henderson*").

The Issues

16 There are thus two entirely different defences. I shall refer to them as the "*Henderson v Henderson* Issue" and the "Substantive Issue". The former requires close attention to be paid to the matters in issue in the 672 Action in order to compare those issues with the issues raised in this action. The question of whether in all the circumstances the bringing of this action is an abuse can then be addressed.

17 The Substantive Issue however requires the findings of the 672 Action to be disregarded. No plea of estoppel is raised by the Plaintiffs. It is common ground that this issue can only be and must be decided on the basis of the evidence adduced at the trial of this action. It is therefore open to this court to come to a different conclusion on the facts to that reached by the 672 Trial Judge in the 672 Action if the evidence given at this trial requires it.

18 Immediately prior to the trial of this action the Defendants objected to certain passages in the affidavits of evidence-in-chief ("AEICs") sworn on behalf of the Plaintiffs because they sought to rely on findings in the 672 Action as being true. An application was therefore made to strike out those passages.

19 I heard arguments on the first day of the trial and gave judgment on the second day. In that judgment I set out the distinction between the approach to those two wholly discrete issues which I draw upon in [20] to [37] below.

20 It is trite law that only evidence relevant to the issues in the case is admissible at trial. Evidence which is relevant and admissible on one of those

issues may not be relevant to the other. The court must be astute in identifying to which issue a given piece of evidence is relevant and to ensure that if it is inadmissible in relation to another issue, it does not serve to cloud the judicial mind on that other issue.

21 Admissibility of evidence relating to the *Henderson v Henderson* Issue is governed by s 42 of the Evidence Act (Cap 97, 1997 Rev Ed) which is as follows:

> **Previous judgments relevant to bar a second suit or trial**
>
> **42.** The existence of any judgment, order or decree which by law prevents any court from taking cognizance of a suit or holding a trial is a relevant fact when the question is whether the court ought to take cognizance of the suit or to hold the trial.

22 The Plaintiffs referred me to the commentary on s 42 which is found in paragraph 7.003 of *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) by Professor Jeffrey Pinsler SC, which states:

> This section concerns estoppel by record, otherwise known as 'judgment estoppel' or estoppel *per rem judicatam*. The effect of the estoppel is that a previous judgement of a court of competent jurisdiction over the parties is conclusive – unless it is obtained by fraud or collusion – as between those parties so that they are estoppel from contradicting it. The section is procedural in nature because its intention is to admit the previous judgment, not for its evidential value, but for the purpose of supporting the plea of *res judicata* so as to bar the suit. Therefore, when the judgment is pleaded in this way and accepted as *res judicata*, it is conclusive as to the facts on which it is based in relation to the parties and their privies.

23 The Plaintiffs also referred me to the decision in *Arul Chandran v Chew Chin Aik Victor JP* [2000] SGHC 111 ("*Arul Chandran*"). I shall cite more out of that judgment than the Plaintiffs referred me to because it is also relevant to

the question of evidence on the Substantive Issue which I shall consider below.

Paragraphs 141–144 read as follows:

> 141 Subject to s 42 to 45A, a previous judgment making certain findings of fact cannot be merely tendered in another trial as proof of the existence or the truth of those facts. If questions of *res judicata* or issue estoppel arise for determination for instance, then the previous judgment is admissible under s 42, (a) to prove the existence of that previous judicial determination as a final judgment of a competent court, and (b) to establish what the cause of action there was, who the parties were, in what capacities they were litigating, and what exactly were the issues previously determined so that the court can decide those questions. But this by no means provides the gateway for the flood of facts established in other judicial forums to be admitted as evidence or as conclusive proof of the same facts which are in dispute in another trial where all or some of the parties are different. The general rule is that the production of a previous judgment merely evidences the fact that there has been a judgment and there are certain legal consequences. But tendering the previous judgment and then quoting parts of the judgment at length in a question to which the witness refuses to accept as being undisputed will not *per se* amount to evidence proving the correctness or the truth of any of the facts mentioned therein.
>
> 142 I follow the strict approach. I am mindful of the hearsay rule. Where the evidence amounts to hearsay it can only be admitted if the hearsay evidence comes in under the exceptions to the hearsay rule provided in the Evidence Act. Hence, reading out chunks of any judgment relating to certain facts (whether disputed or not) as found previously by a court to a witness at this trial, in particular to Arul, as a prelude to the questions asked of him during his cross-examination, will not turn that narration by counsel into evidence to prove those facts, if Arul does not admit or agree to them. …
>
> 143 I am also mindful that I have to consider whether those facts not proved have materially injured his reputation after taking account of those other facts and imputations that the defendant manages to prove to the requisite degree of probability, commensurate with the gravity of the charges. If his reputation has not materially suffered because of those facts not proved, then the justification defence still succeeds.
>
> 144 However, in relation to what Arul had (a) testified to in evidence at the previous trial before Justice Abdul Razak (for which notes of evidence were available), (b) affirmed in any of

> his previous affidavits in the various court actions in Johore, or (c) said in any correspondence with the Law Society, the defendant or third parties, these are admissible in evidence before me, when the object is to discredit him, contradict his testimony, or establish the contrary facts or admissions, by proof that he had indeed said something very different on some previous occasion. The relevance and admissibility under these circumstances have been clearly provided for in other sections of the Evidence Act.

24 This judgment highlights very clearly the circumstances in which previous statements are admissible at a subsequent trial on the merits and those where they are not. I shall return to this below. However, in the case of *res judicata*, the previous judgment is admissible, but only for the limited purposes outlined above, either (a) to prove its existence, or (b) to identify issues that were previously determined.

25 Additionally, of course, in a case of an alleged *Henderson v Henderson* estoppel, evidence relating to why the plaintiff could not or should not have brought the claim in the previous action and any other evidence relevant to the question of abuse of process will be admissible.

26 On the Substantive Issue, s 42 does not apply. Questions of admissibility are governed by s 45 of the Evidence Act which reads:

> **Judgments, etc., other than those mentioned in sections 42 to 44 when relevant**
>
> **45.** Judgments, orders or decrees other than those mentioned in sections 42, 43 and 44 are irrelevant *unless the existence of such judgment, order or decree is a fact in issue or is relevant under some other provision of this Act.*
>
> [emphasis added]

27 The existence of the judgment is not a fact in issue in relation to the Substantive Issue and, thus, the question is whether it is relevant under some other provision.

28 Both parties accept that this provision is based on s 43 of the Indian Evidence Act and each referred me to *Sarkar's Law of Evidence*, the Plaintiffs choosing to use the 16th edition (Sudipto Sarkar and V R Manohar, *Sarkar's Law of Evidence* (Wadhwa & Co, 16th Ed, 2007)) and the Defendants the 19th edition (Sudipto Sarkar and Dr H R Jhingta, *Sarkar's Law of Evidence* (LexisNexis, 19th Ed, 2016)). I can discern no difference between them. Since the first one I read was the 16th edition, I shall cite from that at page 952:

> The object behind enacting section 43 appears to be twofold: (1) to treat every case a class by itself so that the judgment delivered in one case may not be availed of by parties to another case; and (2) to maintain the independence of courts by preventing the parties from submitting before the court hearing their case the judgments of other courts. …

29 The editors then turned to consider the latter portion of the section at pages 952–953:

> The latter portion of this section, that is, the words "*unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other section of this Act*" requires some explanation. In *Gujja Lai v. Fateh Lall* 6 C 171 FB, Garth CJ has thus explained the section:
>
> > The cases contemplated by s 43 are those where a judgment is used not as *res judicata* or evidence more or less binding upon an opponent by reason of the adjudication which it contains. But the cases referred to in s 43 are such, I conceive, as the section itself illustrates thus, *viz* when the fact of any particular judgment having been given is a matter to be proved in the case. As for instance, if *A* sued *B* for slander, in saying that he *(A)* had been convicted of forgery, and *B* justified it upon the grounds that the alleged slander was true, the conviction of A for forgery would be a fact to be proved by *B* like any other fact in the case, and quite irrespective of whether *A* had been actually guilty of the forgery or not. Thus, I conceive would be one of the many cases alluded to in s 43.

30 The commentary continues:

> Thus, for example, where it is proposed to discredit a witness or to contradict his testimony by proving that he gave different testimony on a former trial, the judgment in the former case will, notwithstanding that the parties to it were strangers to the subsequent suit, be admissible for the purpose of laying the foundation for the evidence of the former statements. …

31 In a following passage, the editors state as follows:

> Where a judgment is not *in rem*, nor relevant to matters of public nature, nor between the parties to a subsequent suit, the fact that the court by that judgment decides a point in a particular way, is not relevant under s 13 for the purpose of the decision on the same point in the subsequent suit ... It has been observed in a later Nagpur case that the reference to the Full Bench in *Shankar's* case was in terms wider than that was necessary for the purpose of the decision in that case and *pro tanto* it is *obiter*. A judgment is not admissible to prove the truth of the fact which it states. But where the right of a party has already been concluded by a previous judgment, the fact can be proved by production of the judgment since in such a case the existence of the judgment itself is relevant …

32 With regard to that last sentence, it is important to note that the editors are talking about the right of a party; that is, a party to the subsequent litigation who was also a party to the earlier case. It is not a reference to any other party, more specifically to a party to the earlier litigation who is not a party to the subsequent action or *vice versa*. The right of any of the Plaintiffs in this action has not already been concluded by a previous judgment.

33 Accordingly, evidence of statements made in an earlier case may be adduced in order to seek to discredit evidence given by a witness in a later case, but there is an important distinction between reliance upon statements made in a previous action and conclusions reached by the court in that previous action on the basis of those statements, as is clear from the passages from *Arul Chandran* cited above at [23].

34 The Defendants referred me to the case of *Zainal bin Kuning and others v Chan Sin Mian Michael and anor* [1996] 2 SLR(R) 858 ("*Zainal*") at [68]–[70] where the Court of Appeal, when considering whether previous convictions were admissible in evidence, said this:

> 68 While these convictions are admissible in evidence in the instant case – they appeared to have been accepted by both sides and were not strictly proved before the court below – the evidence adduced at the trial of Mohd Sulaiman and the findings thereon made by the courts – both the High Court and the Court of Appeal – cannot be accepted or relied upon in the instant case to prove the primary fact on which the appellants based their argument. The judgments and notes of proceedings in the case concerning Mohd Sulaiman are, of course, public documents: see s 76 of the Evidence Act … Assuming that certified copies thereof had been produced … the contents thereof are purely hearsay. In other words, what was said by Jahpar and Mohd Sulaiman and other witnesses at the trial of Mohd Sulaiman was purely hearsay as to the truth thereof. Clearly the appellants cannot rely on what Jahpar and Mohd Sulaiman said at the trial to establish that they (the appellants) had no involvement in the offence for which they were prosecuted.
>
> 69 [The court gave an illustration and continued] This illustration covers squarely the position in this case. *A judgment determining a fact in one trial cannot be used or relied upon in another trial.*
>
> 70 The appellants could have subpoenaed Jahpar and Mohd Sulaiman and called them as witnesses to prove the primary fact that they (the appellants) were not involved in the housebreaking at the coffeeshop or the attack on Ang. Unfortunately they were not called.
>
> [emphasis added; internal citations omitted]

35 The position under s 45 is clear. A finding of fact in a previous judgment cannot be relied upon to prove primary facts which have to be proved in a subsequent action. It is, I think, succinctly put in the passage emphasised above in *Zainal* (at [69]).

36 What can be used, if relevant, is evidence given at a previous trial if its purpose is to challenge or discredit the evidence given by a witness at a subsequent trial. If a witness has made a previous inconsistent statement, this can be put to the witness to challenge the subsequent evidence and to give the witness the opportunity to satisfy the court, if they can, that the later evidence is to be preferred. This is not because it is evidence given in a previous trial, it is because it is an antecedent inconsistent statement. It could just as well have been given in a pre-existing document.

37 This type of evidence is covered by s 157(*c*) of the Evidence Act, which reads, so far as relevant:

> **Impeaching credit of witness**
>
> **157.** The credit of a witness may be impeached in the following ways by the adverse party or, with the consent of the court, by the party who calls him:
>
> …
>
> (*c*) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted.

The *Henderson v Henderson* Issue

Preliminary Issue

38 In order to determine the issue of *Henderson v Henderson* abuse, it is not necessary to know anything more about the parties or, indeed, the witnesses who gave evidence. Before turning to the law, I shall consider the desirability of hearing any allegation that an action should be struck out on these grounds as a preliminary issue. In the present case this was not done. At the outset the Defendants did not seek such an order on the basis that, having had one appeal to the Court of Appeal which had resulted in the matter having to be restarted in the High Court, they were unwilling to risk the same happening again and

preferred to incur the costs of preparing for a trial which, if the *Henderson v Henderson* Issue was finally decided in their favour, would be unnecessary. The Plaintiffs did not oppose this and the court did not at that stage see fit to impose such a course on the parties.

39 When the matter was transferred to the Singapore International Commercial Court, my instinct was to order the trial of a preliminary issue even at a late stage. However, both parties requested that there should not be such an order, not only on the basis originally relied upon by the Defendants but also on the ground that significant discovery had by then been given and preparations for trial were well advanced. A trial date was available which was suitable for the parties and the court, and if there was to be a preliminary hearing followed by an appeal that trial date would be lost. I concluded that, in those circumstances, there should not be the trial of a preliminary issue since neither party wished it for the reasons given.

40 With hindsight I regret that decision and wish that I had followed my instincts. The *Henderson v Henderson* Issue could have been prepared for hearing and heard in a relatively short period of time. The hearing would have lasted a day, two at the most. If successful, even after an appeal, the time and expense of the trial that has now taken place would have been avoided. Yes, there might well have been a delay but that it is price well worth paying to investigate the possibility that the trial should not be allowed to take place at all.

41 I consider that it will rarely, if ever, be the case that an allegation that a subsequent action should be struck out on *Henderson v Henderson* grounds should not be heard as a preliminary issue, even if this does cause a measure of delay.

42 Be that as it may, there was no such order in this case and the issue now falls to be decided. The fact that there was no preliminary hearing is not material to outcome of that issue. It has to be determined on the basis of the facts at the date when the writ in this action was issued.

Henderson v Henderson – The Law

43 As is well known, the extended form of *res judicata* has its origins in the celebrated statement by the Vice-Chancellor, Sir James Wigram, in *Henderson v Henderson* [1843] 3 Hare 999 at 114:

> … where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

44 The doctrine has evolved over the years both through decisions in Singapore and in the United Kingdom. The foundation of the current approach to the doctrine lies in the decision of the House of Lords in *Johnson v Gore Wood & Co* [2002] 2 AC 1 ("*Johnson v Gore Wood*").

45 In that case a company, Westway Homes Ltd, a company controlled by Mr Johnson, had previously brought an action against Gore Wood & Co, a firm of solicitors, for negligent advice. That action was eventually settled during the trial with the payment of a substantial sum of money to the company. Prior to

the trial, Gore Wood's solicitors were informed that Mr. Johnson also had a claim against Gore Wood arising out of the same facts which he would pursue in due course.

46 Following the settlement with the company, in 1993 Mr Johnson commenced his own action which proceeded slowly towards trial. It was not until December 1997, some 4½ years later, that the defendant sought to strike out the action as an abuse of the process of the court relying on the *Henderson v Henderson* doctrine. Even at this late stage, this issue was directed to be heard as a preliminary issue. The judge held in favour of the plaintiff but the Court of Appeal reversed that decision and the action was struck out. The plaintiff appealed to the House of Lords.

47 The leading opinion was that of Lord Bingham of Cornhill. It is necessary to cite a number of passages from that opinion (at 22C–F):

> Abuse of process
>
> The rule of law depends upon the existence and availability of courts and tribunals to which citizens may resort for the determination of differences between them which they cannot otherwise resolve. *Litigants are not without scrupulous examination of all the circumstances to be denied the right to bring a genuine subject of litigation before the court* (*Yat Tung Investment Co. Ltd. V. Dao Heng Bank Ltd* [1975] AC 581 at 590 *per* Lord Kilbrandon, giving the advice of the Judicial Committee; *Brisbane City Council v. Attorney-General for Queensland* [1979] AC 411 at p 425 *per* Lord Wilberforce, giving the advice of the Judicial Committee). This does not however mean that the court must hear in full and rule on the merits of any claim or defence which a party to litigation may choose to put forward. For there is, as Lord Diplock said at the outset of his speech in *Hunter v. Chief Constable of the West Midlands Police* [1982] AC 529 at 536, an
>
> > "*inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise*

> *bring the administration of justice into disrepute among right-thinking people*. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."

[emphasis added]

48 After reviewing a number of earlier authorities, Lord Bingham continued (at 31A–F):

> … But *Henderson v. Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. *The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all*. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. *It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before*. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be

> found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.
>
> [emphasis added]

49 Lord Bingham then went on to consider the question of the extent to which the doctrine applied to parties to the later action who had not been parties to the earlier action (at 32C–G):

> Two subsidiary arguments were advanced by Mr. ter Haar in the courts below and rejected by each. The first was that the rule in *Henderson v. Henderson* did not apply to Mr Johnson since he had not been the plaintiff in the first action against GW. In my judgment this argument was rightly rejected. A formulaic approach to application of the rule would be mistaken. WWH was the corporate embodiment of Mr. Johnson. He made decisions and gave instructions on its behalf. If he had wished to include his personal claim in the company's action, or to issue proceedings in tandem with those of the company, he had power to do so. The correct approach is that formulated by Sir Robert Megarry V-C in *Gleeson v. J. Wippell & Co. Ltd.* [1977] 1 WLR 510 at 515 where he said:
>
> > "Second, it seems to me that the substratum of the doctrine is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation. This is in the interest both of the successful party and of the public. But I cannot see that this provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff from suing him, *unless there is a sufficient degree of identity between the successful defendant and the third party. I do not say that one must be the alter ego of the other: but it does seem to me that,*

> *having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party*. It is in that sense that I would regard the phrase 'privity of interest.'"

[emphasis added]

50 Lord Millett concurred and said this (at 60C–D):

> While, therefore, the doctrine of *res judicata* in all its branches may properly be regarded as a rule of substantive law, applicable in all save exceptional circumstances, the doctrine now under consideration can be no more than a procedural rule based on the need to protect the process of the Court from abuse and the defendant from oppression. In *Brisbane City Council v. A.-G. for Queensland* [1979] AC 411 at p 425 Lord Wilberforce, giving the advice of the Judicial Committee of the Privy Council, explained that the true basis of the rule in *Henderson v Henderson* is abuse of process and observed that it
>
> > ". . . ought only to be applied when the facts are such as to amount to an abuse: otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation."

> ***There is, therefore, only one question to be considered in the present case: whether it was oppressive or otherwise an abuse of the process of the court for Mr. Johnson to bring his own proceedings against the firm when he could have brought them as part of or at the same time as the Company's action. This question must be determined as at the time when Mr. Johnson brought the present proceedings and in the light of everything that had then happened***. There is, of course, no doubt that Mr. Johnson *could* have brought his action as part of or at the same time as the Company's action. But it does not at all follow that he *should* have done so or that his failure to do so renders the present action oppressive to the firm or an abuse of the process of the court. As May L.J. observed in *Manson v Vooght* at p. 387, it may in a particular case be sensible to advance claims separately. In so far as the so-called rule in *Henderson v. Henderson* suggests that there is a presumption against the bringing of successive actions, I consider that it is a distortion of the true position. The burden should always rest upon the defendant to establish that it is oppressive or an abuse of process for him to be subjected to the second action.
>
> …
>
> Particular care, however, needs to be taken where the plaintiff in the second action is not the same as the plaintiff in the first, but his privy. Such situations are many and various, and it would be unwise to lay down any general rule. The principle is, no doubt, capable in theory of applying to a privy; but it is likely in practice to be easier for him to rebut the charge that his proceedings are oppressive or constitute an abuse of process than it would be for the original plaintiff to do so.
>
> Mr Johnson conceded that he and the Company are privies. ***He was in a position to decide when to pursue the two claims and whether to pursue them together or separately, and that is enough for present purposes***.
>
> [emphasis in original in italics; emphasis added in bold italics]

51 On the particular facts of that case, the House of Lords held that Mr Johnson was acting reasonably in not bringing his claim as part of the earlier litigation so that there was no abuse of process and the action was therefore not struck out.

52 The dictum of Lord Bingham cited above was applied by Sundaresh Menon JC (as he then was) in *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 when he summarised the approach as follows at [53]:

> This [the decision in *Johnson v Gore Wood*] has been followed in our jurisprudence by Belinda Ang Saw Ean J in [*Kwa Ban Cheong v Kuah Boon Sek* [2003] 3 SLR(R) 644] at [25] to [33] as well as by the Court of Appeal in [*Lai Swee Lin Linda v AG* [2006] 2 SLR(R) 565]. *To put it shortly, a court should determine whether there is an abuse of process by looking at all the circumstances of the case, including whether the later proceedings in substance is nothing more than a collateral attack upon the previous decision; whether there is fresh evidence that might warrant re-litigation; whether there are* bona fide *reasons why an issue that ought to have been raised in the earlier action was not; and whether there are some other special circumstances that might justify allowing the case to proceed.* The absence or existence of these enumerated factors (which are not intended to be exhaustive) is not decisive. *In determining whether the ambient circumstances of the case give rise to an abuse of process, the court should not adopt an inflexible or unyielding attitude but should remain guided by the balance to be found in the tension between the demands of ensuring that a litigant who has a genuine claim is allowed to press his case in court and recognising that there is a point beyond which repeated litigation would be unduly oppressive to the defendant.* In the context of cases such as the present, the inquiry is directed not at the theoretical possibility that the issue raised in the later proceedings could conceivably have been taken in the earlier, but rather at whether having regard to the substance and reality of the earlier action, it reasonably ought to have been. In my judgment, the answer to that in the present case is plainly no.
>
> [emphasis added]

53 In *Lim Geok Lin Andy v Yap Jin Meng Bryan and another appeal* [2017] 2 SLR 760, Andrew Phang Boon Leong JA, giving the judgment of the Court of Appeal, also applied the reasoning in *Johnson v Gore Wood* ([44] *supra*) and made the following observations (at [39]–[43]):

> 39 The prominence of the rule in *Henderson* was recently re-affirmed in the United Kingdom Supreme Court case of *Virgin Atlantic Airways Limited v Zodiac Seats UK Limited (formerly*

> *known as Contour Aerospace Limited)* [2013] UKSC 46. Lord Sumption observed (at [25]) that:
>
> > Res judicata and abuse of process are juridically very different. Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation.
>
> 40 This court in *The Royal Bank of Scotland NV v TT International Ltd* [2015] 5 SLR 1104 also clarified (at [102]) that doctrine of abuse of process is oft-called the "the extended doctrine of *res judicata*" because:
>
> > … it extends cause of action estoppel and issue estoppel beyond cases where the point sought to be argued in later proceedings had actually and already been decided by a court in earlier proceedings between the same parties … to cases where the point was not previously decided because it was not raised in the earlier proceedings even though it could and should have been raised in those proceedings.
>
> …
>
> 43 We note that many of the relevant abuse of process decisions relate to situations where the ***same plaintiff*** sues different parties. In these cases, one of the governing principles appears to be that there is generally no abuse of process unless the defendants are themselves related by what has been termed a "*privity of interests*" (see, especially, *per* Sir Robert Megarry VC in *Gleeson v J Wippell & Co Ltd* [1977] 1 WLR 510 at 515) – presumably on the basis that the plaintiff ought, owing to a close or special relationship or commonality of interest between the defendants, to have brought a claim against both of them in one and the same action. However, the defence of abuse of process could also be successfully invoked where the ***same defendant*** is sued twice by different plaintiffs on the identical issues which have already been determined in the earlier action …
>
> [emphasis in original in italics and bold italics; emphasis added in underline]

54 Reference was then made to a West African decision and the judgment continued at [43]–[44]:

> The West African Court of Appeal applied Lord Penzance's dictum in the English Court of Probate and Divorce decision of *Wytcherley v Andrews* (1871) LR 2 P & D 327 … at 328 that:
>
> > …there is a practice by this court, by which any person having an interest may make himself a party to the suit by intervening; and it was because of the existence of that practice that the judges of the Prerogative Court held, that *if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to re-open the case* …
>
> …
>
> 44 It seems to us that the common thread linking the decisions relating to the doctrine of abuse of process is the courts' concern with managing and preventing multiplicity of litigation so as to ensure that justice is achieved for all. ***In our judgment, the rule in* Henderson *is applicable where some connection can be shown between the party seeking to relitigate the issue and the earlier proceeding where that essential issue was litigated, which would make it unjust to allow that party to reopen the issue***. There is no reason in principle why the rule in *Henderson* ought to be confined only to repeated claims by the same plaintiff or to repeated claims against the same defendant. It is important to also emphasise not only the *fact-sensitive* nature of the inquiry that is entailed in applying the rule in *Henderson* but also the *strict limits* within which such a rule will be applied …. Indeed, as has already been noted above (at [38]), the court will exercise its discretion in such a way as to strike a balance between allowing a litigant with a genuine claim to have his day in court on the one hand and ensuring that the litigation process would not be unduly oppressive to the defendant on the other. The court will also be mindful of the considerations which led a claimant to act as he did (see [42] above).
>
> [emphasis in original in italics; emphasis added in bold italics]

55 The policy reasons underlying the doctrine were further examined by George Wei J in *Antariksa Logistics Pte Ltd and others v Nurdian Cuaca and others* [2018] 3 SLR 117 at [81]–[84]:

> ***Policy reasons underpinning the extended doctrine of res judicata***
>
> 81 It is helpful to begin with a consideration of the broad public policy grounds underpinning the extended doctrine of *res judicata*. As the AR below noted at some length, there are multiple, often competing, policy reasons for the doctrine.
>
> 82 Fundamentally, *the doctrine aims to bring finality to litigation and to avoid multiplicity of proceedings …* This serves at least two functions. *First, it promotes the public interest of efficiency and economy in the conduct of litigation as a whole.* It prevents "wasted time and cost, duplication of effort [and] dispersal of evidence" *… Second, it also enhances the private interest of the other party to the proceedings by avoiding oppression and unfair harassment to it …*
>
> 83 Further, the doctrine aims to avoid bringing the administration of justice into disrepute: … This would occur if the re-litigation constitutes a collateral attack on the outcome of previous proceedings, *leading to the risk of an inconsistent judgment especially if "different courts at different times are obliged to examine the same substratum of fact which gives rise to the subject of litigation" …*
>
> 84 *However, these aims must be balanced against a party's indisputable right of access to justice and protection of the law.* As observed by Lord Millett in *Johnson* at 59, "[i]t is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon."
>
> [internal citations and emphasis omitted; emphasis added]

56 The latest consideration of the scope of the doctrine and the principles to be applied is to be found in the judgment of Lord Sumption in the UK Supreme Court in *Takhar v Gracefield Developments Ltd and others* [2019] 2 WLR 984 ("*Takhar v Gracefield Developments Ltd*"), a case involving an application to set aside a judgment allegedly obtained by fraud, when he said this (at [61]–[63]):

> 61 The cause of action to set aside a judgment in earlier proceedings for fraud is independent of the cause of action

asserted in the earlier proceedings. It relates to the conduct of the earlier proceedings, and not to the underlying dispute. There can therefore be no question of cause of action estoppel. Nor can there be any question of issue estoppel, because the basis of the action is that the decision of the issue in the earlier proceedings is vitiated by the fraud and cannot bind the parties: *Director of Public Prosecutions v Humphrys* [1977] AC 1, 21 (Viscount Dilhorne). If the claimant establishes his right to have the earlier judgment set aside, it will be of no further legal relevance qua judgment. It follows that res judicata cannot therefore arise in either of its classic forms.

62 The rule, originally stated by Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100, 115, that a party is precluded from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones, is commonly treated as a branch of the law of res judicata. It has the same policy objective and the same preclusive effect. But, it is better analysed as part of the juridically distinct but overlapping principle which empowers the court to restrain abuses of its process. The relationship between the two concepts was examined by this court in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160, paras 22-25. Whereas res judicata is a rule of substantive law, abuse of process is a concept which informs the exercise of the court's procedural powers. *These are part of the wider jurisdiction of the court to protect its process from wasteful and potentially oppressive duplicative litigation even in cases where the relevant question was not raised or decided on the earlier occasion.* Since the decisions of the House of Lords in *Arnold v National Westminster Bank plc* [1991] 2 AC 93 and *Johnson v Gore Wood & Co* [2002] 2 AC 1 it has been recognised that *where a question was not raised or decided in the earlier proceedings but could have been, the jurisdiction to restrain abusive re-litigation is subject to a degree of flexibility which reflects its procedural character. This allows the court to give effect to the wider interests of justice raised by the circumstances of each case.*

63 It is this flexibility which supplies the sole juridical basis on which the respondents can argue that the evidence of fraud must not only be new but such as could not with reasonable diligence have been deployed in the earlier proceedings. It is also the basis on which Lord Briggs, in his judgment on the present appeal, suggests a less absolute rule than that proposed by Lord Kerr. I cannot accept either the respondents' argument, or Lord Briggs' more moderate variant of it. *The reason is that proceedings of this kind are abusive only where the point at issue and the evidence deployed in support of it not only could have been raised in the earlier proceedings but should*

> *have been*: see *Johnson v Gore-Wood & Co*, at p 31 (Lord Bingham of Cornhill) and *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160 at para 22 (Lord Sumption). As Lord Bingham observed in the former case, it is "wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive." *The "should" in this formulation refers to something which the law would expect a reasonable person to do in his own interest and in that of the efficient conduct of litigation.* However, the basis on which the law unmakes transactions, including judgments, which have been procured by fraud is that a reasonable person is entitled to assume honesty in those with whom he deals. He is not expected to conduct himself or his affairs on the footing that other persons are dishonest unless he knows that they are. That is why it is not a defence to an action in deceit to say that the victim of the deceit was foolish or negligent to allow himself to be taken in: *Central Railway Company of Venezuela v Kisch* (1867) LR 2 HL 99, 120 (Lord Chelmsford); *Redgrave v Hurd* (1881) 20 Ch D 1, 13-17 (Jessell MR). It follows that unless on the earlier occasion the claimant deliberately decided not to investigate a suspected fraud or rely on a known one, it cannot be said that he "should" have raised it.
>
> [emphasis added]

57 The task facing the court therefore is, first, to consider whether the claims made in the second action could, and if so, should have been brought in the first action. If so, the court must then go on to consider whether at the time the second action was started, in the light of everything that had happened prior to that date, it would be an abuse of process to allow the second action to proceed. The burden is on the Defendants to demonstrate that the Plaintiffs are abusing the process of the court by bringing the second action. The burden is a heavy one. As Lord Bingham put it, "*[l]itigants are not without scrupulous examination of all the circumstances to be denied the right to bring a genuine subject of litigation before the court*" (see [47] above). But equally, on the other hand, as Lord Diplock put it, the court must possess the power "*to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a*

party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people" (see [47] above).

The claims brought in the 672 Action

58 In the 672 Action claims were made by BTL, the parent company, and by BIPL, neither of which is a party to this action. The Plaintiffs in this action were not parties to that action.

59 The claims made in the 672 Action were as follows:

(a) by BTL against Mr Goh:

(i) breach of contractual, statutory and/or equitable fiduciary duties in his capacity as a director/employee of BTL;

(b) by BIPL against Mr Goh:

(i) unjustified expenses claims made against BIPL;

(ii) unjustified payment of salary by BIPL;

(c) by BTL against Wyser:

(i) dishonest assistance of Mr Goh in committing his various breaches and/or knowing receipt of the payments under the Wyser Agreement; and

(d) by BTL against Mr Goh and Wyser:

(i) unlawful conspiracy together with Nedec/Kodec to injure BTL and its subsidiaries, by diverting the baseplate production capacity of the Beyonics Group in favour of Nedec/Kodec.

60 Under [59(a)(i)], the claims were made under four headings as explained in [40] of the 672 Judgment:

> 40 The company–director relationship is a well-established category of fiduciary relationship. It is not seriously disputed (nor do I think it can be seriously disputed) that Mr Goh, as a director and the CEO of the Plaintiffs, owed fiduciary duties to the Plaintiffs. In my view, Mr Goh owed these four overlapping duties which are pleaded in the Amended Statement of Claim:
>
> (a) Duty to act honestly and *bona fide* in the best interest of the First Plaintiff. In this regard, it has been stated that "[d]irectors … may only consider the interests of their company when making a decision. Their overriding motive must be to advance the company's interests": see *Walter Woon on Company Law* (Sweet & Maxwell Asia, 3rd Ed, 2009) ("*Walter Woon on Company Law*") at para 8.16.
>
> (b) Duty to avoid and disclose conflicts of interest. Flowing from the duty to act honestly and in the best interests of the company, a director should not "place himself in a position where his duty and his interest conflict", such that there is a risk that he prefers his personal interest over that of the First Plaintiff: see *Walter Woon on Company Law*, at para 8.37 and 8.43.
>
> (c) Duty not to make any secret or improper profit. This is a particular instance of the rule against conflicts of interest. As stated in *Walter Woon on Company Law* at para 8.45, this rule "is so strict that if an opportunity to make a profit or obtain a benefit comes to him because he is a director, that profit or benefit must be disclosed to the company and approved. In the absence of such disclosure and approval, the director is liable to account for that profit even if he has been guilty of no moral wrong."
>
> (d) Duty to disclose wrongdoing. Encompassed within the duty to act bona fide in the best interests of the company is a duty on the fiduciary to disclose his wrongdoing to the company. In *Quality Assurance Management Asia Pte Ltd v Zhang Qing* [2013] 3 SLR 631 ("Quality Assurance") at [97], the High Court cited Item *Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244 at [41]–[44] for the proposition that "[a]n employee who is also a fiduciary and who owes his employer a general fiduciary duty of loyalty – that is, a duty to act in good faith in the best interests of his employer – is obliged

> pursuant to that general duty to disclose his own wrongdoing to his employer".

61 Under this claim, BTL sought damages/equitable compensation for:

(a) sums received under the Wyser Agreements;

(b) loss of profit suffered by the Beyonics Group as a whole by reason of diversion of baseplate products manufactured by Nedec/Kodec at the Beyonics Group expense ("the Diversion Loss"); and

(c) loss of profits from the loss of future sales that would have been obtained by the Beyonics Group but for the breaches ("the Total Loss").

62 The claim by BIPL under [59(b)] above was in relation to salary paid by BIPL pursuant to one of the Resignation Agreements referred to in [6] above.

63 As indicated, the 672 Trial Judge found in favour of the 672 Plaintiffs although the sums awarded in respect of the Diversion Loss and the Total Loss were less than the sums claimed by the 672 Plaintiffs (at [225]–[226]):

> 225 In conclusion, I find that [BTL's] claims against Mr Goh for breaches of fiduciary duties, against Mr Goh and Wyser International for unlawful means conspiracy in relation to the Diversion Loss, and against Wyser International for dishonest assistance with respect to payments under the Wyser Agreements have been made out. Accordingly, I grant judgment to (BTL) against Mr Goh and Wyser International jointly and severally for
>
> (a) US$166,554.02 paid under the First Wyser Agreement;
>
> (b) US$200,000 paid under the Second Wyser Agreement; and
>
> (c) US$2,970,559 for the Diversion Loss.
>
> In addition, I grant judgment to [BTL] against Mr Goh for the Total Loss quantified at US$4,793,591.

> 226 I also find that [BIPL's] claim against Mr Goh for unjustified expenses and salary are made out. Accordingly, I grant judgment to BIPL against Mr Goh for the sum of
>
> (a) S$126,967.45 and HK$38,400 as unjustified expenses and
>
> (b) S$45,900 as unjustified salary.

64 The Court of Appeal upheld the awards made in relation to the sums paid under the Wyser Agreements and those made in respect of the unjustified expenses and salary. It disallowed the awards in relation to the Diversion Loss and the Total Loss on the basis that any such loss had not been incurred by BTL but by BAP, which was not a party to the 672 Action.

The claims brought in this action

65 The primary claim in this action is brought by BAP and is founded upon an allegation that Mr Goh owed a duty of loyalty and fidelity to BAP. In the alternative, substantially the same claim is made on behalf of BAP, BTEC and BPM individually. The alleged breaches are based on the same allegations as were made in the 672 Action.

66 There is also a claim against Wyser brought by BAP or, alternatively, by BAP, BTEC and BPM, for dishonest assistance of Mr Goh together with a claim for conspiracy by unlawful means against Mr Goh and Wyser. Again this is based on the same allegations as were made in the 672 Action.

67 The relief sought in respect of all these claims is for the same Diversion Loss and Total Loss that was disallowed in the 672 Action. These claims therefore mirror the claims previously made by BTL in the 672 Action. It is however to be noted that the sums claimed in relation to those alleged losses

were not the sums awarded by the 672 Trial Judge but the higher sums claimed by the 672 Plaintiffs.

68 Additional claims have, however, been brought in this action.

69 First, it is alleged that Mr Goh breached his duty to disclose to BAP his alleged breaches of fiduciary duties such that BAP paid Mr Goh the sum of S$200,000 as a bonus which BAP would not have paid had Mr Goh disclosed his breaches (the "Unjustified Bonus Claim").

70 Secondly, it is alleged that Mr Goh's failure to disclose to BAP, BIL and BTS his alleged breaches of fiduciary duties caused those parties to enter into one of the Resignation Agreements referred to in [6] above and thus to pay Mr Goh's salaries until 30 April 2013 which they would not have done had they been made aware of his breaches. These claims are equivalent to the claims made by BILP in the 672 Action ("the Unjustified Salaries Claim").

Could these claims have been brought in the 672 Action?

71 It is clear that Mr Shaw was informed before the 672 Action was commenced that the losses claimed by BTL in the 672 Action were in fact losses which would have been directly suffered by BAP. Paragraph 3.4 of the FTI Report states:[6]

> We are instructed that the sales of finished baseplates … would have been recognised in the accounts of BAP.

And continues in paragraph 3.6:[7]

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6 1DRJB 13.

7 1DRJB 14.

> On the assumption that the Beyonics Group continues the existing invoicing structure, sales to the NEDEC/KODEC Group would have been recognised in the accounts of BAP. *We therefore are in fact assessing the loss suffered by BAP.*
>
> [emphasis added]

72 Mr Shaw was cross-examined on these matters and was somewhat evasive in answering the direct question of whether he knew before the 672 Action was commenced that the loss had actually been suffered by BAP but eventually accepted that at that time he was clear where the revenue was booked.[8]

73 I am therefore satisfied that the Diversion Loss and the Total Loss claims could have been brought by BAP (and, if necessary, in the alternative, by BAP, BTEC and BPM) in the 672 Action.

74 Equally it is clear that the directors of BTL were aware of the existence of both the additional claims when the 672 Action was commenced. In an affidavit sworn on 24 July 2013 by Mr Gerhard Mueller, a director of BTL, in support of an application for a Mareva injunction and Anton Pillar order against Mr Goh and his wife, Mr Mueller referred to the Unjustified Bonus Claim and the Unjustified Salaries Claim and stated in respect of both that "*[t]he Beyonics Group reserves its right to make a claim for the same at the appropriate time*".[9] Mr Shaw made the same reservation in his AEIC sworn in the 672 Action on 20 April 2015 when he stated in relation to the Unjustified Bonus Claim, "*as the parent company of BAP, and on behalf of BAP, [BTL] reserves BAP's right to make a claim for this sum*". In relation to the Unjustified Salaries Claim he

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8 T1/126/17–135/11.

9 1DRJB 44, 109–111, 113–114 at paras 101–104, 109–111.

was equally specific when he said "*[a]s the parent company of BAP, BIL and BTS, [BTL] reserves BAP's, BIL's and BTS's rights to make claims for the salary payments made to [Mr Goh]*".[10]

75 Mr Shaw was cross-examined on these matters[11] and accepted that he was aware of the existence of these claims before the 672 Action was commenced.[12] Three passages should be noted:[13]

> A. No. It's clear to me in hindsight and at the time as well that there were select companies in the Beyonics Group that were making claims against Goh. In terms of my thinking about Goh and what he did, he was a director of 40-plus companies. He was paid out of several companies. His misdeeds are not limited to BTEC. These are the only ones we've brought to the court in this case or in the previous case back in 2015. So in reading this, I probably didn't have much diligence or care in distinguishing plaintiff from non-plaintiff and actually as I read it now, I don't really distinguish much difference but -- so I'm not -- I don't think I'm legally qualified to answer these questions.
>
> …
>
> Q. Let me put it another way, sir. If you had been told that the plaintiffs had to include BAP, BIL, and BTS, you could have authorised the lawyers to use their names as plaintiffs; correct?
>
> A. If my counsel had advised me on that, I probably would have followed them, yes.
>
> …
>
> Q. … I am here talking about a different creature, the claim for the salary and for the expenses which were said to be unjustified.

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10 1DRJB 217, 328–330 at paras 197–200.

11 T1/87/12–116/16.

12 T1/126/9–16.

13 T1/103/11–25; T1/110/15–20; T1/116/7–17.

> I am here giving you a chance, sir, since you didn't deal with it in your affidavit to explain to this court why, having regard to everything I have shown you, BAP, BIL and BTS were not joined as plaintiffs to make the claims that they are making in these proceedings. I am giving you an opportunity.
>
> A. I don't have a good answer for that.

76 On the basis of this, I am satisfied that the Plaintiffs were aware of the facts giving rise to the Unjustified Bonus Claim and the Unjustified Salaries Claim and could have been authorised by Mr Shaw to bring those claims in the 672 Action.

Should these claims have been brought in the 672 Action?

77 As Lord Sumption noted in *Takhar v Gracefield Developments Ltd* ([56] *supra*) at [63], the word "should" refers to something which the law would expect a reasonable person to do in his own interest and in that of the efficient conduct of litigation.

78 Dealing first with the Diversion Loss and the Total Loss claims, the factual background to these claims was necessarily going to be investigated in the 672 Action because of the claims made for those losses by BTC. All that was necessary therefore was for the pleadings to be amended to add BAP, BTEC and BPM as Plaintiffs in the 672 Action, claiming in the alternative to BTL in much the same way as has now been done in this action.

79 The Plaintiffs accept that had the allegation that BAP rather than BTL had suffered the Diversion Loss and the Total Loss been expressly pleaded in the 672 Action, that BTL "could have easily taken steps to add BAP"[14] to the

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14 Plaintiffs' opening statement at 82(c).

672 Action. They assert however that since the matter was not pleaded and was alluded to only twice in cross-examination and was covered in greater detail only after the trial in closing submissions that it was reasonable for them not to have applied to amend to join BAP, BTEC and BPM as plaintiffs in the 672 Action.

80 In [68] and [69] of the 672 Appeal Judgment, it was held that there was no requirement that the matter should be expressly pleaded and that it was wrong to say, as the 672 Plaintiffs contended, that the 672 Defendants had dropped the matter. In so far as it is open to me to consider the matter afresh, which I doubt, respectfully, I agree. At the latest, by the time the written closing submissions were received the Plaintiffs' advisers could have been in no doubt that the point was being taken and they elected to deal with the matter by taking the pleading point and contending that they had been taken by surprise. No application to amend was made.

81 Order 20 rule 5(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) provides that:

> **5**.—(1) Subject to Order 15, Rules 6, 6A, 7 and 8 and this Rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

82 An application to amend can be made during or even after trial (see Singapore Civil Procedure 2020 (Vol 1) (Sweet & Maxwell, 2020) at para 20/8/6). The principles which apply to any application to amend are well known and are considered in para 20/8/8 of the same. For present purposes it is sufficient to record that in general amendments ought to be allowed to be made "for the purpose of determining the real question in controversy between the parties" (per Jenkins LJ in *G.L. Baker Ltd v Medway Buildings and Supplies Ltd*

[1958] 1 WLR 1216 at 1231). The guiding authority which has been applied in Singapore is the UK House of Lords case *Ketteman v Hansel Properties Ltd* [1987] 1 AC 189 where Lord Brandon said this at 212:

> With regard to the principles on which his discretion to allow or refuse the applications to amend should be exercised, the judge referred to the notes to R.S.C., Ord. 20, r. 5, in *The Supreme Court Practice 1982* and to the authorities there cited. The effect of these authorities can, I think, be summarised in the following four propositions.
>
> First, all such amendments should be made as are necessary to enable the real questions in controversy between the parties to be decided.
>
> Secondly, amendments should not be refused solely because they have been made necessary by the honest fault or mistake of the party applying for leave to make them: it is not the function of the court to punish parties for mistakes which they have made in the conduct of their cases by deciding otherwise than in accordance with their rights.
>
> Thirdly, however blameworthy (short of bad faith) may have been a party's failure to plead the subject matter of a proposed amendment earlier, and however late the application for leave to make such amendment may have been, the application should, in general, be allowed, provided that allowing it will not prejudice the other party. Fourthly, there is no injustice to the other party if he can be compensated by appropriate orders as to costs.

83 Had the 672 Plaintiffs applied to amend either when the matter was first raised during cross-examination or after receipt of the 672 Defendants' written closing submissions, I am in no doubt that applying the above principles, the 672 Trial Judge would, in the exercise of her discretion, have allowed the amendment. The amendment was necessary to allow the real question in controversy to be decided which was whether the Beyonics Group had suffered loss by reason of Mr Goh's actions. The 672 Defendants were contending that, if there was any loss, it was BAP rather than BTL that had suffered it. BAP was thus a necessary and proper party. The application would have been made late

and it may have been necessary for the experts to consider in a little more detail precisely where the losses had fallen, which might have led to the addition of BTEC and BPM as parties if the 672 Defendants took the additional point that it was those companies rather than BPM that had actually suffered some of the losses.

84 The additional work would not have been great and the 672 Defendants could have been adequately compensated by an award of costs. Refusing the application would have led (a) to the possibility of an appeal against refusal, which necessarily would have had to be heard before judgment could be given or (b) to refusal of leave to appeal which would have been seen to raise the possibility that if either the 672 Trial Judge or the Court of Appeal held that it was BAP which had suffered any losses, an injustice, far outweighing the cost and delay of allowing the amendment would arise.

85 It is these factors which lead me to the clear conclusion that the 672 Plaintiffs should have made an application to add BAP, BTEC and BPM as parties to the 672 Action to seek to recover the Diversion Loss and the Total Loss and that this application would have been allowed.

86 I turn then to consider the Unjustified Bonus Claim and the Unjustified Salaries Claim. In this case it would have been necessary for BAP, BIL and BTS to be joined as parties, for the issues to be pleaded and the necessary evidence adduced. In the case of the Unjustified Salaries Case, since the claims mirrored that being made by BIPL, minimal extra evidence would have been required. The Unjustified Bonus Claim arose out of the same matrix of facts as underlies the Diversion Loss and the Total Loss claims. Absent special circumstances, these factors are compelling. The 672 Plaintiffs knew of the existence of the potential claims yet elected not to include them in the litigation.

87 The only special circumstance relied upon by the Plaintiffs is the fact that the Defendants were specifically informed that BTL reserved the Plaintiffs' right to bring the claims at an appropriate time (see [73] above). In *Johnson v Gore Wood* ([44] *supra*) a similar reservation was made and was a factor in the House of Lords' conclusion that in the circumstances of that case there was no abuse of process in allowing the second action to proceed. The primary reason however lay in the fact that the settlement provisions of the earlier action only made sense on the basis of an assumption that Mr Johnson was likely to make a personal claim and that he had compelling reasons to defer prosecution of that claim.

88 There are no equivalent reasons here. In cross-examination it was suggested that Mr Shaw had reserved the right to bring further proceedings as a means of putting pressure on Mr Goh.[15] I do not accept this. I prefer Mr Shaw's evidence recited in [74] above which is to the effect that he and his lawyers had identified many possible claims and made an election as to which to put forward in the 672 Action for reasons which he cannot now explain. He advanced no reasons for making the election not to include these claims in that action and, without compelling reasons, it is right to conclude that these claims should have been included in the 672 Action as well.

89 The Plaintiffs deal with the question of whether they should have brought the current claim in the 672 Action at some length in their written closing submissions.[16]

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15 T1/117/12–118/18.

16 Plaintiff's written closing at 947–993.

90 First, they contend that plaintiffs must be at liberty to decide whether to sue and, if so, who to sue and when. This however cannot be an unfettered freedom. One of the fetters on that freedom is the *Henderson v Henderson* doctrine. The suggested freedom cannot be exercised if it results in an abuse of process.

91 Secondly, they contend that there is no principle that a related group of companies is obliged to commence a single suit against a given defendant. Again, if there is such a principle, it must be a principle conditioned by or subject to the *Henderson v Henderson* doctrine.

92 Thirdly, they assert that BTL reasonably considered itself to be the proper party that suffered the Diversion Loss and the Total Loss and that this factor, in some way, justifies the bringing of the second action. I regret that I do not follow the logic of this. I fully accept that BTL were either advised or itself formed the belief that it was the appropriate plaintiff to claim those losses but the Court of Appeal has decided that it was mistaken in so doing. The reasonableness or otherwise of the grounds on which the belief was formed is neither here nor there; it was wrong. The question I have to decide is whether the Plaintiffs or the Defendants should suffer because of that mistaken belief. It cannot of itself constitute a basis for concluding the Plaintiffs should not have been joined as parties to the 672 Action.

93 Fourthly, they submit that since the Defendants did not take the affirmative position that BAP was a proper party to the 672 Action and/or admitted that BPL was the proper party to that action and/or failed to seek to strike out the 672 Action in so far as it related to the Diversion Loss or the Total Loss, this should count against the conclusion that BAP should have been joined as a party to the 672 Action. This is however merely a different way of

contending that the Court of Appeal should not have decided the appeal in the way it did. I have to proceed on the basis that BPL was not the proper party and that this was an issue of law which the 672 Plaintiffs should have taken into account in formulating the 672 Action.

94 Finally, the Plaintiffs draw my attention to a number of matters which have occurred since the commencement of this action and which, it is suggested, should be taken into account. I do not accept this. The question of abuse of process has to be considered as at the date of the writ in this action. Subsequent events cannot influence that decision. This is amply demonstrated by the facts in *Johnson v Gore Wood* ([44] *supra*) where there was a 4½ year delay in bringing the application under *Henderson v Henderson* yet it was allowed to proceed.

95 None of these points therefore undermine the conclusion I have reached that the Plaintiffs in this action should have been joined as parties to the 672 Action and brought the claims made in this action in the 672 Action. To echo the words of Lord Sumption in *Takhar v Gracefield Developments Ltd* ([56] *supra*), I have concluded that in the circumstances of this case the law would have expected a reasonable person to done this both in his own interest and in that of the efficient conduct of litigation. Indeed, Mr Shaw reluctantly accepted this at the end of his cross-examination on this issue quoted in [74] above when he accepted that he did not have a good answer to the question why BAP, BIL and BTS were not joined as plaintiffs to make their claims in the 672 Action.[17]

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17 T1/116/10–17.

Abuse of process

96 The fact however that a subsequent claim could and should have been brought in an earlier action does not inevitably mean that the subsequent action should be struck out as an abuse of process. As indicated in [56] above, there is a heavy burden on the Defendants to demonstrate that the Plaintiffs are abusing the process of the court by bringing this action. The Plaintiffs will only be denied the right to bring a genuine subject of litigation before this Court if it would be manifestly unfair to the Defendants for this to be done. In the light of the 672 Judgment it is plain that the Plaintiffs have a genuine cause of action.

97 I therefore turn to consider the factors that the Defendants rely upon as supporting the suggestion that it would be manifestly unfair on them to be exposed to the burden of a further trial.

98 Mr Goh gave evidence as to the way in which the 672 Action was conducted in paragraphs 452 to 500 of his AEIC in this action, which was not the subject of cross-examination. I can consider his evidence concerning the Plaintiffs' and Mr Shaw's conduct under three headings: conduct before the 672 Action, conduct during the 672 Action and conduct after the 672 Appeal Judgment prior to the writ in this action.

Conduct before the 672 Action

99 Mr Goh ceased to be a director of companies in the Beyonics Group on 9 January 2013 and under the Resignation Agreements, his employment was to end on 30 April 2013. On 12 April 2013, Mr Shaw asked Mr Goh to attend a meeting on 23 April 2013 to discuss "*important matters relating to the past and future business of the Beyonics Group of companies*". Mr Goh responded indicating his unavailability on that date and said that he was travelling for the

rest of that week. He asked what the purpose of the meeting was, for an agenda and an indication of the attendees and suggested that the meeting be fixed for another day.

100 Mr Shaw did not provide the information requested but said that it was imperative that Mr Goh made time to meet. Mr Goh responded saying that if discussion of the matters was critical, Mr Shaw should write to him and he would consider the matters whilst on his travels. Mr Shaw then turned abusive and responded by an e-mail on 17 April 2013[18] insisting that Mr Goh attend the meeting on 23 April 2013 to discuss his past management practices and activities as CEO and ended with the statement that Mr Goh should "*act like a man instead of shrinking like a boy*".

101 Notwithstanding this Mr Goh responded on 20 April 2013 saying that he was available for a meeting in May. Mr Shaw did not take him up on this offer.[19] It is regrettable that the parties did not meet as this might have served to diffuse the worsening relationship but, having seen both in the witness box, I rather doubt it. Taken on their own however, abusive comments prior to litigation cannot carry much, if any weight, in the overall assessment of manifest unfairness.

Conduct during the 672 Action

102 Thereafter there was no further contact between them; there was no letter before action and the 672 Action was commenced on 25 July 2013 naming Mr Goh, his wife, Wyser and another Wyser company as defendants. Nothing turns

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18 40 Agreed Bundle ("AB") 26393.

19 Goh AEIC 452 to 458; 40AB 26393.

on the presence of the second Wyser company. On the following day, the 672 Plaintiffs sought and obtained an *ex parte* Mareva injunction from the Singapore Court against Mr Goh, his wife and Wyser in standard form: restraining them from disposing of assets worldwide up to S$12 million, together with an asset disclosure order. The order limited Mr and Mrs Goh to spending S$2,000.00 a week towards living expenses and S$5,000.00 a week on legal advice provided they told the 672 Plaintiffs' solicitors where the money came from and accounted once a week for the amount spent.[20]

103 The next day, 27 July 2013, an equivalent order was obtained *ex parte* from the Hong Kong Court restraining them from disposing of assets in Hong Kong up to HK$73.5 million.[21]

104 The matter did not return to court in Singapore for a continuation of the Mareva injunction until 2 April 2014 when Mr and Mrs Goh offered to have caveats lodged against five properties that they owned to obtain release of the injunction. The judge acceded to this offer and directed that the Plaintiffs be at liberty to lodge the caveats which would remain until after the decision on the trial or until further order. The Mareva injunctions were thus discharged, having been in force for some nine months.

105 On 28 June 2016, the 672 Judgment was handed down ordering the Defendants to pay almost US$8 million, which they did. The Plaintiffs, however, declined to release the caveats without seeking a further order from

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20 1 DRJB 142.

21 1 DRJB 149.

the court on the basis that this would serve to protect the Plaintiffs in respect of any order as to costs and disbursements.

106 The effect of the 672 Appeal Judgment was that the Defendants only had to pay the 672 Plaintiffs some US$500,000.00 so that, in the event, the two Mareva injunctions gave the 672 Plaintiffs far greater protection than they were entitled to.

107 Mareva injunctions are exceptional remedies granted in specific circumstances where the potential loss to plaintiffs if defendants are not restrained from disposing of assets outweighs the invasion of the defendants' privacy and deprivation of their right to deal with their assets and live their lives as they please. It is a necessary shield for plaintiffs but one cannot get away from the fact that it will inflict damage not only financial but also, almost inevitably, emotional on defendants without their first having been held to be liable to the plaintiffs at all. This is particularly so in a case such as the present where Mrs Goh, against whom no cause of action was raised, was subject to the Mareva injunction.

108 I emphasise that the 672 Plaintiffs did nothing wrong in seeking the Mareva injunctions. The courts held that they were entitled to them and the variation nine months later still placed a fetter on Mr and Mrs Goh's freedom to deal with their properties as they saw fit. Where a party obtains these exceptional remedies, which inevitably will serve to place pressure on the defendants, it is incumbent on them to prosecute their claims against those defendants with the utmost diligence in accordance with the rules and with respect for the defendants' position.

109 In my judgment, the 672 Plaintiffs failed in that duty. First, rather than bringing all their claims in the 672 Action, they expressly elected to reserve certain claims for a later date and did not seek to join the current Plaintiffs to that action. In the circumstances, this was inappropriate as it left the 672 Defendants uncertain as to when the litigation was going to end. Once the Mareva injunctions were in place I consider that there was an added burden on the 672 Plaintiffs to ensure that all the claims which the Beyonics Group wished to make arising out of the same matrix of facts were in fact made so that there could be an end to the dispute as early as possible.

110 Secondly, following the 672 Judgment at first instance, they did not seek a continuation of the caveats, which lapsed when the Judgment was given, but declined to withdraw them on the basis that this provided them with security for costs and disbursements. Whilst a continuation of the some of the caveats might have been ordered by the 672 Trial Judge pending payment of costs, an application should have been made and it was not. Without such an application, their conduct was inappropriate and would have had the effect of placing further unwarranted pressure on Mr and Mrs Goh.

111 At the time, it appears that Mr Shaw was aware of and indeed wanted there only to be one trial and must therefore have accepted that the claims that he had purported to reserve would never be brought. In cross-examination he said this:[22]

> … I assumed at the time that this was a one case and then we'd be done with it, but through some legal technicality that I frankly don't fully comprehend, the High Court or the Court of Appeal, I should say, removed that as aspect because of some technical legal stuff. But I don't -- I didn't see it that way at all.

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22 T1/120/2–11; T1/121/20–24.

> I saw it as that we were going to be done with that process and did not look forward to coming back here again.
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> …
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> I thought at that time there was going to be one trial and we were going to be over with it. I never had an expectation of a follow-up but again because of what seemed to be a technical reason legally, we find ourselves back again.

Conduct subsequent to the 672 Appeal Judgment

112 Following the 672 Appeal Judgment, the 672 Defendants sought the return of the excess damages that they had paid following the first instant judgment. They had paid some US$8 million and the Court of Appeal's award was for less than US$500,000. The 672 Defendants' solicitors sought repayment by letter dated 4 July 2017. The 672 Plaintiffs' solicitors replied by letter dated 10 July 2017 refusing to do so on the basis that there could be no dispute that the Defendants were liable to pay the excess sums to BAP. On the same day BAP, BIL and BTS wrote to the Defendants demanding not only that the excess sums should be paid over to BAP but also making the Unjustified Bonus and the Unjustified Salaries Claims.

113 The inter-solicitor correspondence ran on without result which led to the 672 Defendants writing to the Court of Appeal on 14 July 2017 seeking an order for the refund of the excess. Again, the 672 Plaintiffs refused to back down and some fairly acrimonious correspondence ensued. The 672 Defendants wrote again to the Court of Appeal on 17 July 2017 following which the 672 Plaintiffs did back down and by a letter dated 20 July 2017 agreed to refund the excess by 31 July 2017. In fact, this was not done until 3 August 2017.

114 The 672 Plaintiffs' conduct in this regard was unacceptable. They had no right to retain the excess and they knew it. They sought to use possession of the excess to place pressure on the Defendants in this action to agree to pay the

money to the Plaintiffs without a court order compelling them to do so. Once the Defendants declined to agree to the 672 Plaintiffs' suggested course of action, those Plaintiffs were obliged either to repay the sums or, possibly, start a new action naming these Plaintiffs as parties and seeking an order of the court that the new Plaintiffs should be allowed to retain the excess pending trial of the new action. Again therefore, without taking such steps, their conduct was inappropriate and would have had the effect of placing yet further unwarranted pressure on Mr and Mrs Goh.

Other factors

115 In different ways, both parties sought to draw the Court's attention to the fact that allowing this trial to go ahead would amount to some form of collateral attack on the findings of fact made by the 672 Trial Judge. This however is the inevitable effect of allowing a second trial where the same or similar issues arise for consideration. As a general rule, of course, this is undesirable as it may lead to inconsistent outcomes, but in circumstances where it is appropriate to hold a second trial, as for example in *Johnson v Gore Wood* ([44] *supra*), it is a potential consequence of requiring evidence to be led again. This does not amount to an impermissible attack on the findings in the previous judgment. What would be impermissible would be to seek in the second action to revisit the findings of the Court of Appeal in the 672 Action. This would be an impermissible collateral attack on the legal outcome which would constitute an abuse. But it is not what the Plaintiffs are seeking to do.

116 However, in considering the question of unfairness, it is right that I should take into account the fact that the 672 trial was a burdensome trial, lasting some 19 days in court followed by extensive written submissions. The 672 Judgment ran to 228 paragraphs and almost 100 pages. It is not something that

an individual defendant, however pecunious, should lightly be exposed to. Yet the consequence of the decisions made by 672 Plaintiffs in that action leading to the bringing of this action must necessarily expose the Defendants, effectively Mr Goh, to a further trial of equivalent magnitude if it was allowed to proceed. In my judgment, where, as here, the new claims could and should have been brought in the earlier action with little or no additional expense, the 672 Plaintiffs should not only show that that they behaved properly towards the Defendants in that action but also that there are good reasons for allowing the second action to go to trial.

117 The sole reason put forward by the Plaintiffs is that striking this action out would be a travesty. As counsel for the Plaintiffs put it in opening:[23]

> Insofar as abuse of process is concerned, we say it is actually a travesty for Mr Goh to seek refuge under this doctrine to get away without paying a single cent. That would be the effect of what he seeks to achieve if his defence of abuse of process is allowed. Why do we have this doctrine? The touchstone at the end of the day is justice and we have quotes from the Court of Appeal that the court will exercise discretion in such a way as to strike a balance between allowing a litigant with a genuine claim to have his day in court on the one hand and ensuring that the litigation process would not be unduly oppressive to the defendant on the other. It is a weighing exercise. It is a fact-sensitive inquiry.

118 The problem with this submission is that it presumes that the Plaintiffs will succeed in the second action. Whilst, having regard to the facts as found in the 672 Action, the Plaintiffs may well have viewed their prospects of success as being very high, they do not dispute that a full trial is needed to obtain judgment in their favour. It will almost inevitably be the case that the Plaintiffs in any subsequent action will believe that their prospects of success are good

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23 T1/61/24–25/14.

otherwise they would have been unlikely to start that action. The *Henderson v Henderson* doctrine works on the basis that a potentially valid claim will not be allowed to go to trial and this is why the unfairness to the Defendants must be manifest before the Plaintiffs are denied the right to bring a genuine claim. This is a genuine claim but it is no more than that.

119 Further, the fact that the Defendants did not seek to have the *Henderson v Henderson* Issue determined as a preliminary issue and therefore accepted the inevitable burden of a subsequent trial is not a matter that, in my judgment, carries any weight. Mr Goh would naturally have preferred there to be no second trial but the way in which he conducted the second trial once it had been commenced, weighing up the burden of a further trial as against the possibility of a further appeal on the *Henderson v Henderson* Issue, followed by the second trial if the Defendants failed on the *Henderson v Henderson* Issue, was a matter for him. It is not a matter relevant on the *Henderson v Henderson* Issue as it occurred after the date of the writ in this action.

Conclusion on the Henderson v Henderson Issue

120 Drawing all these factors together, the Plaintiffs in this action could and should have brought the claims made in this action in the 672 Action. Had the claims been raised in that action they could have been adjudicated upon without materially increasing either the burden or length of that trial. It could be foreseen when the writ in this action was issued that if this action proceeded to trial it would be of equivalent magnitude to the 672 trial. The Defendants are Mr Goh and a company controlled by him. Effectively, therefore, it is an individual who is being forced to bear the burden of a second trial.

121 The 672 Plaintiffs cannot be criticised for seeking relief in that action in the form of Mareva injunctions but where such injunctions are sought, particularly when sought against individuals, more especially against individuals against whom no other relief is sought, the Plaintiffs must act with due diligence in accordance with the rules and with respect for the position in which they have placed the Defendants by obtaining Mareva relief.

122 The 672 Plaintiffs did not do this. On more than one occasion they used the position the litigation had placed them in to further the Beyonics Group's interests but disregarded their obligations to the Defendants.

123 Taking all these factors into account I am satisfied that the Defendants have discharged the heavy burden upon them to demonstrate an abuse of process. In my judgment it would be manifestly unfair to the Defendants, particularly to Mr Goh, for a second trial to take place based on the same matrix of facts as arose in the first trial. The unfairness is such that it outweighs the right of the Plaintiffs to have what is plainly a genuine cause of action tried. This action should therefore be struck out.

124 At one stage of the argument I did consider whether it was possible under the *Henderson v Henderson* doctrine for relief short of striking the action out to be granted. I had in mind the possibility, for example, of making an award of costs in the second action that ensured that the Defendants were not out of pocket by reason of the failure of the Plaintiffs to bring their claims in the 672 Action. On further consideration and having received submissions on the point, I am satisfied (a) that such a course is not open to me and (b) that on the facts of this case it would not be an appropriate course to take even if it was open to me for the reasons I have given.

125 As to (a), it is only in exceptional circumstances that the *Henderson v Henderson* doctrine applies. The unfairness must be manifest. There must be an abuse. This is not a doctrine which gives the court an unfettered discretion to deal as it sees fit with unfairness which falls short of being manifest. It is a matter of judgment not discretion; either the abuse is manifest or it is not. If it is, the only appropriate relief is striking out. If it is not, the application fails and the trial goes ahead in the usual way.

The Substantive Issue

126 Strictly speaking the decision on the *Henderson v Henderson* Issue makes it unnecessary for me to give judgment on the Substantive Issue. However the parties wished the trial on the Substantive Issue to go ahead, the evidence was heard and submissions were made. I shall therefore give judgment on the basis that I am wrong on the *Henderson v Henderson* Issue.

The HDD Industry

127 This action concerns the manufacture of baseplates which, subsequently, are further processed by the addition of motors and drives to make an end product, a HDD (hard disc drive), which is then incorporated into both desktop and laptop computers.

128 At all material times, the Beyonics Group had two manufacturing divisions, the PES (Precision Engineering Services) Division and the EMS (Electronic Manufacturing Services) Division (see [3] above). The PES Division manufactured and sold baseplates destined for end customers, such as Seagate, Hitachi and Western Digital. These baseplates are manufactured for an end customer under what is described as a "baseplate programme", with each programme having its own design specifications and schematics, and a

manufacturer of baseplates must be qualified by an end customer to undertake a specific baseplate programme.

129 The baseplate manufacturing process has two main stages called the "1st Stage" and the "2nd Stage" (see [141] below). Thereafter, completed baseplates are sent to a company which assembles the other components of the HDD in a process called the motor baseplate assembly ("MBA"). This company will then ship the completed baseplate to the end customer. The MBA company which features prominently in this action is the Nidec Corporation ("Nidec") (see [134(c)] below).

130 BAP, BTEC, and BPM together with BTT (see [4] above) were part of the PES Division. BTEC owned and operated a baseplate manufacturing facility in Changshu, China, BPM owned and operated a baseplate facility in Tampoi, Malaysia and BTT owned and operated a Baseplate Facility in Ayutthaya, Thailand. BAP did not own or operate any Baseplate Facility. BAP was in essence a sales company for the baseplate manufacturing companies. Seagate and the other end customers ordered baseplates through the MBA companies which then would place purchase orders to a baseplate manufacturer selected by them, such as BTEC, BPM and BTT.

131 Prior to October 2011, the manufacture of baseplates within the Beyonics Group was divided between BTT, BPM and BTEC. In some cases, 1st Stage work was performed in one facility and 2nd Stage in another. In October 2011 there were extensive floods in Thailand which affected not only BTT's premises but the premises of other baseplate manufacturers. BTT's factory was a total write off and resulted in a significant insurance claim. The floods had a major effect on the HDD industry and it was the steps that the

various players in that industry took to seek to alleviate the problems that arose that underlie this dispute.

132 At all material times, Mr Goh was both a director and the CEO of the parent company, BTL. He was also either a director or employee of all the Plaintiffs (see [153] below). The management structure of the Beyonics Group consisted of Mr Goh as the CEO of the Group and, reporting to him, there were General Managers at each manufacturing plant. Mr Lee Leong Hua, who gave evidence, was at all material times Senior General Manager of BTEC's facility at Changshu.

133 The 2nd Defendant, currently named Pacific Globe Enterprises Limited, was at the material times named Wyser International Limited and is incorporated in the British Virgin Islands. It is (and was) owned and controlled by Mr Goh. I shall refer to it as "Wyser".

134 The other companies that feature prominently are:

(a) "Seagate": Seagate Technology International, a company with its headquarters in California, was a customer of both divisions of the Beyonics Group. The PES Division manufactured and supplied baseplates for Seagate HDDs, including baseplates under what was known as the Brinks 2H programme (also known as the Pharaoh programme). The EMS Division manufactured and supplied printed circuit board assemblies. Seagate held about 40% of the HDD market over the relevant period. Mr Chua Wui Chung ("Mr Billy Chua"), Senior Manager for the Commodity Management Team ("CMT") at Seagate, was subpoenaed to give evidence at the trial by the Plaintiffs.

(b) "Nedec/Kodec": Nedec Co Ltd and Kodec Co Ltd are incorporated in South Korea and manufacture HDD and automotive components. Nedec and Kodec together with a Chinese company, Langfang Nedec Machinery & Electronics Co. Ltd ("LND"), are members of the NEDEC/KODEC Group of companies. LND has a baseplate manufacturing facility in Langfang, China. Save where necessary, I shall refer to any or all these entities simply as Nedec/Kodec. The Nedec/Kodec group is a private group of companies. The owner and Chairman was Mr Neung Woong Hwang. His son, Mr Sejoon Hwang, also known as Stephen Hwang ("Mr Hwang"), was the CEO and the chief financial officer ("CFO") was Mr Tae Sung Lee ("Mr Tony Lee"). Mr Tony Lee gave evidence on behalf of the Defendants.

(c) "Nidec": Not to be confused with Nedec/Kodec, Nidec Corporation is a Japanese manufacturer of electric motors. Their products are found in HDDs, electric appliances, automobiles and commercial and manufacturing equipment. Nidec (Zhejiang) Corporation ("NCC") and Nidec Electronics (Thailand) Co Ltd ("NET") were subsidiaries of Nidec Corporation and were at all material times MBA entities. In the case of the PES Division, NCC issued purchase orders to BAP for baseplates manufactured by BTEC, and NET issued purchase orders to BTT for baseplates manufactured by BPM and BTT. Again, save where necessary I shall refer to all these entities, together or individually, as Nidec. No witness from Nidec gave evidence at the trial.

135 In addition to Seagate, in 2010 the other principle HDD manufacturers were Western Digital, Toshiba, Samsung and Hitachi. There were two sizes of HDD, 2.5" and 3.5". In 2011 there was a measure of consolidation in the

industry. Seagate acquired Samsung's HDD business, Western Digital acquired Hitachi's 2.5" business and Toshiba the 3.5" business.

136 Other entities that were involved in the manufacture of baseplates in addition to companies in the Beyonics Group and Nedec/Kodec were MMI China (a subsidiary of MMI International Holdings Pte Ltd, a Singapore company) and Nidec Brilliant, a subsidiary of Nidec. Prior to the sale of Samsung's HDD business to Seagate, Nedec/Kodec were qualified to manufacture baseplates for Samsung but not for Seagate. Prior to 2011 the Beyonics Group were qualified to manufacture baseplates for Seagate and Hitachi and, in 2011 began to manufacture also for Western Digital.

137 When the likes of Seagate, Western Digital and Toshiba launch a new product, a specific baseplate will be required. Whilst the various baseplates are fundamentally similar, the specification for each will vary.

138 In order to become a manufacturer of baseplates for, *eg*, Seagate HDDs, the manufacturing plants have to undergo a qualification process. Two levels of qualification are required for baseplates of any given product. First, the plant must be a qualified supplier for Seagate and, secondly, it must be specifically approved for the manufacture of baseplates for the product in question. So far as concerns Beyonics, BTEC became a Seagate qualified plant in 2005 whereas both BPM and BTT had qualified earlier (1991 and 2004 respectively).

139 Secondly, once qualified in this general sense, in order to qualify to manufacture a particular product a rigorous programme has to be followed, which takes some 4 to 6 months on average. In outline, as between, say, BTEC and Seagate, the process requires Seagate to issue drawings for the new product, followed by discussions between the relevant teams at Seagate and BTEC.

Following internal discussions at BTEC coupled with the preparation of the necessary moulds, cast toolings, machining fixtures and inspection fixtures, pre-production samples, known as First Articles, would be produced. These would be inspected by Seagate and (hopefully) approved. Seagate would then send its engineering representatives to the plant to do a line qualification. Samples will be sent to the relevant MBA entity to test motor assembly and, if the MBA entity approved them, the samples will be sent to Seagate for a full assembly test run after which the plant would be allowed to proceed with full production.

140 Hence the fact that a company is qualified to manufacture baseplates for one customer does not entitle it to manufacture for another. Equally, qualification for one product does not enable to manufacturer to circumvent the rigorous qualification process for another product.

141 The manufacture of baseplates involves various manufacturing processes, which can be broadly divided into two main stages. The 1st Stage involves, among other things, die casting and ends with e-coating, and this stage is often referred to as "e-coating". The 2nd Stage involves, among other things, precision machining and other work to produce a finished baseplate, and this process is often called "machining".

142 In the 1st Stage, die casting molten metal is poured into a mould and allowed to solidify; the die casted parts are then sent for trimming, deburring and polishing after which they will be put through a process of stress relief to refine their grain structure. There is then a pre-treatment process to clean the baseplates using chemicals.

143 For some baseplates, it is necessary for pre-machining to be done. There are two machines that can be used to do this, Special Purpose Machines

("SPM") or Computer Numerical Control Machines ("CNC"). I shall have to consider the function and costs of these two types of machine below.

144 The baseplates will then be e-coated to coat the surface of the baseplates and they will be inspected prior to undergoing the 2nd Stage which may be carried out at the same facility as the 1st Stage or they may be transported to a different facility for the 2nd Stage.

145 In the 2nd Stage, CNCs and/or SPMs are used to drill holes and cut the baseplate. CNC Machines are more precise machines, but are more expensive than SPMs. Hence CNC Machines are generally used to drill critical holes and cut the baseplate whereas SPMs are used to do drilling and tapping of non-critical holes. Both machines can be used for all this work but because the SPM machine is less precise, the propensity for rejected products is greater.

146 Following sample inspection and the removal of machining burrs certain products will undergo pin assembly. The baseplates then go through a high pressure water jet and ultrasonic washing to clean the holes to remove particles that are not visible to the naked eye. The baseplates will thereafter be put through an air leak test and a final inspection before being shipped to the relevant MBA.

The Issues

147 With that background, I can turn to consider the issues that arise for determination.

148 The main claims against Mr Goh and Wyser are for breaches of duties, dishonest assistance, and conspiracy. They are brought by BAP as the primary plaintiff. In the alternative, a similar claim is made by BAP, BTEC, and BPM.

It is alleged that in his capacity as a director and/or an employee of those companies, Mr Goh allegedly:

(a) used Wyser secretly to enter into the Wyser Agreements and received undisclosed payments from Nedec/Kodec pursuant thereto;

(b) secured a collaboration between BAP and Nedec/Kodec ("the BN Alliance") to divert 2nd Stage work in the manufacture of baseplates for Seagate HDDs from the Beyonics Group to Nedec/Kodec, and procured a US$2.5 Million Grant from Seagate to Nedec/Kodec to assist this; and

(c) facilitated Nedec/Kodec's business with Seagate for the supply/manufacture of baseplates for Seagate HDDs in competition with BAP, BTEC, and/or BPM, with the intention that Nedec/Kodec should supplant the Beyonics Group as a supplier and/or manufacturer of baseplates for Seagate HDDs in whole or in part.

149 The claim against Wyser is for dishonest assistance of Mr Goh's alleged breaches of duty and against both Defendants for unlawful means conspiracy.

150 The primary loss allegedly suffered is the Diversion Loss and the Total Loss referred to in [61] above.

151 In addition a claim is made by BAP for the return of a bonus S$200,000 awarded to Mr Goh in January 2012 which, it is claimed, would not have been paid if Mr Goh's alleged breaches had been known to the then directors at that time.

152 Further, claims are made by BAP, BIL and BTS for the return of the sums paid to Mr Goh under the various Resignation Agreements (see [6] and [70] above) which again, it is alleged, would not have been paid if Mr Goh's alleged breaches had been known at that time.

153 Mr Goh does not dispute that he was a director and/or employee of the various Plaintiffs or that he owed them the well-known obligations of loyalty and fidelity and the fiduciary duties imposed upon directors. It is also not in dispute that Wyser is owned and controlled by Mr Goh. Mr Goh's primary defence is that at all times he acted in the best interests of the Beyonics Group in general and of each of the Plaintiffs in particular and that a thorough examination of the facts as presented to this court will demonstrate that. Accordingly, he contends that there was no breach of any of the duties owed to the Plaintiffs and that the bonus and the payments made to him under the Resignation Agreements were properly paid.

154 He further contends that the payments made to Wyser under the Wyser Agreements were in respect of consultancy work done by him in order to assist the relationship between Beyonics and Nedec/Kodec, a relationship that was in the best interests of Beyonics that he should strive to enhance. Since Beyonics was not in the business of providing consultancy work, it was appropriate that the payments should have been made to his order and not to Beyonics. In any event, following the 672 Action, all sums paid under the Wyser Agreements have been repaid and thus, he asserts, the question of whether it was appropriate for the payments to have been paid to Wyser rather than Beyonics does not arise in this action.

155 The only other minor defence pleaded relates to the BTEC's claim in relation to the Diversion Loss and the Total Loss. If, contrary to the Plaintiffs'

primary case that BAP is entitled to make to claim for the whole of those losses, the claim must be made by each of BAP, BTEC and BPM for their individual losses, the Defendants contend that Mr Goh's obligations towards BTEC are governed by Chinese law and that, under that law, the claim is time-barred ("the Limitation Defence").

The Law

156 The Plaintiffs' primary case is that Mr Goh breached the fiduciary duties he owed to BAP, BTEC and BPM and/or his duties of fidelity and loyalty to BPM and that Wyser dishonestly assisted in those breaches.

157 Alternatively it is said that there was a conspiracy to injure those companies by unlawful means, the conspirators being Mr Goh, Wyser and representatives from Nedec/Kodec. The unlawful means were the breaches and dishonest assistance pleaded in this action and those upheld by the Court of Appeal in the 672 Action.

158 Much of what follows is an abbreviated extraction (with gratitude) from the Plaintiffs' written closings.

Breach of Duties

(1) Duty of an Employee

159 Every employment contract contains an implied term that an employee will serve his employer with good faith and fidelity (*Halsbury's Laws of Singapore* (LexisNexis, 2017) ("*Halsbury's*") Vol 9 at paras 100.171 and 100.175). This means that employees are expected to "serve their employers diligently, honestly and loyally" (see *Asiawerks Global Investment Group Pte*

Ltd v Ismail bin Syed Ahmad [2004] 1 SLR(R) 234 ("*Asiawerks*") at [61]) which includes a duty:

(a) not be engaged in any other business during their working hours without approval (*Asiawerks* at [61]);

(b) not to divert business away from his employer (*Asiawerks* at [61]);

(c) not to take unauthorised profits at the expense of his employer (*Halsbury's* Vol 9 at para 100.177); and

(d) not to injure his employer by selling the employer's assets at a substantial discount (*Halsbury's* Vol 9 at para 100.177).

(2) Duty of a Director

160 The company-director relationship is a well-established category of fiduciary relationships and *"[t]he distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary*" (*Snell's Equity* (John McGhee QC gen ed) (Sweet & Maxwell, 33rd Ed, 2015) ("*Snell's Equity*") at para 7-008). The obligation is a high one, as set out in *Kumagai-Zenecon Construction Pte Ltd and another v Low Hua Kin* [1999] 3 SLR(R) 1049 at [13]):

> The standard of duty imposed by law on a fiduciary is the highest standard known to the law. It is a duty to act for someone else's benefit by sacrificing one's own personal interest to that of the other. …

161 First, a director must act honestly and bona fide in the best interests of the company (*Walter Woon on Company Law (*Tan Cheng Han SC, gen ed) (Sweet & Maxwell, 3rd Ed, 2009) ("*Walter Woon*") at para 8.16). The test in

respect of the duty to act honestly and *bona fide* in the best interests of the company is both objective and subjective. The objective element in the test requires an examination of "*whether an honest and intelligent man in the position of the directors, taking an objective view, could reasonably have concluded that the transactions were in the interests of the company*" (*Walter Woon* at para 8.22). The subjective element in the test relates to whether the director had exercised his discretion *bona fide* in what he considered was in the interests of the company. In this regard, *"[d]irectors are allowed to take a wider view of what the company's interests are [and] a transaction that seems on the face of it to be a bad one may be commercially justifiable if it leads to other intangible benefits for the company*" (*Walter Woon* at para 8.21).

162 The subjective and objective requirements were considered by the Court of Appeal in its Judgment in the 672 Action (at [35]–[36]):

> 35 Indeed, there are both subjective and objective elements in the test. *The subjective element lies in the court's consideration as to whether a director had exercised his discretion bona fide in what he considered (and not what the court considers) is in the interests of the company*: *Re Smith & Fawcett Ltd* [1942] Ch 304 at 306, as accepted by this court in *Cheong Kim Hock v Lin Securities (Pte)* [1992] 1 SLR(R) 497 at [26] and in *Ho Kang Peng v Scintronix Corp Ltd* [2014] 3 SLR 329 ("*Ho Kang Peng*") at [37]. Thus, a court will be slow to interfere with commercial decisions made honestly but which, on hindsight, were financially detrimental to the company.
>
> 36 The objective element in the test relates to the court's supervision over directors who claim to have been genuinely acting to promote the company's interests even though, objectively, the transactions were not in the company's interests. *The subjective belief of the directors cannot determine the issue: the court has to assess whether an intelligent and honest man in the position of a director of the company concerned could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company.* This is the test set out in *Charterbridge Corporation Ltd v Lloyds Bank Ltd* [1970] Ch 62 (at 74) and it has been applied here since adopted by this court in *Intraco Ltd v Multi-Pak Singapore Pte Ltd* [1994] 3 SLR(R) 1064 (at [28]).

> Thus, "where the transaction is not objectively in the company's interests, a judge may very well draw an inference that the directors were not acting honestly": *Walter Woon on Company Law* (Tan Cheng Han gen ed) (Sweet & Maxwell, Revised 3rd Ed, 2009) ("*Walter Woon*") at para 8.36, referred to in *Ho Kang Peng* at [38]. It is thus observed in *Walter Woon* at para 8.36 that in practice the courts often apply a more objective test although the test is theoretically subjective.
>
> [emphasis added]

163 There is therefore an important distinction between cases where directors have in good faith made incorrect commercial decisions and cases where directors have not acted honestly. The Court of Appeal in *Ho Kang Peng v Scintronix Corp Ltd (formerly known as TTL Holdings Ltd)* [2014] 3 SLR 329 stated at [39]:

> … [I]mmunity from suit for poor commercial decisions was meant to protect "[*b*]*ona fide* entrepreneurs and honest commercial men [who] should not fear that business failure entails legal liability", and to encourage commercial risk and entrepreneurship…

164 Secondly, a director must avoid and disclose conflicts of interest. A fiduciary must not place himself in a position or enter into a transaction in which his personal interest may conflict with his duty to his principal, unless his principal, with full knowledge of all the material circumstances and of the nature and extent of the fiduciary's interest, consents (*per* Lord Herschell in *Bray v Ford* [1896] AC 44 at 51, cited in *Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal* [2009] 3 SLR(R) 109 ("*Ng Eng Ghee*") at [137]). The test for determining whether a conflict of interests exists is an objective one. The law requires that there is a "reasonable perception of a conflict of interest arising" (*Ng Eng Ghee* at [138]) but the law is strict: where a director is found to have placed himself in a position of conflict of interest, he will not be permitted to assert that his action was *bona fide* or thought to be in the interests of the company (*Walter*

Woon at para 8.44). More specifically a director may not obtain for himself or for a third party any property or business opportunity that properly belongs to his company (*Walter Woon* at para 8.58).

165 Thirdly, a director must not take secret or improper profits obtained through the use of the company's property, information or opportunities to which he has access by virtue of being a director, without the full informed consent of the company. The duty is a strict one, as set out in *Walter Woon* at para 8.45(4):

> … The rule against a director making a secret profit is so strict that if an opportunity to make a profit or obtain a benefit comes to him because he is a director, that profit or benefit must be disclosed to the company and approved. In the absence of such disclosure and approval, the director is liable to account for that profit even if he has been guilty of no moral wrong.

166 It follows that if a director accepts a bribe in consideration for acting in a certain way in relation to the company's affairs, he will be in breach of his fiduciary duty. As stated in *Snell's Equity* at para 7-047:

> It is a clear breach of fiduciary duty for a fiduciary to take a bribe. A "bribe consists in a commission or other inducement, which is given by a third party to an agent as such, and which is secret from his principal." It is irrelevant whether the bribe actually influenced the fiduciary's conduct …

167 Fourthly, a director must disclose his wrongdoing. Here there is a difference between the obligation placed on an employee at common law and that placed on a fiduciary, such as a director, in equity as acknowledged in *Quality Assurance Management Asia Pte Ltd v Zhang Qing and others* [2013] 3 SLR 631 where one of the claims concerned a bonus payment that the plaintiff made to the defendant. The High Court observed at [96]–[97]:

> 96 At common law, an employee has in general no implied duty to confess his own misdeeds to his employer. But in the

> context of a particular contract and on the facts of a particular case, an employee may have an implied duty to report the misdeeds of *other* employees: see *Bell v Lever Brothers Ltd* [1932] AC 161 at 228; *Sybron Corporation v Rochem Ltd* [1984] 1 Ch 112 cited in *Chua Choon Cheng v Allgreen Properties Ltd* [2009] 3 SLR(R) 724 at [87]–[88].
>
> 97 In equity, the position is different. An employee who is also a fiduciary and who owes his employer a general fiduciary duty of loyalty – that is, a duty to act in good faith in the best interests of his employer – is obliged pursuant to that general duty to disclose his own wrongdoing to his employer … By his own admission, Zhang was a fiduciary who owed a duty of loyalty to QAM. So QAM could, and probably should, have based its claim to recover from Zhang a sum equivalent to the bonuses they had paid to him as being equitable compensation for Zhang's breach of his duty of loyalty in failing to disclose his own wrongdoing to QAM. …

Dishonest Assistance

168 The test for dishonest assistance is a four-stage test as laid down by the Court of Appeal in *George Raymond Zage III and another v Ho Chi Kwong and another* [2010] 2 SLR 589 ("*George Raymond*") at [20]:

> The elements of a claim in dishonest assistance are: (a) the existence of a trust; (b) a breach of that trust; (c) assistance rendered by the third party towards the breach; and (d) a finding that the assistance rendered by the third party was dishonest …
>
> [internal citations omitted]

169 The test for dishonest assistance is an objective test. The defendant "*must have such knowledge of the irregular shortcomings of the transaction that ordinary honest people would consider it to be a breach of standards of honest conduct if he failed to adequately query them*" (*George Raymond* at [22]). If the defendant is found liable, he must account as if he were truly a trustee to the claimant (*Snell's Equity* at para 30-080).

Unlawful Means Conspiracy

170 Unlawful means conspiracy is established where "*two or more persons… agree and act on a course of conduct to cause damage to another*" (*The Law of Torts in Singapore*, (Gary Chan Kok Yew & Lee Pey Woan, eds) (Academy Publishing, 2nd Ed, 2016) at para 15.051). There are two forms of the tort of conspiracy: (i) conspiracy by lawful means, and (ii) conspiracy by unlawful means. In this case, the Plaintiffs' pleaded case relates only to unlawful means conspiracy.[24]

171 The elements of a claim for unlawful means conspiracy were set out by the Court of Appeal in *Yuanta Asset Management International Ltd and another v Telemedia Pacific Group Ltd and another and another appeal* [2018] 2 SLR 21 at [142]:

> … [T]he plaintiffs must show that:
>
> (a) there was a combination of two or more persons to do certain acts;
>
> (b) the alleged conspirators had the intention to cause damage or injury to the plaintiff by those acts;
>
> (c) the acts were unlawful;
>
> (d) the acts were performed in furtherance of an agreement; and
>
> (e) the plaintiffs suffered loss as a result of the conspiracy.

172 In the case of (b) above the intention need not be predominant (*Clerk & Lindsell on Torts* (Michael A. Jones, ed) (Sweet & Maxwell, 2014) at para 24-94).

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[24] Statement of Claim at 41.

173 More specifically, where there has been a plan between two or more parties to injure a company by diverting business or assisting a company's competitor and where that plan has been carried through to the detriment of the company, the Court will find an intention to injure as is demonstrated by *Chew Kong Huat and others v Ricwil (Singapore) Pte Ltd* [1999] 3 SLR(R) 1167 at [34]–[35].

The mental state of Wyser

174 It is not disputed in this case that it is necessary to attribute a state of mind to a company which is a defendant in circumstances where a given state of mind is a necessary element of the alleged wrong. Equally it is not disputed that the mind in question is the mind of the controlling director, in this case, Mr Goh (see *Parakou Shipping Pte Ltd (in liquidation) v Liu Cheng Chan and others* [2017] SGHC 15 at [147], citing *Bilta (UK) Ltd (in liquidation) and others v Nazir and others (No 2)* [2015] 2 WLR 1168 at [67]).

Claim for repayment of bonus

175 The claim for repayment of the bonus is based upon Mr Goh's breaches of fiduciary duty in failing to disclose his wrongdoing. The Plaintiffs specifically drew my attention to, and invited me to apply, the observations of Choo Han Teck J in *John While Springs (S) Pte Ltd and another v Goh Sai Chuah Justin and others* [2004] 3 SLR(R) 596 ("*John While Springs*") at [7]:

> … A bonus is generally a payment fashioned as a reward as well as an incentive. No reasonable employer would have offered a bonus to a cheating employee, or one who was in breach of his fiduciary duty as was the case here. This would be a fair inference of fact from the admitted facts at trial and is not dependent on any assessment of the reliability of witnesses. …

Claim for repayment of sums paid under Resignation Agreements

176 The Plaintiffs rely, in the alternative, on (1) Unilateral Mistake; (2) Misrepresentation by Silence; and/or (3) Failure of Consideration.

(1) Unilateral Mistake in Equity

177 So far as concerns Unilateral Mistake, the Plaintiffs base their case on unilateral mistake in equity, a notoriously difficult and controversial area of the law as the recent decision of the Court of Appeal in *Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA(I) 2 demonstrates. The Plaintiffs commended to me some of the reasoning of Mance IJ in his dissenting judgment which they contended set out principles which were not inconsistent with the reasoning of the majority.

178 This is not a matter which the Defendants addressed in their written closings and I have my doubts as to the correctness as to the breadth of the Plaintiffs' submissions. In these circumstances I considered whether it would be appropriate to invite further submissions from the Defendants. However, having reviewed the Plaintiffs' submissions on Misrepresentation by Silence and Failure of Consideration, I concluded that if they could not succeed on the basis of those submissions, they would not succeed on the basis of Unilateral Mistake in Equity. I shall therefore not consider the law on this issue further.

(2) Misrepresentation by Silence

179 It is well settled that in appropriate circumstances silence can to a representation.

180 In *Broadley Construction Pte Ltd v Alacran Design Pte Ltd* [2018] 2 SLR 110 at [28], Steven Chong JA giving the judgment of the Court of Appeal observed that:

> The law has always been cautious in ascribing legal significance to a party's silence. This applies to silence as acceptance of the terms of a contract (see *R1 International Pte Ltd v Longstroff AG* [2015] 1 SLR 521 at [53]–[54], waiver of rights (see *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 ("*Audi Construction*") at [58]–[61] and squarely in cases of misrepresentation by silence (see *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] 3 SLR 801 at [65]). Silence, being passive conduct, and inherently lacking the definitive quality of an active statement, is rarely considered sufficient to amount to a representation. *But the courts have also made it clear that silence can in appropriate circumstances acquire a positive content and amount to a representation*. Such cases have been characterised as situations where there is a duty on the alleged representor to speak or disclose certain facts, and in cases of misrepresentation, that failure to do so renders a statement previously made by the representor false or (more rarely) itself constitutes a false statement. *Such a duty may arise out of the relationship of the parties* and/or other circumstances in which the silence is maintained, and *is to be assessed by reference to how a reasonable person would view the silence in the circumstances*: *Audi Construction* at [61].
>
> [emphasis added]

181 In *Loh Sze Ti Terence Peter v Gay Choon Ing* [2008] SGHC 31 , Belinda Ang Saw Ean J stated at [77]:

> Under this head of claim, Loh must establish the making of the misrepresentation by Gay, the inducement thereby of Loh and reliance thereon by Loh to his detriment. Briggs J in *Ross River Ltd & Another v Cambridge City Football Club Ltd* [2007] EWHC 2115 at [193] and [194] helpfully summarises the legal position on the law of rescission for misrepresentation which I accept and apply to this case:
>
> > The making by one contracting party to another of a material misrepresentation of fact which induces that other to make the contract gives that other the right to rescind the contract, qualified in cases of innocent or negligent misrepresentation by the court's statutory discretion to award damages in lieu, but not so qualified where, as here, the misrepresentation is fraudulent.
> >
> > Although silence as to the material facts is not in general capable of constituting a misrepresentation, it may do so where the defendant is under a positive duty of disclosure, for example when negotiating a species of contracts regarded as *uberrimae fidei*, or *where an*

> *existing relationship between the parties, such as a fiduciary relationship, imposes an obligation of disclosure.*
>
> [emphasis added]

182 Accordingly, where, as here, a fiduciary relationship does exist between the parties to contracts, the Resignation Agreements, silence may constitute a representation depending on how a reasonable person would view the silence in the circumstances. More specifically, would the reasonable person regard the silence as being a representation that the fiduciary had no wrongdoings to disclose to his employer?

183 In addition, the person to whom the representation was made must show that he relied upon the representation as an inducement to enter the contract. The false representation need not be the sole inducement, as long as it "*played a real and substantial part and operated in their minds, no matter how strong or how many were the other matters which played their part in inducing them to act*" (*Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 at [23]).

(3) Failure of Consideration

184 The Court of Appeal considered this aspect in its Judgment in the 672 Action (see the 672 Appeal Judgment at [85]–[92]). Judith Prakash JA, giving the judgment of the Court, distinguished the entitlement of an employee to retain salary owning to him on termination of a contract from his right to retain a bonus paid in circumstances where there was a breach of a fiduciary relationship in [86]–[88]:

> 86 … The Judge found that the post-resignation salary payment was unjustified and should be repaid to [BIPL]. Her reason, based on *John While Springs*, was that no reasonable employer would continue to pay a fiduciary salary when faced

> with knowledge of the fiduciary's breach of duties and lack of good faith.
>
> 87 With respect, we do not agree that *John While Springs* supported the Judge's finding on this issue. In *John While Springs*, Choo Han Teck J allowed the plaintiffs to reclaim bonus payments paid to their ex-employee who had breached his fiduciary duty on the basis that "[n]o reasonable employer would have offered a bonus to a cheating employee, or one who was in breach of his fiduciary duty as was the case here". However, the present case can be distinguished on the facts. Unlike a bonus that is "generally a payment fashioned as a reward as well as an incentive" (*John While Springs* at [7]), salaries paid after resignation are generally contractually due to the employee. In such situations, payments of salary after resignation are not gestures of goodwill, but would be the employee's contractual entitlement. In *Schonk Antonius Martinus Mattheus v Enholco Pte Ltd* [2016] 2 SLR 881 ("*Schonk*"), *this court held that an employer may not use an employee's breach of fiduciary duties to justify withholding payment of salary that that employee is entitled to. Instead, the employer would only be entitled to make a deduction from the employee's salary in respect of such losses as the employer can prove that it has suffered by reason of the employee's breach* (Schonk at [15]). The employee in breach in *Schonk* was held to have been entitled as a matter of law to his salary for so long as he was working and, in the particular circumstances of that case, regarded himself as an employee. In the present case, if Mr Goh had a legal entitlement to the salary he was paid for the period after he served notice of resignation, his breaches of fiduciary duties would not take that entitlement away from him. Accordingly, those breaches cannot, in themselves, support a claim for reimbursement of the amount paid.
>
> [emphasis added]

185 However the Judgment went on to consider the question of consideration in circumstances where the employee has not insisted on his contractual right to payment but has entered a subsequent contract on different terms and Prakash JA reasoned as follows at [88]–[89]:

> 88 There is, however, another way in which the Judge's order that Mr Goh repay the salary he received can be justified. To abridge a contractual period of notice, mutual agreement between the parties to a contract of employment is required: see *Halsbury's Laws of Singapore* (LexisNexis Singapore, 2017 Reissue) ("*Halsbury's*") vol 9 at para 100.190. Although Mr

Goh's notice of resignation was signed only by him, it purports to evince such a mutual agreement to abridge the six months' contractual period of notice to about three and a half months (from 10 January to 30 April 2013). ***The issue that arises is whether this was a valid agreement supported by consideration***. Mr Goh argues that he provided consideration in the form of his accepting a lower amount in lieu of full notice (which would have been six months' worth of salary) and by giving up any claim against the company.

89 It is trite that a detriment incurred by the promisee (at the request of the promisor) may constitute consideration. This rule does not apply here, however. First, Mr Goh was not as a matter of law entitled to salary in lieu of notice either contractually by express provision or under common law; and second, the abridgment of the contractual notice period was requested by *Mr Goh himself* and not by [BIPL].

90 An employer is entitled to terminate a contract of employment by payment of salary in lieu of notice, even where the contract is silent on this and also arguably where it is expressly provided that it is terminable by notice. ***However, it seems that the employee is, under common law, not entitled to terminate the contract of employment by payment of salary in lieu of notice*** (see *Halsbury's* vol 9 at para 100.195, citing *Heron, Gethin-Jones & Liow v John Chong* [1963] MLJ 310 at 313, *per* Wee Chong Jin CJ, where this court held that implying a term to enable an employee to terminate his employment by paying salary in lieu of giving and serving the required notice was not necessary to give the employment contract business efficacy). ***Here, Mr Goh was the one who sought an abridgment of his contractual notice period. The company simply agreed to his request. Thus there was no issue of any consideration being provided by Mr Goh.*** If the company had wanted him to leave early and forgo the salary which he could otherwise have earned during the six-month notice period, then Mr Goh's acceptance of three-and-a-half months of salary would have been good consideration for the abridgment agreement.

91 Mr Goh's submission that he gave good consideration by giving up any and all claims that he may have had against [BIPL] is also flawed. Although such forbearance can constitute sufficient consideration (*Ang Sin Hock v Khoo Eng Lim* [2010] 3 SLR 179 at [71]), on the facts it cannot be surmised that there was a request from [BIPL] that Mr Goh forbear from suing it. In *Sea-Land Service Inc v Cheong Fook Chee Vincent* [1994] 3 SLR(R) 250, this court found on the facts that there was no implied request from the appellants for the respondent to

> forbear to sue them and thus held (at [22]) that there was no consideration in the form of a forbearance to sue.
>
> [emphasis in original in italics; emphasis added in bold italics]

186 Accordingly, in circumstances where it is the employee who requests an abridgment of his contractual notice period and it is the employer who accedes to that request, the employee is, in law, providing no consideration for the resultant agreement. Whilst any findings of fact made in the 672 Action are not binding upon me, this court is bound by the findings of law.

Causation

187 It is well established that the common law test for establishing causation is the "but-for" test in which the defendant will be liable only if the plaintiff's damage would not have occurred "but for" his wrongful act. Until very recently the position in equity in cases such as the present where the alleged wrong consists of a breach of fiduciary duties was less clear.

188 However, following the service of the written closings in this action the Court of Appeal handed down judgment in *Sim Poh Ping v Winsta Holding Pte Ltd and another and other appeals* [2020] SGCA 35 ("*Winsta*"). At the parties' request I invited further written submissions on the impact of this judgment on the facts of this case.

189 The *Winsta* judgment focusses on what are referred to as "non-custodial" breaches of trust which do not involve any damage to or loss of property in the fiduciary's custody. These duties include the duties of "no conflict" and "no profit" as well as the duty to act in good faith which are precisely the duties alleged to have been broken in this case (see *Winsta* at [253]).

190 The judgment of the Court was delivered by Andrew Phang Boon Leong JA who considered three possible approaches that had been applied in previous cases (at [89]–[92]):

> 89 The first (which we refer to hereafter as "**Approach 1**") … is that causation is ***not*** relevant once a *breach* of fiduciary duty has been established. In particular, a defendant would not be permitted to argue that it is not responsible for the damage which the plaintiff has suffered as that damage would have occurred in any event and that the defendant had therefore not caused the damage in question. The underlying rationale for such a strict (indeed, prophylactic) approach centres on the need to deter breaches of fiduciary duty.
>
> …
>
> 91 The *second* (which we refer to hereafter as "**Approach 2**") – which is in *complete contrast* to the first…. – is that the plaintiff must ***always*** establish "but for" causation.
>
> 92 The *third* (which we refer to hereafter as "**Approach 3**") is a kind of *hybrid* approach which, whilst not eschewing the requirement of causation (which is wholly endorsed under Approach 2), nevertheless attempts to give effect to the underlying rationale under Approach 1 by *reversing the burden of proof* inasmuch as the *defendant* will have to prove that the damage suffered by the plaintiff would have occurred in any event.

191 Following a detailed review of authorities and learned articles in a number of common law jurisdictions, reasons were given in [240]–[243] for preferring Approach 3:

> 240 In our view, ***Approach 3*** … should be adopted in Singapore. This approach does not eschew the need for a causation test, and at the same time, such an approach gives legal effect to the stringent duties placed on fiduciaries and the corresponding need to deter fiduciaries from breaching their duties. Under this approach to causation, the principal bears the legal burden of establishing its claim, but the ***legal burden of proof*** *of showing that the loss would have been sustained by the principal even if the fiduciary had not breached his or her fiduciary duty falls on the* ***fiduciary***. Consistent with s 103(2) of the Evidence Act (Cap 97, 1997 Rev Ed), given that under Approach 3 the fiduciary is bound to prove the existence of facts showing that the losses would have been sustained even

> without his or her breach, the legal burden of proof lies on him or her. In other words, the burden lies on the fiduciary to rebut the ***rebuttable presumption*** that the loss would not have been sustained by the principal had the fiduciary not breached his or her fiduciary duty. This rebuttable presumption arises once the principal is able to prove on a balance of probabilities that the fiduciary has breached his or her fiduciary duty, and that loss has been sustained.
>
> 241 …
>
> 242 However, we *depart from* the Singapore High Court cases with regard to their holding that the burden that shifts to the fiduciary to show that the principal would have suffered the loss even if there had been no breach is only an *evidential* one. Consonant with the need for strong deterrence against fiduciaries breaching their fiduciary duties, it is necessary to place the legal burden on the fiduciary fully and squarely. ….. Once the principal is able to show breach and loss, there arises a rebuttable presumption that the breach is a "but for" cause of the loss. The burden is then on the fiduciary to rebut this presumption.
>
> 243 In a case where there is patently no linkage between the fiduciary's breach and the losses sustained, it may, understandably, be of concern to some that the legal burden to rebut the presumed causation is placed on the *fiduciary*. Such concern, if it so arises, is laid to rest by the fact that the discharge of the legal burden would not be an onerous one where there is clearly no causative link. As we have explained in *Loo Chay Sit v Estate of Loo Chay Loo, deceased* [2010] 1 SLR 286 at [14], although the legal burden lies on one party – in this case, the fiduciary – the evidential burden may shift as between the parties, depending on the precise evidence adduced before the court. After the fiduciary shows evidence pointing to the lack of linkage between the breach and the loss, the evidential burden may shift to the principal to adduce evidence to show otherwise. The precise manner in which the evidence is adduced will of course depend on the precise facts and circumstances of each case. Courts should not belabour themselves unnecessarily with exceptional cases and throw the baby out together with the bathwater in attempting to craft legal propositions for these extreme outlying situations. In any case, even where there is patently no causative link, we are of the view that the *practical application* of the rebuttable presumption does not pose a problem.
>
> [emphasis in original]

192 A summary of the applicable approach is contained in [254]:

> 254 To summarise briefly, the approach to causation is as follows:
>
> (a) In a claim for a ***non****-custodial* breach of the duty of *no-conflict* or *no-profit* or the duty to act in *good faith*, the plaintiff-principal must establish that the fiduciary breached the duty and establish the loss sustained.
>
> (b) If the plaintiff-principal is able to meet the requirements of (a), a *rebuttable* ***presumption*** that the fiduciary's breach caused the loss arises. The ***legal burden*** is on the wrongdoing ***fiduciary*** to rebut the presumption, to prove that the principal would have suffered the loss in spite of the breach.
>
> (c) Where the fiduciary is *able* to show that the loss would be sustained in spite of the breach, no equitable compensation can be claimed in respect of that loss.
>
> (d) Where the fiduciary is *unable* to show that the loss would be sustained in spite of the breach, the upper limit of equitable compensation is to be assessed by reference to the position the principal would have been in had there been no breach."
>
> [emphasis in original]

193 This therefore is the approach to causation that I shall adopt in this case.

The Witnesses

194 All the witnesses that gave evidence before me were giving evidence in relation to events that occurred from 2010 until 2013, some seven to ten years ago. Many of them had already given evidence in relation to precisely the same events at the 672 trial. At the outset therefore it is appropriate to bear well in mind that the contemporaneous documents may provide a more reliable record of the events than will the recollection of a witness some years after those events occurred.

195 As the Court of Appeal observed in *OCBC Capital Investment Asia Ltd v Wong Hua Choon* [2012] 4 SLR 1206 at [41], a case concerned with a dispute over the existence and terms of an alleged contract:

> … It bears mention that the first port of call for any court in determining the existence of an alleged contract and/or its terms would be the relevant *documentary* evidence. Where (as in the present case) the issue is whether or not a binding contract *exists* between the parties, ***a contemporaneous written record of the evidence is obviously more reliable than a witness's oral testimony given well after the fact, recollecting what has transpired. Such evidence may be coloured by the onset of subsequent events and the very factual dispute between the parties.*** In this regard, *subjective* statements of witnesses *alone* are, in the nature of things, often unhelpful. Further, where the witnesses themselves are not legally trained, counsel ought not – as the Respondent's counsel sought to do in oral submissions before this court – to forensically parse the words they use as if they were words in a statute. ***This is not to state that oral testimony should, ipso facto, be discounted. On the contrary, credible oral testimony can be helpful to the court, especially where (as we shall see below in relation to supporting the Appellant's case) such testimony is given for the purpose of clarifying the existing documentary evidence.*** There is, however, no magic formula in determining the appropriate weight that should be given to witness testimony. Much would depend on the precise factual matrix before the court. However, it bears reiterating that the court would always look first to the most reliable and objective evidence as to whether or not a binding contract was entered into between the parties and such evidence would tend to be *documentary* in nature.
>
> [emphasis in original in italics; emphasis added in bold italics]

196 Similarly, in *Sandz Solutions (Singapore) Pte Ltd and others v Strategic Worldwide Assets Ltd and others* [2014] 3 SLR 562 ("*Sandz Solutions*") at [77], the Court of Appeal held that in circumstances where the events in question took place many years ago, it would be preferable to place more reliance on the objective documentary evidence.

> We have some concerns about labelling Mr Liaw, and for that matter, Mr Tan (see [76] of the Judgment), as evasive and/or

> vacillating witnesses. The Judge was correct to find certain aspects of their evidence unsatisfactory, but we think it pertinent to note that the events in question took place nearly five years prior to the trial. A trial should not be a test or contest of memories. As we observed above at [50], even the recollections of the most truthful of witnesses would be tested by the lapse of time. *In the premises, we think it preferable in these proceedings to place more reliance on the objective documentary evidence before us as well as the actual conduct of the parties, as opposed to their hazy recollections of past events on the witness stand.*
>
> [emphasis added]

197 The same considerations apply to cases such as the present where the witnesses are trying to recall what transpired in phone conversations or at meetings of which partial written records in the form of contemporaneous documents exist, either in the form of Board minutes, presentation documents or e-mails. There is however a difference between a witness's recollection of a particular event and their recollection of working practices and working relationships that existed at the time. Whilst a proper degree of caution has to be taken in assessing the weight that should be given to evidence given many years later as to who said what to whom at a particular meeting or in a given conversation, the same may not apply in an appropriate case where a witness is giving evidence as to the way in which a particular business operated over the years or as to the dynamics of a particular relationship. These are matters on which recollections long after the event may carry more weight.

198 Equally care has to be taken when reading documents, particularly e-mails, after the event in the context of litigation. E-mails are not documents written on oath and, in the present case, most were written in English which was not the native tongue of the writer. Undue focus on the precise language used is not helpful. What may be helpful is evidence from the writer or recipient as to the relationship between them which may account for the way in which

something was written or, indeed, explain why certain things which might have been said were not said or were not directly stated.

199 The parties requested a period of time in which to prepare written closings and indicated that they were prepared to forgo the right to ask for oral submissions thereafter. I agreed to this but reserved the right to ask for oral submissions on any issue that I felt required this after I had read the written closings. After a requested extension of time, these were provided on 20 March 2020. They were voluminous, running to 379 pages for the Plaintiffs and 298 pages for the Defendants. Whilst these do reflect to a certain extent the amount of documents and evidence, it is a matter of concern that the volume (and hence the expense) may be disproportionate to the sums at stake in the litigation.

200 It is regrettable but perhaps inevitable that matters have become polarised with the passage of time and that both the parties and their advocates have somewhat lost a sense of objectivity. The written closings have thus been written from opposite ends of the spectrum making the judicial task of determining the truth, or as near to the truth on the balance of probabilities as is realistically possible after the passage of time, a more difficult task. An extreme example of this is the parties' submissions on the credibility of Mr Goh as a witness.

201 In paragraph 189 of their written closing the Plaintiffs said this:

> Before we deal with the substantive points on liability, *we note at the outset that Mr Goh was not a credible witness*. He would even deny matters clearly recorded in documents he sent or be evasive about them – this is the second time he is being taken to task on inconsistencies between his testimony and the documents, and *yet he still chooses to be less than candid in the witness box*.
>
> [emphasis added]

202 In contrast, in paragraph 196 of their written closing the Defendants submitted the direct opposite:

> Mr Goh was the Chief Executive Officer ("CEO") and a director of [BTL] from 1 May 2000 to 30 April 2013. He is one of the Defendants and has personal knowledge of many of the matters that arise for determination in the Suit. Although Mr Goh is Chinese educated and his primary language is Mandarin, he gave his evidence in English without the aid of an interpreter and *the authenticity of his evidence shorn [sic] through his candour and immediate responses to questions*. Mr Goh's evidence was corroborated by the testimonies of the other witnesses.
>
> [emphasis added]

203 That said, I am grateful to counsel for the clarity with which they have structured their submissions and the logical way in which they have approached the facts. I shall deal with the specific observations that they make on the weight to be attached to individual aspects of each witnesses' evidence as they arise. I shall first however consider the general demeanour of the witnesses of fact in the order in which they gave evidence. For convenience I may repeat some of the observations made above in relation to the *Henderson v Henderson* Issue.

Kyle Arnold Shaw Junior

204 Mr Shaw is a powerful personality who was intimately involved in the purchase of the Beyonics Group and became Chairman of Channelview after the take-over. He was not however involved at all in the events that give rise to the allegations of breach of duties which took place in the period up to January 2012 when the BN Alliance agreement between Beyonics and Nedec/Kodec was signed. He was not involved in the decision to pay the bonus but did agree to the terms of the Resignation Agreements. Much of his evidence consisted of conjecture and/or of his opinion of what he would have done had he been

Chairman in 2011 or what Mr Goh should have done at that time which is both inadmissible and unhelpful.

205 Further, it was plain from his evidence that he had concluded that Mr Goh had committed the "crimes and misdeeds" of which he was accused.[25] This is not surprising given the outcome in the 672 Action but it did lead to him to be somewhat combative and conclusory in his evidence. It also led to some feisty exchanges with counsel for the Defendants. However, making due allowance for this, I consider that Mr Shaw was doing his best to assist the Court on factual matters within his direct knowledge but I do regard the documents as generally providing a better record of the relevant events in which he was involved. His evidence based on those matters was, inevitably, coloured by subsequent events.

Ms Tan Cheng Yin

206 Ms Tan, who is also known as Rita Tan, was and is the Senior Planning Manager of BPM. BPM, Beyonics' Malaysian company, carried out both 1st and 2nd Stage work for some Seagate products but, in relation to the Brinks 2H product, the product in question here, it was only qualified to carry out the 1st Stage work. Until the floods in October 2011 those baseplates were then shipped to BTT in Thailand for the 2nd Stage work to be done. Thereafter all the Brinks 2H work was carried out at BTEC. Ms Tan gave evidence as to the ordering process for baseplates and the regulation of capacity in the factory, the effects of the floods and certain difficulties in supply which occurred in 2012. She also gave evidence about transferring CNC and SPM machines between the various plants. She was plainly highly experienced and gave her evidence fairly.

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25 T1/99/13–17.

Me Lee Leong Hua

207 Since there are two Mr Lees who gave evidence I shall refer to this witness as "Mr LH Lee". Mr LH Lee worked for the Beyonics Group for 37 years from 1981 until he retired in 2017. At all material times he was the General Manager or the Senior General Manager of the BTEC factory. He reported to Mr Goh until Mr Goh resigned and remained at BTEC under the new management. He gave evidence on behalf of the Plaintiffs. His evidence covered the manufacturing processes, the volume of manufacture over the years, the effect of the floods, the growing relationship between BTEC and Nedec/Kodec in 2011 and 2012 and the potential capacity of BTEC to carry out additional 2nd Stage work after the floods. In relation to most of these matters he gave his evidence clearly and fairly. However, I found his evidence, particularly his written evidence, on BTEC's potential capacity to carry out 2nd Stage work somewhat strained and gained the impression that he found himself in the invidious position of a man who had served two masters, Mr Goh and Mr Shaw, and was more concerned at pleasing the latter. I shall make due allowance for this.

Mr Billy Chua Wui Chuang

208 Mr Billy Chua has been employed by Seagate since 1989. At the material time he was Senior Manager for the Commodity Management Team and he was responsible, *inter alia*, for the strategic sourcing and planning of the supply chain for baseplate manufacture. As such he was involved with Beyonics and, after the take-over of the Samsung business by Seagate, with Nedec/Kodec. He was particularly involved with both companies after the floods. Mr Chua reported directly to Mr Scott Lamb, the Executive Director, and indirectly to Mr Toh Han Chiow ("Mr HC Toh"), the relevant Vice-President.

209 Mr Chua came to give evidence pursuant to a subpoena issued by the Plaintiffs. He did not provide an AEIC and was therefore examined orally in chief by counsel for the Plaintiffs and then cross-examined by counsel for the Defendants. It is clear from the pleadings and from other evidence that both parties seek to rely on the evidence of Mr Chua. In particular paragraph 21 of the Defence gives particulars of a number of matters involving Mr Chua on which the Defendants rely. In the 672 trial Mr Chua was subpoenaed by the 672 Defendants.

210 I regard Mr Chua as being a neutral witness. He gave his evidence both in chief and in cross-examination fairly and with as much precision as one could hope for given the passage of time. He was able to add colour to some of the documents and I consider that it is appropriate to attach weight to many of his explanations.

Mr Goh Chan Peng

211 Mr Goh is the first defendant. I have referred to him and his position as CEO of the Beyonics Group above. He was intimately involved in the matters which give rise to this dispute and his conduct has been stigmatised by the Plaintiffs both in their pleadings and in the evidence of Mr Shaw. He was held in the 672 Action to have committed "egregious" breaches of the duties he owed to Beyonics. He was subjected in this action to a lengthy and penetrating cross-examination for the second time. It is therefore not surprising that he appeared defensive in the witness box and was on occasions more than a little prickly. That said, I cannot accept the Defendants' submission that he was a wholly candid witness. Too often he was evasive in his answers and I do not consider that this can be ascribed to any difficulty with language or due to the lapse of time. As with Mr Shaw, I regard the documents as providing a better

record of the events and I approach with caution evidence given by Mr Goh that elaborates on the documents in a way which seeks to cast them in a more favourable light than a plain reading would suggest.

Professor Chua Tat-Seng

212 Professor Chua is currently the KITHCT Chair Professor at The School of Computing, National University of Singapore. He was the founding Dean of the School of Computing in 1998 and has a PhD from the University of Leeds in the UK. He was a non-executive Director of the holding company, BTL, from October 2002 until its purchase by Channelview in February 2012. He was Chairman of BTL's Compensation Committee between 2008 and 2012. As such he was responsible for agreeing to the bonus of S$200,000 awarded to Mr Goh in January 2012.

213 Professor Chua served in the army with Mr Goh and has thus known him for a long time and it was this relationship that led to Professor Chua being appointed as a non-executive Director.

214 His AEIC was short and to the point, dealing with the manner in which the Board conducted its business, the presentations that were made to it and its relationship with Mr Goh. It went on to consider the BTL Board's decision to divest itself of the PES Division in 2010 and the Board's involvement in decisions following the floods, particularly the decision to enter the BN Alliance with Nedec/Kodec in late 2011. He deposes to the reasoning behind the Compensation Committee's decision to award the bonus.

215 In cross-examination, it was clear that he was very well informed as to the nature of the Beyonics Group's business and was knowledgeable as to the way it worked. He was measured and coherent and was of assistance to the court

in explaining the working practices of the Board over the years. In all but one respect I consider it appropriate to place reliance on his evidence. However, at the end of his AEIC he gives his opinion as to the attitude that he thinks the Board would have taken to the sums that Wyser received under the Wyser Agreements had they known of them in late 2011, which they did not. I did not find this hindsight reasoning to be compelling and consider that it demonstrated that he had an over-close relationship with Mr Goh and that his views did not represent the attitude which I consider the full Board should have taken had they been aware of the payments, particularly if it became aware of them otherwise than by disclosure by Mr Goh. I shall take this factor into account when assessing the weight to be attached to Professor Chua's other evidence.

Mr Tae Sung Lee

216 At the relevant time Mr Tae Sung Lee, also known as Mr Tony Lee, was the CFO of Nedec/Kodec. He was involved in forming the relationship between Nedec/Kodec with Seagate after the take-over by Seagate of the Samsung HDD business. He was particularly involved in negotiations between Nedec/Kodec with Beyonics which led both to the BN Alliance and to the offer by Nedec/Kodec to purchase BTEC in April 2012. He also gave evidence concerning the Wyser Agreements.

217 Mr Tony Lee was a courteous personality whose comprehension and use of English was adequate but not great. He had a better understanding of written English and was plainly not always sure what the question was in cross-examination when hearing it orally. He was more at ease when he had the opportunity to review the question in writing on the live-note transcript. This was not a facility that was used at the 672 trial and caused Mr Tony Lee to seek to explain the difference between some answers that he gave in

cross-examination in that trial and in this on the basis that he had not fully understood the equivalent question in the 672 trial. His written evidence however closely dovetailed with that of Mr Goh and there were elements of his cross-examination which caused him to give evidence which was not wholly consistent with the contemporaneous documents. Again therefore the contemporaneous documents may paint a more reliable picture.

Mr Imsoo Seo

218 Having worked for Samsung until 2009, Mr Seo joined Nedec/Kodec and by October 2011 had become the General Manager of the Nedec/Kodec's LND facility at Langfang in China. It was at this factory that the Nedec/Kodec side of the BN Alliance took place. After the floods, baseplates which had undergone the 1st Stage at BTEC were then shipped to Langfang where Nedec/Kodec carried out the 2nd Stage. Mr Goh and others at BTEC assisted Mr Seo and his team to obtain qualification with Seagate to carry out this work. Mr Seo gives evidence as to the assistance that was provided. He gave evidence through an interpreter, with the usual attendant difficulties. The interpreter was extremely efficient, taking down the questions and answers in shorthand before translating them. Mr Seo however appeared to find the process a difficult one and some of his answers were somewhat tangential to the questions. I consider that there is substance in the Plaintiffs' submission that Mr Seo's written evidence contained an overabundance of suggested detail which is not supported by the facts and that he was being used as a mouthpiece for matters which were not within his actual knowledge. Again, the documents provide a more balanced record.

The Facts

219 The facts are complex and the facts on discrete issues are often intertwined. In very general terms the following separate aspects arise:

(a) the Beyonics Group's attitude to the future viability of the PES business after 2009;

(b) the events leading to the purchase of the Beyonics Group by Channelview;

(c) the attempts to dispose of elements of the PES business, particularly BTEC;

(d) the development of the relationship between Beyonics and Nedec/Kodec, relating to the possibility that Nedec/Kodec might make an offer for BTEC;

(e) the development of the relationship between Seagate, Beyonics and Nedec/Kodec leading to the BN Alliance;

(f) the effect of the 2011 floods;

(g) BTEC's capacity to manufacture 2nd Stage baseplates after the floods.

(h) the knowledge and involvement of Mr Shaw in Beyonics' business prior to the purchase by Channelview;

(i) the negotiations leading up to the Wyser Agreements; and

(j) the knowledge and involvement of the Board of BTL in making decisions with regard to the BN Alliance and the Wyser Agreements.

2010: Divestment of and investment in the PES Division

220 When Mr Goh started to work for the Beyonics Group, the PES Division was thriving and profitable. The manufacture of baseplates is however a high volume, low profit business. Over the years, owing to a number of factors, not least the increasing market for tablets and iPads that did not require HDDs and the fact that some of the MBA companies had acquired their own baseplate manufacturing facilities, the market for baseplates became increasingly more competitive and less profitable.

221 In the financial year ending in July 2009 ("FY 2009") the PES Division suffered a loss of S$5.4 million on a turnover of S$131.3 million and in the financial year ending in July 2010 ("FY 2010"), a loss of S$7.9 million on a turnover of S$151.4. In contrast the EMS Division's business was both substantially greater and more profitable, recording a turnover of S$1.47 billion and a profit of S$13.9 million in FY 2009 and a turnover of S$1.4 billion and a profit of S$20.7 million in FY2010.[26]

222 In consequence in 2010 the Board of BTL, which included Mr Goh, Professor Chua and Mr Chay, took the view that it should seek to divest the PES Division. Professor Chua said this:[27]

> 20. The members of the BTL Board were very concerned about the PES Division's poor performance and the risk that it would jeopardise the profitability of the Beyonics Group.
>
> 21. Therefore, the members of BTL Board began to consider various strategies with the objective of ensuring the profitability of the Beyonics Group. One of the strategies that we considered was to divest the PES Division.

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26 Goh AEIC 65–68, 73–75.

27 Prof Chua AEIC 20–22.

> 22. By in or around early 2010, the BTL Board had decided that the Beyonics Group should divest the PES Division. The BTL Board was of the view that divesting the PES Division would benefit the Beyonics Group commercially. …

223 Mr Goh gave evidence to the same effect.[28] Both witnesses were cross-examined on their evidence.[29] In particular Professor Chua said this:[30]

> Q. When you say there was a decision to divest, would you say that it's just one of the options to be considered as to how to deal with the performance issues in the PE division?
>
> A. I think we considered a range of strategies. I think try to cut costs and -- and -- kind of improve their efficiencies is one of them. But -- but I think we also look at the whole industry as a whole. I think PE division kind of consider sunset industry at that time.
>
> Q. Okay.
>
> A. I think small player like us it is kind of very hard to -- to kind of to make a profit then because -- our kind of main supply on hard disk actually is going down and there are more players coming in.
>
> Q. Right.
>
> A. I feel at that time -- at least personally I feel unless you are big player, it is very hard to kind of actually make it very profitable at that time. So because a lot of -- a lot of cost actually is beyond our control, for example, the raw materials, everything, and being a small player we have actually very little control over this -- this cost. And so -- so kind of -- I feel that in the -- in the long run, I think we had to -- unless we -- we invest a lot to bring up -- our division up, otherwise I think, kind of, divestment is probably one of the best strategy at that time.

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28 Goh AEIC 69–75

29 T11/90/4–96/10; T8/32/15–40/2.

30 T11/92/16–93/20.

224 No written record recording this decision has been adduced and both witnesses were challenged on the basis that if such a decision had been made at a Board meeting, it would have been recorded in the Minutes of that meeting. A number of such Minutes have been produced and it can be seen that they seldom extend over more than two pages as a record of meetings which lasted for several hours. Professor Chua gave evidence that usually Mr Goh would give a presentation to the Board, which would be followed by discussions on the topics raised. He said that a decision to divest was a sensitive matter and that it would not be expressly minuted until there was a specific offer on the table.[31]

225 I accept Professor Chua's evidence on this issue of divestment and am satisfied, on the balance of probabilities, that the Board did make a decision sometime in 2010 to divest itself of the PES business if an appropriate opportunity arose. It did not employ consultants to assist in this but relied upon contacts of the Board members, particularly Mr Chay and Mr Goh, to set the process in motion. Mr Goh gave evidence that thereafter he had casual discussions with KKR, Carlyle, Standard Chartered Bank private equity, and Nidec[32] but no documents recording these discussions exist.

226 In September 2010, the Board made a decision to limit further capital investment into the PES Division.

227 In paragraphs 24-25 of his AEIC Professor Chua said this:

> 24. At a BTL Board meeting on 28 September 2010, Mr Goh updated the BTL Board about the slowdown that the HDD industry had been experiencing since June 2010 and the impact of the introduction of the iPad and similar electronic

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31 T11/94/6–105/4.

32 T8/53/24–54/15.

> tablets on the HDD industry. Mr Goh told the BTL Board that the PES Division's action plan was to continue to keep its costs low by continuing to reduce working hours, overtime and manpower. Mr Goh also informed the BTL Board that the entities in the PES Division i.e. BTEC, BPM and BTT had no plans to incur major capital expenditure.
>
> 25. The BTL Board agreed with this strategy. In my view, the plan not to incur major capital expenditure was completely logical in light of the downturn and reducing demand for HDDs. It was also consistent with the decision of the BTL Board to divest the PES Division. A copy of the minutes of the BTL Board meeting on 28 September 2010 is annexed hereto and marked "CTS-5".[33]

228 An extract from Item 6.1 of those Minutes reads:

> …. Our action plan is to continue to reduce working hours, overtime and manpower in the PES Division. We do not plan to incur major capital expenditure

229 It would not make commercial sense to limit the investment in the business without an exit strategy of some kind, otherwise the business would simply be left to wither on the vine. The contemporaneous documents are thus consistent with a decision to seek to divest the PES Division.

230 Indeed there are documents which indicate that the decision had been made and communicated at least to Mr LH Lee as early as March 2010 as appears from an e-mail exchange with Mr Goh on 18 March 2010[34] in which he reported on a meeting with NCC (part of Nidec) who had been asked whether Nidec were interested in purchasing BTEC and had been told that they were not keen to do so.

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33 1AB 628–630.

34 26AB 16856.

231 Mr Goh gave evidence of his (hazy) recollection that the Board had specified that any investment greater than US$1 million required Board approval and from US$10,000 up to US$1 million required Mr Goh's approval.[35] Professor Chua did not specifically corroborate these figures but did confirm that all capital expenditure approved by the Board was at budgetary meetings attended by the division managers.[36]

232 Investment was thus not ruled out but was controlled at Board level and a measure of capital expenditure was approved. Two examples are, first, the purchase of the outstanding 20% shares in Wealth Preview (an e-coating business) in October 2011[37] at a price of RM994,400 which, as Professor Chua observed, was not a large sum for a business 80% of which Beyonics had purchased in 2008.[38] Secondly, capital expenditure of S$2,651,000 was incurred in FY 2011 and S$2,933,000 in FY 2010 but it is to be noted that this should be compared to S$36 million in FY 2007 and around S$17 million in FY 2008 and 2009.[39] I am therefore satisfied that the policy of limiting investment in the PES division was implemented as recorded in the minutes.

233 This policy continued into 2011. The Board Minutes for 10 June 2011 record:[40]

> The market conditions are very challenging and our PES division's strategy is to maintain its current production

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35 T8/30/18–32/14.

36 T11/103/25–104/9.

37 1AB 661–662

38 T11/101/4–14

39 Exhibit P7.

40 1AB 640.

> capacity, manage costs, improve efficiency and margins and try to achieve breakthrough in the coming quarters.

2011: Divestment discussions prior to the 2011 floods

(1) Between SKP and Mr Shaw

234 As indicated in [5] above it was in late 2010 or early 2011 that Mr Goh met with Mr Tsui Sung Lam and the possibility of SKP purchasing the whole of the Beyonics Group, both the PES and EMS Divisions, was first considered by Mr Shaw. The course of the negotiations was succinctly summed up by Mr Shaw:[41]

> I mentioned he came to us around December 2010 with this idea. We started looking at it in January/February of 2011. He had Standard Chartered and DBS's banks already to the company who seemed poise and willing to provide financing. We had some discussions up through June/July. Then it kind of died, in a sense, because the banks weren't really that keen; business conditions were deteriorating, the overall markets were bad and so the deal kind of went into a hiatus. We continued to work on it a little bit and we came back and instead of offering 32 to 34 cents a share, I said we'll offer 26 cents a share. So we lowered our price which meant less equity, less debt necessary to buy the business and on the basis of that the banks were willing to lend and the company – the board of directors was willing to accept that, subject to a shareholder vote. So there were really two phases in the deal. One at a high price and then one at the lower price which subsequently got done.

235 During the course of the negotiations a letter was written on 6 July 2011 by SKP to Standard Chartered Bank in Hong Kong concerning the possibility of finance for the proposed purchase.[42] This is a comprehensive document answering various questions which has been asked by the bank. These focused

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41 T2/56/1–22.

42 26AB 17130.

on the PES Division, its viability and SKP's intentions in relation thereto. There were concerns about the current losses of that division but in answer to Question 3 SKP did express the view that the business could be profitable in the future. Question 4 relates to the possibility that the PES division might be shut down and on the effect that such a decision might have on the relationship between Seagate and the EMS division. In response, SKP said:[43]

> SKP does NOT plan to shut down PES. PES division will continue to operate as an on-going business, but it will be classifies [*sic*] as "PES business held for sale" in the FY11 financial statements. … The PES business will be marketed for sale to a trade buyer as soon as practical, and so it is critical to maintain operations. Merlot [the code name for Beyonics] will force a small increase in sales price to Seagate to improve profitability, which Seagate will have to accept in short-run as there are few alternatives to switch in short-term. …

236 Mr Shaw confirmed that before writing this letter he had spoken with Mr Goh and that it was both Mr Goh's and the Bank's view that the PES Division should be sold. He however kept an open mind on this and, in the event, after the floods and the eventual takeover of the business, Mr Shaw elected not to dispose of the PES Division. He expressed his thinking as follows:[44]

> So when [Mr Goh] said, you know, "We should sell this", when the banks said we should sell it, we did entertain it. But as time went by and we teased out the facts because they were buried -- it was buried under a lot of noise and disinformation, it became clear that it was actually maybe a better business. Now, the bottom line: before I could get around to selling PES, I'd already raised all the money to pay back the banks and once I paid back the banks, I didn't have to sell PES. It was only put on the market, or considered for selling, because of the pressure I felt to pay back the banks extremely quickly.

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43 26AB 17132.

44 T1/207/5–19.

237 As at July 2011 therefore SKP was fully informed as to the financial position of the PES Division and was well aware of the possibility of a sale, including a sale to a competitor in the PES business, and that, with this in mind, it was prudent to maintain the current business so far as possible. At this time therefore SKP's thinking was little different to that of Mr Goh and the main Board.

238 As Mr Shaw indicated there was then a delay before matters were carried forward by the Facility Agreement with the banks dated 3 October 2011,[45] and the Implementation Agreement between Channelview and Beyonics dated 5 October 2011.[46] My attention was drawn to clause 3.1.10 of the Implementation Agreement which defines Seagate, *inter alia*, as being a "Major Customer" of Beyonics and it was a condition precedent to the acquisition that there was no loss of a "Major Customer" before the completion of the purchase. Mr Goh sought to suggest that the importance of Seagate lay in relation to the EMS Division rather than the PES Division.[47] I do not accept this. Business with Seagate in both divisions was important and was recognised without distinction in the Implementation Agreement. However, nothing turns on this as, first, Seagate was not lost as a customer prior to the completion of the purchase and, secondly, I have no reason to believe that Clause 3.1.10 had any influence on the thinking or actions of Mr Goh thereafter.

239 Further it should be noted that prior to the takeover Mr Chay and Mr Goh between them owned 19.98% of the shares in BTL (Chay owned 15.90%

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45 1AB 144.

46 1AB 340.

47 T8/26/9–29/10.

and Goh owned 4.085%).[48] By virtue of a Subscription Agreement entered into by Mr Chay and Mr Goh with Bayport and Channelview on 5 October 2011, they were between them to subscribe for 25% of the ordinary shares of Channelview (together with some preference shares).[49] Mr Goh's share of this amounted to 6.47% of the ordinary shares which he estimates to have been worth some S$9 million at the time of the takeover.[50] He did not sell these shares until some years later, possibly as late as 2016.[51]

240 This, to my mind, is a significant factor which should be taken into account in assessing whether or not Mr Goh was disregarding the best interests of the shareholders in BTL and, thereafter in Channelview, in his dealings with Nedec/Kodec.

241 All of the above took place before the 2011 Thai floods occurred and there is no evidence that the floods had any impact on the subsequent progress of the purchase which, as indicated above, resulted in approval by the Beyonics shareholders on 30 December 2011 followed by the scheme being approved by the Singapore Court on 2 February 2012.

242 Mr Shaw was updated from time to time by Mr Goh in the intervening period and was aware that Mr Goh was seeking to interest potential purchasers of the PES division and was, in particular, speaking to Nedec/Kodec about the possibility of selling BTEC to them. An example of this is an e-mail exchange between Mr Shaw and Mr Goh on 25 October 2011 when Mr Goh, informed Mr

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48 1AB 409.

49 1AB 398.

50 Goh AEIC 158–161.

51 T11/81/9–82/25.

Shaw, *inter alia*, that he was intending to sell the PES Division immediately after the purchase by Channelview and hoped to sell BTEC in relation to which he was going to meet with the potential buyers in November.[52]

(2) With Nedec/Kodec

243 In April 2011, Seagate announced that it had acquired Samsung's HDD business. Nedec/Kodec was a major supplier of baseplates to Samsung but was not at that time qualified as a supplier of any baseplates to Seagate.

244 Mr Goh gave evidence that following the decision to divest the PES Division, he approached various industry players about the possibility of the sale of all or some of the entities in the PES Division. On 22 June 2011, he had lunch with Mr Miyabe Toshihiko, the Senior Vice-President of Nidec. In his AEIC he gave his recollection that he told Mr Toshihiko about the decision to divest the PE Division and that Mr Toshihiko suggested that Mr Goh should speak to Mr Stephen Hwang, the President and CEO of Nedec/Kodec.[53] Again his recollection is a hazy one as demonstrated by his cross-examination[54] but the contemporaneous documents support the fact of the lunch and the subsequent introduction to Mr Hwang and corroborate the gist of Mr Goh's evidence.

245 In paragraph 117 of his AEIC Mr Goh said this:

> Mr Toshihiko's suggestion that I approach the NEDEC/KODEC Group made sense to me because I knew that Seagate had recently announced (in April 2011) that it would be acquiring Samsung's HDD business. As the entities in the PES Division (i.e. BTEC, BPM and BTT) also manufactured baseplates under

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52 26AB 17365; T2/105/2–109/12.

53 Goh AEIC 111–116.

54 T8/78/15–82/12.

> Seagate's baseplate programmes and were qualified to perform First Stage Work and/or Second Stage Work under Seagate's baseplate programmes, I believed the NEDEC/KODEC Group could be interested in acquiring the PES Division to expand its role in manufacturing baseplates for Seagate. …

246 The following day, Mr Goh e-mailed Mr Toshihiko to indicate that he would like to meet with the "NADEC" [*sic*] senior management and Mr Toshihiko responded:

> By the way, I contacted Mr. Hwang, the President of NEDEC. He also wanted to talk to you regarding the Seagate business.

247 Mr Toshihiko provided Mr Hwang's telephone number and, subsequently, via Mr LH Lee, his e-mail address.[55] Contact was made and a visit by Mr Hwang to BTEC's plant in Changshu was arranged for 12 July 2011. In an e-mail dated 28 June 2011[56] from Mr Goh to Mr Hwang, copied to Mr LH Lee, Mr Goh gave details of the arrangements for the meeting and wrote:

> We can discuss our strategy going forward after the two HDDs consolidation exercise.

248 This was a reference to the fact that Seagate had acquired the Samsung HDD business and Western Digital the HGST division of Toshiba. Mr Goh was cross-examined on this e-mail and pressed on the strategy referred to, with the suggestion that it extended to working together rather than divestment. Mr Goh refuted this suggestion and said that the only strategy he was considering was the sale of the PES Division. I accept this evidence. It is consistent with the contemporaneous documents and makes sense.[57]

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55 26AB 17115–17121.

56 26AB 17122; T8/82/24–85/1.

57 T8/87/15–90/25.

249 It appears that Mr Hwang did visit Changshu on 12 July 2011, possibly with Mr Songam Kim, a Vice President and Mr Yongchul Kim, a director,[58] but not with Mr Tony Lee, who did not join Nedec/Kodec until 8 August 2011. It also appears that Mr Goh was not present and no record of the meeting exists.

250 A further visit to the Beyonics plants in Malaysia and Thailand by Mr Hwang and Mr Tony Lee was proposed for 17 and 18 August 2011 but was rearranged for 4 and 7 September 2011. Mr Goh and Mr Tay Peng Huat, the CFO of BTL, were present. The purpose of the visit was to give Nedec/Kodec the opportunity to consider the possibility of making an offer to purchase assets of the Beyonics Group and, for this purpose a Confidentiality Undertaking, in relatively conventional NDA form, was executed on 5 September 2011.[59]

251 Both Mr Goh and Mr Tony Lee gave evidence that following the visit Mr Goh was told that Nedec/Kodec would only be interested in considering the purchase of BTEC, not the whole PES division. Mr Tony Lee explained:[60]

> Q. After this visit in early September, I think you have said that the KODEC Group was actually only interested in BTEC really; right? What aspects of BTEC made it an attractive target for KODEC Group?
>
> A. Because the main reason was it is located in Shanghai area, that -- that was the major concern. It was near Shanghai area and NEDEC -- NK Group, two factories are located in Tianjin area, but the customer of automotive parts and NCC, they -- NCC is actually located in Pinghu area, it's quite near to Shanghai. After we see Thailand factory of Beyonics, and the Malaysian factory of Beyonics, then, okay, this is no good for us.

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58 26AB 17128.

59 1AB 140–143.

60 T12/13/18–14/7; Goh AEIC 125.

252 Around that time, a number of e-mails passed between Mr Hwang and Mr Goh and between Mr Tony Lee and Mr Tay.[61] These need to be read as a whole. It is plain that the parties had an amicable meeting including a "fat lobster" lunch and discussions apparently ranged over a number of business matters including: forex and interest rates in Singapore, the upcoming Seagate supplier conference, the possibility of Beyonics selling a small number of die casting and CNC machines to Nedec/Kodec and the benefits of an offshore Mauritius company. A proposal was made for a return visit by Mr Goh to visit Nedec/Kodec factories.

253 Particular attention was paid during the trial to some words in an e-mail dated 8 October 2011 from Mr Hwang to Mr Goh which stated:

> Thank you for all your consideration during the visit to your site in Singapore, Malaysia and Thailand.
>
> This visit was help to understand your company and your HDD base-plate division.
>
> Especially your well-meant advice will be a great help how Nedec survives in HDD business.
>
> I will contact you soon for the next step after I attend the Seagate's supplier convention next week

254 Mr Goh was cross-examined as to what was said at the meeting.[62] His initial answer was that he could not recall but on being pressed he gave some answers which were confused and somewhat contradictory, which led the Plaintiffs to submit that he was lying when he asserted that the meeting was only about purchasing the PES business, the implication being that even at this early stage Mr Goh was seeking some form of joint venture with Nedec/Kodec. I do

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61 26AB 17408–17413 and 17172–17188.

62 T8/92/19–94/1.

not accept this. There is nothing in the contemporaneous e-mails that suggest that the discussions extended beyond general business discussions appropriate between a potential buyer and seller of a business under an NDA. I consider that there is substance in the first answer of Mr Goh that he did not recall what was said. The e-mails are the best record and I have well in mind the observations of the Court of Appeal in *Sandz Solutions* cited at [196] above.

255 This meeting took place before the "Seagate Supplier Convention". When Seagate purchased the Samsung HDD business, it entered discussions with the baseplate manufactures qualified to fabricate baseplates for Samsung HDDs. In the case of Nedec/Kodec this process began on 14 July 2011. A system was introduced whereby Samsung manufacturers could pre-qualify as a supplier to Seagate without undergoing the usual manufacturer qualification. This Nedec/Kodec sought to do by an application dated 16 September 2011 and subsequent to this Nedec/Kodec attended the Convention.[63] This covered a wide range of issues.[64] More specifically, Seagate indicated that it was planning to replace a number of its existing 2.5" HDD models with the Samsung equivalent M8, which Nedec/Kodec was qualified to make, and that there would be a transition from Samsung to Seagate 3.5" HDDs which Nedec/Kodec was not qualified to make.[65]

256 Thereafter a visit was arranged for Mr Goh to visit Nedec/Kodec on 10 November 2011. In an e-mail of 4 October 2011[66] discussing the

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63 Tony Lee AEIC 16–24.

64 40AB 26635–26637, 26AB 17199–17235.

65 26AB 17218–17221.

66 26AB 17236–17237.

arrangements for the visit, Mr Tony Lee indicated that at the visit, "*We can have further talks for co-operation and collaboration*". The Plaintiffs suggested that if all that was being considered at this time was solely the purchase of BTEC then a visit by Mr Goh to Nedec/Kodec was unnecessary and that the reference to co-operation and collaboration supported the submission that by this date Mr Goh and Nedec/Kodec had the possibility of a manufacturing joint venture in mind. Mr Tony Lee gave evidence that the proposed visit was a courtesy to showcase the Nedec/Kodec factories and when writing the e-mail he was thinking about the potential sale of BTEC.[67] This evidence is consistent with the contemporaneous e-mails and I accept it.

257 Accordingly, I hold, on the balance of probabilities, that prior to the floods there had been no discussions between Mr Goh, or anyone else at Beyonics, and Mr Hwang, Mr Tony Lee or anyone else at Nedec/Kodec on the possibility of a joint manufacturing venture.

The Floods: Events up till 27 October 2011

258 In mid-October 2011, Thailand suffered unprecedented rainfall and flooding. One area greatly affected was where there was a concentration of baseplate manufacturing facilities. Beyonics' Thailand facility at Ayutthaya, BTT, was damaged beyond repair and became an insurance write off. Other baseplate manufacturers, including MMI, suffered similar losses. Overall Seagate suffered a loss of supply of some 24 million baseplates.[68] Mr Billy Chua explained Seagate's attitude as follows:[69]

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67 T12/22/5–24/2.

68 40AB 26674.

69 T6/41/24–42/16.

> Q. Mr Chua, in terms of what Seagate was looking for, which was, as you said, some commitment, right, so was there a number that Seagate had in mind in terms of what it would like to get from Beyonics Group?
>
> A. No definite numbers, but as I said, Seagate had lost 24 million capacity during the flood, and immediate term, my recovery plan is to replace this 24 million in all options I can get, all right. So it can be as much as possible in the shortest timeframe to recovery the HDD market for Seagate.
>
> Q. In terms of the particular baseplates you presented to NEDEC/KODEC, did you ask other existing suppliers then as to their capacity for the same programmes?
>
> A. Yes. All the running suppliers and even the Samsung -- other Samsung suppliers.

259 So far as Beyonics were concerned, prior to the floods, the 1st Stage Brinks 2H baseplates were produced at BTM's facility in Malaysia and the 2nd Stage at BTT's facility in Thailand. BTT lost some 200 CNC machines, most of which would have been used for 2nd Stage work. The necessary tooling specific for these baseplates was however salvageable and was transferred to BTEC.

260 On 11 October 2011 Mr Billy Chua sent an e-mail[70] to Mr Goh concerning a meeting arranged for the following day, indicating that Mr HC Toh, the Seagate Vice-President to whom Mr Billy Chua reported, wished to discuss:

> 1. The Thailand flood situation, your factory updates & forward recovery outlook.
>
> 2. The Beyonics privatisation & forward plan.

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[70] 26AB 17294.

261 There is no written record of this meeting and neither Mr Goh nor Mr Billy Chua have any clear recollection of what was discussed. It appears that at this stage the precise extent of the damage due to the flooding was unclear.[71]

262 Mr Goh was however considering various options and on 14 October 2011 e-mailed Mr LH Lee asking whether he had any excess CNC machines, "*Due to BTT situation I am thinking and planning on how to move some machines down to BPM*".[72]

263 Mr LH Lee responded to this the same day saying that after reviewing the matter, out of the 259 machines he could ship 20 back to BPM and indicated the capacity that would be left at BTEC thereafter. But he went on to relay the substance of a conversation he had had that day with Nidec (it is to be remembered that not only was Nidec an MBA assembler, it also had a baseplate manufacturing factory, Nidec Brilliant). Mr LH Lee had been informed by Nidec that it had lost 1000 CNC machines in the floods and that the MBA plant had lost 20 million monthly capacity. Much of this was in products for Hitachi. Mr LH Lee had been asked whether he could increase baseplate production of Hitachi models and he discussed a quotation for a possible order for Hitachi Jupiter 1D baseplates which he was going to discuss with Nidec the following week.[73]

264 Nidec reinforced its requirements in an e-mail on the same day to Mr Li Chun Lin of BTEC outlining the needs for the Jupiter 1D programme and this was followed the following day (Saturday 15 October 2011) by an e-mail from

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71 T8/109/14–111/14.

72 26AB 17299.

73 26AB 17298–9.

Mr LH Lee to Mr Goh discussing costings and Nidec's request for support from BTEC because Nidec were considering moving MBA production to China.[74] It ended by saying:

> [Nidec] internally there is a planning divert all BTEC Seagate part to MMI China and Brilliant China and request BTEC support 100% Hitachi Base plate because Brilliant China not experience in produce Hitachi model.

265 The position had become clearer by 18 October 2011 when an e-mail was sent by Mr LH Lee to Mr Goh[75] detailing a discussion that he had had with Hitachi the previous day concerning a formal request from Hitachi that BTEC should assist with the production of Hitachi's Jupiter 1D baseplates. He also indicated that he had had a meeting with Nidec that day to try to understand their future plans. This included a request that BTEC should place more focus on supporting Hitachi since Nidec had "*currently no shortage of Seagate baseplate with extra supply due to JCY & MMI divert Brink and Pharaoh model to [Nidec]*".

266 The chart included in this e-mail indicated that whereas the production at BTEC proposed for the Brinks 2H programme was going to decrease from 300,000 in December 2011 to 100,000 in February 2012, that for the Jupiter 1D programme was projected to increase from zero in October 2011 to 900,000 in February 2012 and rise further thereafter.

267 This was followed by an e-mail from Mr LH Lee to Mr Goh dated 22 October 2011[76] in which Mr LH Lee updated Mr Goh on his plans for the

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74 26AB 17297–17299.

75 26AB 17300.

76 26AB 17346.

proposed commitment to Nidec to produce 900,000 baseplates per month for the Jupiter 1D programme. It is a detailed review of BTEC's capacity and its proposed allocation of that capacity both for baseplates and for the automotive products produced using the CNC machines. The whole document merits attention but the salient points are:

> Base on current BTEC 259 CNC we can produce *2.4 million pieces per month* include both Hard disc Base and automotive product.
>
> … We need to commit *1.5 millions per [month] for Hitachi model.*
>
> …
>
> Seagate model for 3.5 & 2.5 Base for BTEC allocation from [Nidec] going down due to current running product all model getting EOL [end of life] soon
>
> To commit Jupiter 1D additional sales at max 900k per month and Hitachi added up all model sale going up at max 1.5 million pieces per month at 64% *we need to drop allocate capacity for Seagate model for 3.5" model at 200k per month* and 2.5" Base model at 300k per month totals sale for Seagate per month at 500k at 22% and Automotive sale at 340k per month at 14%.
>
> [emphasis added)

268 The comprehensive table drawn up of the projected monthly sales forecast for each product, including the projected increase for the Hitachi products and the decrease for the Seagate products, shows that it was projected that the BTEC facility would be working at around the projected capacity rate of 2.4 million per month as from February 2012.

269 Both Mr Goh and Mr LH Lee were cross-examined on this document but I consider that the document speaks for itself and is the best record of the thinking of both men at the time. It is to be noted that the capacity forecasts related to 259 CNC machines, the total number at BTEC before the floods so that the proposal to move CNC machines to BPM (see [262] above) had not been implemented.

270 On 26 October 2011 Mr LH Lee was provided by one of his team members with a quotation for Jupiter 1D baseplates as well as a quotation for a different Hitachi baseplate, the Eagle. The Eagle quotation was revised on 27 October 2011 and sent to Mr Goh for approval. Mr Goh gave evidence that he had discussed the question of capacity with Mr LH Lee and that he had assured Mr Goh that although BTEC's capacity was at its limits, it should be able to handle the Eagle order as well.[77] Mr Goh was not cross-examined on this and Mr LH Lee gave no evidence in relation to it.

271 Around this time there was an internal brainstorming session at Seagate. Mr Billy Chua gave this evidence in chief about it:[78]

> Q. … Internally, in Seagate, do you recall when was the first time this sort of proposal was discussed?
>
> A. Within Seagate?
>
> Q. Yes, within Seagate.
>
> A. When the floods started, as a CMT role, we have to look into outlook and probability. These options -- we have many options we have looked at. That depends also on the suppliers' capability of recovery after the flood, right. So this option of using one supplier to support another supplier on the second machining -- I mean on the E-coat part for the second machining, those options are all discussed internally.
>
> Q. In terms of this discussion, do you recall who was present?
>
> A. My VP.
>
> Q. Mr HC Toh?
>
> A. HC Toh.
>
> Q. Anyone else, Mr Chua?

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77 Goh AEIC 179.

78 T6/38/7–39/17.

A. Maybe conference call with my executive director.

Q. Do you recall who was the one who first said, "Ah, maybe we can have suppliers work with each other, as in one will carry out first stage and the other one will carry out second stage"?

A. I will be the one to propose option plan.

Q. Have you heard about such a possibility from anyone else prior to presenting it before your bosses, so to speak?

A. No.

Q. What was Mr HC Toh's reaction to your proposal?

A. He got no objection.

Q. Did Mr HC Toh say that he also had a similar idea in mind?

A. No.

272 In cross-examination Mr Chua was challenged as to whether the idea came from him or from someone else at the meeting and his evidence was that he could not be sure it was him.[79] However he was not challenged on his evidence that the idea originated in Seagate and was first raised at the brainstorming meeting. This evidence is consistent with subsequent documents and I accept that the idea came from Seagate.

273 The first contact between Seagate and Nedec/Kodec was between Mr Tatsuo Ito, of the motor division of Seagate in Longmont, Colorado, and Mr Ryu of Nedec/Kodec by an e-mail dated 12 October 2011 in which Mr Ito said that Seagate had a tentative plan to visit Nedec/Kodec in November for audit purposes and that an NDA would be needed for this purpose. Mr Tony Lee was asked to coordinate the visit and responded by e-mail dated 11 October 2011[80]

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79 T7/4/16–7/11.

80 26AB 17361–17363.

(the dates on these e-mails are confusing but it is clear that Mr Tony Lee was responding to Mr Ito's e-mail since Mr Ryu's e-mail is the first in the series and Mr Lee's is responding to it). Both e-mails relate solely to the proposed audit visit and not to any manufacturing problems arising out of the floods. Mr Billy Chua was not copied in on the e-mails.

274 Matters changed between then and 24 October 2011 when Mr Billy Chua contacted Mr Tony Lee by e-mail,[81] introducing himself as being the person responsible for baseplate manufacture reporting to the same organisation as Mr Tatsuo Ito. Mr Chua indicated that he was "*interested in whether [Nedec/Kodec] is suitable to participate directly in the [Seagate] programs Baseplate. … I may want to set up a conf call asap with you to understand how we can move forward*". The conference call duly took place on the same day as Mr Chua sent a further e-mail to Mr Tony Lee recording some details of the conversation.[82] From this it is apparent that the matters discussed included two 3.5" baseplates, Pharaoh 2H (Seagate's name for what BTEC called Brinks 2H) and Grenada 3D, together with indications of capacity and supply dates. The need for Nedec/Kodec to qualify to manufacture for any Seagate baseplate was also considered.

275 Mr Chua was unsure whether the possibly of two suppliers working together was discussed but thinks it may have been.[83] Mr Tony Lee recalls that it was and that Mr Chua raised the possibility of a collaboration between Beyonics and Nedec/Kodec in relation to the Brinks 2H programme or between

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81 26AB 17360–17361.

82 26AB 17360.

83 T6/34/11–17.

MMI and Nedec/Kodec on the Granada 3D programme.[84] This is consistent with Mr Lee's e-mail of 25 October 2011 in reply[85] in which Mr Lee sought a face to face meeting to discuss matters and proposed flying to Singapore the following day to have meetings on 27/28 October 2011. The e-mail included the following passage:

> Regarding 3.5" Pharaoh 2H and Grenada 3D programs, Langfang [Nedec/Kodec's factory in China, "LND"] factory material development team asks followings.
>
> 1. ....
>
> 2. As currently in LND, DPI paints (Samsung's standard) are in the E-coating line. Therefore, we prefer to get E-coated baseplates for our machining process service. So, whether or not, can we get e-coated baseplates for LND's machining?
>
> 3. From which mill (Beyonics or MMI), are we going to get e-coated baseplates for machining?

276 In his reply[86] Mr Billy Chua agreed to the meeting and indicated that the question of the supply chain could be discussed at the meeting.

277 On the basis of these documents and evidence I accept that the proposal that Nedec/Kodec should carry out 2nd Stage work on e-coated (*ie*, 1st Stage) baseplates manufactured by either Beyonics or MMI came from Mr Chua during the telephone call on 24 October 2011 and that this was the first time that such an arrangement was suggested to Nedec/Kodec.

278 Further, on 24 October 2011 Mr Goh e-mailed Mr Tony Lee of Nedec/Kodec concerning Mr Goh's proposed visit to Nedec/Kodec on

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84 Tony Lee AEIC 41–46; T12/16–21, 35/14–36/7.

85 26AB 17366.

86 26AB 17394.

10 November 2011 when he intended to have a "*discussion on the latest development of HDD business due to Thailand supply chain damage by flood*".[87] Mr Lee responded on 26 October 2011 dealing with the proposed visit but also telling Mr Goh that he was flying to Singapore overnight to have further discussions with Seagate. He enquired whether it might be possible to meet with Mr Goh on 28 October 2011. The e-mail ended:[88]

> Issues might be HDD business with Seagate, Thailand floods affects to HDD baseplate business and Idea about "Joint operation" of your Changsu factory because we have a plan to have an internal conference about HDD business on Nov 2nd-3rd in Tianjin for further expansion plan in China. Your Changsu factory can be another alternative solution for us because we are currently expanding our business more on Automotive parts and HDD business even in 3.5".

279 I shall return to consider this e-mail further below. The parties then agreed to meet at Mr Goh's offices at 10.30 on 28 October 2011.

280 During this period however, there is no evidence of any written communication between Beyonics and Seagate subsequent to the meeting between Mr Goh and Mr HC Toh on 12 October 2011. Mr Billy Chua recalls at least one telephone conversation with Mr Goh during this period concerning BTEC's capacity as being 3 million per quarter which Mr Chua considered was not enough and that Mr Chua had asked him to check for additional capacity.[89]

281 The next written communication was an e-mail from Mr Goh to Mr Billy Chua sent at 8.50am on 27 October 2011 when Mr Goh updated Mr Chua on

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87 26AB 17407.

88 26AB 17406.

89 T6/28/23–30/18.

the position within Beyonics following the floods.[90] He itemised the state of the plant in Thailand and concluded that even if a clean-up was possible, Beyonics would be unable to make the plant operational within a year. He indicated his proposals for future business:

> Our objective is to turn on Malaysia and China to support the HDD bases selectively due to CNC machinery and jig and fixtures; but due to having major losses in PE division; our investment is limited and we could only exercise limited investment strategy to help the current demand faced by our customers.
>
> … but we believe this is what we can do:
>
> 1. Brinks 2H and Pharaoh 2D, we will ship all our head inventories (raw casting after e-coating) and Molds to BTEC to continue the business from there: the objective is to reduce our inventories and mold exposure; both programs are running at BPM and BTEC;
>
> 2. BPM ….will support the Muskie 2D and 4D and some Sentosa model….. subject to investment proposals

282 The e-mail went on to seek support from Seagate for an investment of US$600,000 in relation to the BPM aspect and ended with the words; "*Let discussion[sic] this afternoon when I return back from Malaysia*".

283 It is to be noted that this e-mail makes no reference to the possibility of BTEC manufacturing 1st Stage baseplates for delivery to another baseplate manufacturer for the 2nd Stage work.

284 The Plaintiffs assert that Mr Goh should have been more proactive in October 2011 to reassure Seagate that notwithstanding the floods, Beyonics could reorganise its business so that the necessary quantities of Brinks 2H baseplates, both at the 1st and 2nd Stage, could be produced by allocating all

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90 26AB 17415–6.

the work to BTEC. This, they contend, would have rendered Seagate's approach to Nedec/Kodec, at least in relation to the Brinks 2H programme, unnecessary so that the possibility of the BN Alliance would never have arisen. I do not accept this. The above narrative demonstrates that Mr Goh and his team were focusing on the challenges faced both by them due to the damage at BTT and to others in the supply chain. In particular, they were in close contact with Nidec which was the entity that determined which baseplate orders were to be placed with which baseplate manufacturer.[91] It was Nidec that indicated that BTEC was to be allocated the Hitachi work and that Seagate work at BTEC was to be reduced and placed with others. It was reasonable to assume that Nidec was liaising with Seagate and Hitachi to ensure, as best it could, that the needs of the HDD companies were being met. As Mr LH Lee acknowledged, the Hitachi work was more profitable than work for Seagate.[92] Seagate did not contact Beyonics with any specific requests and it is apparent from the e-mail of 27 October 2011 that Mr Goh was keeping Mr Billy Chua informed as to Beyonics' position. I do not consider that it was reasonable to expect Mr Goh to reach beyond Nidec to Seagate to seek to undermine the proposals coming from Nidec which promised to provide orders more than sufficient to occupy BTEC's capacity. The prospect of increased work from Hitachi which offered higher margins than work for Seagate was an understandable incentive to accommodate Nidec's request.

The events of 27–28 October 2011

285 The meeting between Seagate and Nedec/Kodec on 27 October 2011 began at 9.00am some 10 minutes after Mr Goh's e-mail to Mr Billy Chua was

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91 LH Lee AEIC 31.

92 T5/6/19–25.

sent. The principal representative of Seagate was Mr Billy Chua and Mr Tony Lee was the sole representative of Nedec/Kodec. Mr Chua gave a presentation[93] which identified the possibility of Nedec/Kodec carrying out 2nd Stage work on e-coated baseplates manufactured either by Beyonics for the Pharaoh (*ie*, Brinks) 2H programme or by MMI for the Grenada 3D programme. Mr Lee indicated that Nedec/Kodec's preference, following discussions with his senior management, was to work with Beyonics.[94]

286 Following the meeting, that evening, Mr Chua sent an e-mail to Mr Lee, copying in numerous others, summarising the matters discussed.[95] It records the decision that Nedec/Kodec should become involved in the Pharaoh 2H programme as a priority and stated:

> To speed up the qual and support process at LND, recommendation is to start qual using the Beyonics Casting/E-cost baseplate & qualify machining first at LND…
>
> I had spoken earlier to CP Goh on this Castings support, no objection. Pse review this when you meet him tomorrow.

287 There then followed, on the next day, 28 October 2011, the meeting between Mr Tony Lee and Mr Goh. Prior to that meeting, at 9.35am Mr Goh sent an e-mail to Mr LH Lee saying:[96]

> I am suppose you have cap. casting and e-coating for the Brink 2H, i am looking for 1M a month to cast, e-coating and sell the parts; please adv. you capacity.

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93 40AB 26638–43.

94 T12/39/15–48/4; see T7/10/17–22.

95 26AB 17423–17424.

96 26AB 17463–17464.

This is consistent with Mr Goh's understanding that at that time there was excess capacity at BTEC for 1st Stage work.[97] He also sent an e-mail at 10.36 to Ms June Yang, the financial controller at BTEC asking for costings calculations on Brinks 2H baseplates.[98]

288 The only contemporaneous record of the meeting is in an e-mail from Mr Tony Lee to Mr Chua dated 29 October 2011.[99] It was plainly an amicable meeting and extended over lunch. The e-mail states that Mr Goh confirmed that he would quote a price for Pharaoh 2H e-coated material (*ie*, 1st Stage) before machining (*ie,* 2nd Stage) by the following Monday but Mr Lee was concerned that BTEC's indicated allocation did not seem to be enough to cope with Seagate's request. It records that Mr Goh had advised Nedec/Kodec to ask Seagate to cover the tooling costs involved in order to shorten the lead time for qualification. The section on the meeting with Beyonics ends with the statement:

> *As NEDEC and Beyonics are good friends to each other though we are in the same HDD baseplate business, close collaboration is not a problem at all.*
>
> [emphasis added]

289 This e-mail was forwarded by Mr Tony Lee to Mr Goh[100] thanking him for his hospitality the previous day and asking him to refer to the e-mail to Mr Chua. The material passage reads as follows:

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97 Goh AEIC 207; T8/142/14–143/13.

98 26AB 17455.

99 26AB 17471–17472.

100 26AB 17471.

> Please kindly refer to [the e-mail to Mr Chua]. *You were mentioned in the e-mail as a great excuse which you allowed me to do.*
>
> My boss, Mr Stephen Hwang showed a great interest in your proposal about an FI (financial investor) involvement as a bridge in taking over your Changsu mill as one of the alternative solutions for our automotive and HDD business. *Surely, your involvement is our unnegotiable string attached to the deal even afterwards.*
>
> ….
>
> *Now, we are waiting for your positive answer on coming Monday* because we'd like to plan 2012 with or without it in coming NEDEC directors' strategy meeting held on Nov.2nd and 3rd.
>
> [emphasis added]

290 At 2.46pm Ms Yang provided Mr Goh with the costing sheet for Brinks 2H[101] which indicate that the cost of the 1st Stage, including overheads, was US$1.099 and that the total cost of both stages was US$1.587. Finally, at 5.50pm on 28 October 2011 Mr LH Lee responded to Mr Goh's email earlier in the day about capacity.[102] The salient points read:

> Our casting and E-coat cap can do 4 million per month.
>
> Take into consideration of Jupiter 1D 1 million per month [Nidec] agree our price our maximum sale commitment during month of Mar 2012 at 2.4 million machining capacity fully utilize plus 1 million Brink 2H E-coat part propose sale to Nedec. [Totals] casting monthly capacity at 3.4 millions utilize with balance 600k per month casting and E-coat capacity.

291 Based on the terminology used in this litigation, the e-mail states that BTEC's capacity for 1st Stage work (casting and e-coating) was 4 million per month but that the capacity for 2nd Stage (machining) was only 2.4 million. This latter capacity was going to be fully utilised by March 2012 by the new

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101 26AB 17454.

102 26AB 17465.

order for Jupiter 1D and the other projected 2nd Stage orders. Adding a further 1 million 1st Stage orders from Nedec would increase 1st Stage monthly capacity to 3.4 million which would leave an available balance of 600,000 for 1st Stage work. These were figures that Mr LH Lee would himself have checked before sending the e-mail.[103]

292 In paragraph 215 of his AEIC Mr Goh said this:

> In light of Mr Lee Leong Hua's and Ms June Yang's emails, I believed that the Beyonics Group would be able to accommodate Seagate's request that the Beyonics Group partner with the NEDEC/KODEC Group (i.e. the B-N Alliance). At the same time, it also made sense commercially for BTEC to utilise its spare capacity for First Stage Work and produce 1 million First Stage Baseplates for sale to the NEDEC/KODEC Group at a profit.

293 The recollections of both Mr Goh and Mr Tony Lee as to the relationship between Beyonics and Nedec/Kodec at this time and the matters discussed at the meetings as given in evidence at this trial and, in so far as it was introduced during cross-examination in this case, at the 672 trial, was unclear, confused and sometimes contradictory. This was an aspect of evidence where Mr Goh was particularly defensive and evasive, no doubt because he was well aware that the Plaintiffs relied heavily on the events of these few days as indicating that he instigated the BN Alliance and thereafter involved himself in too rapid an acceptance of the relationship with Nedec/Kodec from which the inference that he was deliberately not acting in the best interest of Beyonics should be drawn.

294 The documents provide the best record of what occurred and when. I shall draw upon them in seeking to resolve certain important questions that arise

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103 T4/46/21–47/24.

over the developing relationship between the parties over this period. There are a number of issues that need to be resolved: when did Mr Goh first become aware of the Seagate's idea of joint manufacture between Beyonics or MMI and Nedec/Kodec, why did he accede to the request that Beyonics should take part and what were his reasons for him doing so, why did he accede so rapidly, and what discussions did he have with his colleagues at Beyonics before acceding to it?

295 The starting point is Mr Tony Lee's e-mail to Mr Goh referred to in [278] above. It has to be remembered that there was an NDA in place between Nedec/Kodec and Beyonics concerning the possibility that Nedec/Kodec would purchase BTEC and the e-mail must be read with this in mind. But, equally, by this date Mr Lee was aware of Seagate's idea of joint manufacture. On its face the reference to "joint operation" is ambiguous. It could be referring only to the possible takeover; it could be referring only to the Seagate idea; or it could be referring to both. Mr Lee believes that he did have in mind Seagate's idea but considers that if Mr Goh had not been told about this in advance he would not have appreciated this. He also acknowledged that the "alternative solution" referred to was the possible takeover.[104]

296 In his AEIC Mr Goh said that he did not understand what Mr Lee meant by a "joint operation" or an "alternative solution" but was prepared to wait for clarification at the meeting two days later.[105] Mr Goh continued in his AEIC by stating that he first became aware of the Seagate proposal when Mr Billy Chua

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104 Tony Lee AEIC 52–55; T12/38/24–42/24.

105 Goh AEIC 183–184

telephoned him but was certain that it was after his e-mail to Mr Chua at 8.50am on 27 October.[106]

297 Mr Goh was cross-examined extensively on this[107] but maintained his position that he did not understand what Mr Lee meant by "joint operation" and that he was content to wait until the meeting on 28 October to clarify matters. But, by then, he had spoken to Mr Chua the previous day so he knew about the Seagate proposal from him such that there was no need at the meeting to revert to Mr Lee's e-mail to enquire what he meant. This is a credible explanation.

298 There was however some debate as to when precisely Mr Goh was first informed about the Seagate proposal. Mr Goh's evidence in cross-examination was that he was provided with an outline of the proposal by Mr Billy Chua by telephone during the afternoon or evening of 27 October and the matter was expanded upon by Mr Tony Lee at the meeting on 28 October.[108] In his evidence in chief, Mr Billy Chua was asked whether he had asked Mr Goh if he could supply e-coated baseplates to others for machining before Mr Chua and Mr Tony Lee spoke on 24 October 2011 (see [274] above). He said that he could not recall the timings[109] but went on to say that he believed that he would have asked Mr Goh about this by 25 October and that at that stage Mr Goh did not have an answer.[110] He said that he could not recall whether he spoke to Mr Goh before or after the meeting with Mr Tony Lee on 27 October[111] although in

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106 Goh AEIC 195–200.

107 T8/119/19–124/22.

108 T8/127/14–22, 129/3–131/2.

109 T6/37/2–25.

110 T6/40/14–41/1.

111 T6/53/13–54/6.

evidence in the 672 Action he had said that he thought he had spoken to Mr Goh before the meeting.[112] In cross-examination he repeated his recollection as being that the telephone call to Mr Goh on 27 October was after the meeting with Mr Lee at 9.00am and not before.[113]

299 I do not consider that much turns on the precise timing of the call on 27 October but, on balance, the contemporaneous documents support the conclusion that it was afterwards. The e-mail was at 8.50am and Mr Goh indicated that he was about to travel from Malaysia back to Singapore and, until the meeting, Seagate could not have known whether Nedec/Kodec were prepared to go along with the Seagate proposal and, if so, whether they would prefer to work with BTEC or MMI.

300 What I find more difficult is to determine whether Mr Billy Chua outlined the Seagate proposal to Mr Goh on 25 October 2011. The contemporaneous documents are sparse and the one that does exist is not consistent with him having done so. There is no e-mail recording the conversation and no written follow up from Mr Goh. In his e-mail of 27 October 2011 Mr Goh deals with a number of matters concerning Beyonics' relationship with Seagate but does not mention the Seagate proposal, which one might have expected it to do had Mr Chua already broached the subject with Mr Goh. Once Mr Goh had discussed the matter with Mr Chua on 27 October 2011 he sent an e-mail early the following morning to Mr LH Lee seeking input as to the possibility of manufacturing 1 million 1st Stage baseplates per month. If the

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112 T7/7/19–9/16.

113 T7/108/22–109/25.

matter had been raised with him earlier, one might have expected him to have made such a preliminary enquiry earlier.

301 Taking all these matters into account I am not persuaded that Mr Goh was aware of the possibility of Beyonics becoming involved in what became known as the BN Alliance until the seeds of the idea were sown by Mr Lee's reference to a "joint operation" in his e-mail of 26 October followed by the clarification thereof by the telephone call with Mr Chua on 27 October and the meeting with Mr Tony Lee on 28 October.

302 The Plaintiffs' assertion on the conduct of the parties at this time was that it was Mr Goh's alleged "*evasiveness in the witness box was born out of his efforts to try to distance himself from any suggestion that he had initiated the partnership proposal or was involved in initiating the proposal, and to downplay his discussions with Mr Tony Lee on 28 October 2011*".[114] The Plaintiffs also contended that some of the comments in the above e-mails indicated a far closer relationship between Beyonics and Nedec/Kodec at this time than Mr Lee and Mr Goh would have me believe and that both Mr Lee's rapid choice of Beyonics as a possible partner in the BN Alliance and Mr Goh's equally rapid acceptance of the possibility of taking part in the Alliance demonstrated this.

303 The Plaintiffs relied in particular on the four passages underlined in the e-mails quoted in [288] and [289] above: first, Mr Tony Lee's comment: "*NEDEC and Beyonics are good friends to each other though we are in the same HDD baseplate business, close collaboration is not a problem at all*". On

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114 Plaintiff's written closing at 310.

any basis having regard to the state of the negotiations for the possible purchase of BTEC, this is an overstatement but it is not inconsistent with Mr Lee's somewhat exaggerated use of English in other e-mails. There was good reason for him to emphasise the fact that Nedec/Kodec and Beyonics did have previous business contacts although, having regard to the NDA, he could not indicate that a possible merger was being contemplated. Secondly my attention was drawn to the comment, again by Mr Lee: "*You were mentioned in the e-mail as a great excuse which you allowed me to do*". The Plaintiffs suggest that this was a reference to the fact that Mr Goh had told him that BTEC might not have the capacity to meet Seagate's demand of 6 million per quarter and this would appear to be correct. But it is not indicative of anything other than the position recorded in the e-mail to Mr Billy Chua where Mr Lee stated that he was going to talk to Mr Goh about capacity again the following Monday. It obviously suited Mr Lee to be able to relay concerns about capacity as being Beyonics' rather than Nedec/Kodec's concerns but equally it would not be in Mr Goh's interests to give assurances on capacity without first reviewing it with the production team at BTEC. Third, reliance was placed on the words, "*Surely, your involvement is our unnegotiable string attached to the deal even afterwards*." This comment was made in the context of the possible takeover and, stripped of the over effusive language, is no more than a statement of usual practice that it is a term of many takeovers that key personnel are retained for a period as, indeed, was the case with the Channelview takeover of Beyonics. Finally, reliance is placed on the words "*Now, we are waiting for your positive answer on coming Monday because we'd like to plan 2012 with or without it in coming NEDEC directors' strategy meeting held on Nov. 2nd and 3rd*." It is suggested that this was an indication of an unusually close relationship because one competitor would not release such information to a competitor. I do not see it as such. To the contrary, the words used are more consistent with Mr Goh

having not committed BTEC to the partnership at the meeting on 28 October 2011 and having promised to revert to Mr Lee on the following Monday. Mr Lee was giving Mr Goh the reason why a response on the Monday was important to Nedec/Kodec.

304 I have already rejected the submission that it was Mr Goh who initiated the partnership proposal. The following factors lead me to the conclusion that there was nothing sinister about the way in which Beyonics and Nedec/Kodec interacted and that Mr Goh was, at this time, acting reasonably and in what he considered to be in the best interests of Beyonics in forming the belief that he did as expressed in paragraph 215 of his first AEIC (see [292] above):

(a) The possibility of Nedec/Kodec purchasing BTEC had already been canvassed between them and there was an NDA in place. There was therefore every reason for Nedec/Kodec to wish to work with Beyonics rather MMI to render a subsequent merger more attractive.

(b) The primary problem caused by the floods was the loss of CNC machines. These were expensive machines (around US$80,000 each) and there were only 259 at BTEC. Their primary use was in machining at the 2nd Stage.

(c) Beyonics had been offered an attractive contract by Nidec for Hitachi baseplates which necessitated reducing its commitment to manufacture baseplates for Seagate. The available CNC machines were projected to be working at or around the capacity for 2nd Stage work as a result.

(d) There was excess capacity at BTEC for 1st Stage work. There was thus a good reason for Mr Goh to seek to employ this capacity to

enhance BTEC's business without incurring any major capital expenditure in accordance with the Beyonics business plan for the PES division.

(e) Working with Nedec/Kodec was also calculated to enhance the business plan of divesting the PES division. BTT was likely to be written off as an insurance claim so that taking steps to further the possibility of the purchase of BTEC by Nedec/Kodec made business sense.

(f) This was a time of crisis in the industry. Decisions had to be made quickly and parties had to work together to help the industry recover from the floods. Nonetheless, Mr Goh did not commit BTEC at the meeting on 28 October 2011 but indicated that he would give an answer by the following Monday and consulted Mr LH Lee and Ms Yang before committing BTEC any further.

(g) Mr Goh held a significant shareholding in Beyonics.

Events after 28 October 2011

305 By the end of 28 October 2011 the position was that Mr Goh had agreed to consider the possibility of a partnership which both Seagate and Nedec/Kodec wished BTEC to do. He had consulted his Senior Manager at BTEC, Mr LH Lee, for details of capacity and had ascertained that there was excess 1st Stage capacity but that there was projected to be none for 2nd Stage capacity early in 2012.[115] He had agreed to revert to Mr Tony Lee on the following Monday, 30 October 2011.[116]

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115 26AB 17465.

116 26AB 17471.

306 Before continuing with the narrative of events, I think it is important to pause and reflect that the proposed BN Alliance was not the sole focus of any of the parties at the time. Seagate were conducting similar discussions with other baseplate manufacturers. Mr Billy Chua gave evidence that this resulted in other pairings similar to that proposed with Nedec/Kodec and BTEC between MMI and Shinsung (another ex-Samsung supplier) and between Nidec's baseplate facility with Foxconn. Similar partnerships were also arranged at the motor level between MMI and NMB, another Nidec entity.[117]

307 Nedec/Kodec were having to consider the challenges of obtaining qualification to make Seagate baseplates at both the 1st and 2nd Stages which was important to them in the light of the loss of some of the Samsung business. In the PES division, the floods leading to the loss of BTT, with the consequent effect on the factory and personnel, was obviously a pressing problem. Negotiations were also ongoing, not only with Seagate but with Hitachi, as already mentioned, and also with Western Digital.[118] At that time, Mr Goh had overall responsibility for 14 factories across the PES and the EMS divisions.

308 On 31 October 2011 Mr LH Lee confirmed that Nidec had accepted BTEC's quote for the Hitachi Eagle 2.5" baseplate but cautioned that to take the order would mean reducing the Seagate order by 500,000 per month unless there was a further investment in equipment estimated to cost S$6 million, including 60 CNC machines.[119]

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117 T7/136/21–141/24.

118 T9/46/9–24; T9/83/10–84/10.

119 26AB 17485.

309 By 3 November 2011 Mr Goh must have reverted to Mr Tony Lee confirming BTEC's interest in the proposed BN Alliance for the supply of Brinks 2H baseplates because in an e-mail from Mr Lee to Seagate on that day a price was quoted for the supply of the completed baseplate at US$1.90 on the basis of a quotation by Beyonics for supply of the 1st Stage product at US$1.25. Mr Scott Lamb of Seagate responded the same day by saying that the suggested supply plan was "*too low and too slow*" and requesting a supply of "*at least 5m per month asap*".[120]

310 Following the Nedec/Kodec directors' meeting on 2 and 3 November 2011, Mr Lee reverted to Seagate on 4 November 2011 amplifying its proposed commitment to Seagate and setting out the steps proposed leading up to an audit by Seagate fixed for 9 December 2011 at Langfang.[121]

311 0n 4 November 2011 Mr Tony Lee sent an e-mail to Mr Scott Lamb[122] saying that he was talking to Mr Goh by e-mail and that Mr Goh was going to visit Langfang on 10 November to discuss the supply of the 1st Stage baseplates. On the same day Mr Stephen Hwang e-mailed Mr Goh.[123] Since the Plaintiffs placed emphasis on certain words in this e-mail I shall set it out in full.

> I always appreciate all your advices and tips for HDD business.
>
> All the surroundings including the Thai water flood are helping us to increase our leverages of HDD business.
>
> I am still interested in running your Changshu plant.

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120 26AB 17496–17501,

121 26AB 17502–17504,

122 26AB 17508.

123 26AB 17511.

> If I can have the chance to operate it, it must be the best time to take ourselves in action.
>
> On Nov. 10, I would like to talk with you deeply for this concern.
>
> I am looking forward to seeing you.

312 Mr Goh replied the same day:[124]

> Ok, good to hear from you during the busy strategic meeting. I will see u on Nov 10, to discuss. Just for HDD only, total est. 4,000 Cnc machines were in water, supply base now changes, I told Tony that you need to adjustment your price by more than 20 per cent.

313 I shall consider matters arising from those e-mails together with those from the related visit to Langfang on 10 November 2011. Prior to that meeting, on 6 November 2011, Mr Goh sought information from Mr LH Lee and his team for the purposes of his meeting with Nedec/Kodec as to the capacity at BTEC, particularly for the Brinks 2H programme.[125] On 7 November 2011 Mr LH Lee replied, *inter alia*, that he was reducing Seagate's Brinks 2H and Pharaoh 2D production and increasing Hitachi's Mars 1D and Jupiter 1D production[126] but said that casting capacity was "*no issue at support 500k E-coated part sale to Nedec and if 1 million E-coat part per month plan to sale to Nedec we need to purchase some tumbling bowl*".[127]

314 This was followed up by an e-mail from Mr Goh to Mr LH Lee on 8 November 2011 seeking up to date information on the current planned capacity for Seagate and Hitachi as he needed "*to call HC Toh (of Seagate)*

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124 26AB 17511.

125 27AB 17520–17521.

126 27AB 17514.

127 27AB 17512.

again tomorrow when I reach Beijing". Mr LH Lee replied the following day giving a full breakdown of the overall sales forecast between November 2011 and March 2012 which again showed a projected reduction in supply of 2nd Stage baseplates to Seagate and an increase in supply to Hitachi culminating in a total production, including automotive, in March 2012 of some 2.7 million products per month.[128]

315 As agreed, on 10 November 2011 Mr Goh visited Nedec/Kodec's Langfang factory in the company of Mr Stephen Hwang and Mr Tony Lee. In his evidence in chief, Mr Goh said that he used the visit to evaluate whether Nedec/Kodec was able to meet Seagate's requirements and that he identified a number of issues that concerned him surrounding their ability to obtain qualification from Seagate for 2nd Stage work. He said that Mr Lee asked him whether he could provide consultancy services to Nedec/Kodec but that he did not give an answer during the visit. Mr Goh also stated that he told Mr Hwang and Mr Lee about his proposed visit to Seagate on 18 November 2011 (the EBR Meeting – see [336] below) and that Beyonics would be seeking funding from Seagate at that meeting. He went on to say that the parties discussed the investment that might be necessary for Nedec/Kodec to manufacture the Brinks 2H baseplates. Mr Lee estimated this to be US$5 million and Mr Goh told Mr Lee that it was unlikely that Seagate would fund the full amount. Mr Lee then asked Mr Goh if he could enquire at the EBR meeting whether Seagate would give a grant to Nedec/Kodec of between US$2–2.5 million in support of the proposed BN Alliance which Mr Goh agreed to do.[129] Mr Lee's evidence in chief was entirely consistent with this.[130]

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128 Goh AEIC 236; 27AB 17533–17534.

129 Goh AEIC 229–235.

316 Both were cross-examined on this evidence. The cross-examination of Mr Goh was wide ranging and, as happened on a number of occasions, Mr Goh's answers were long and introduced a number of tangential matters.[131] In substance however his evidence was broadly consistent with his evidence in chief but he emphasised that his primary objective was to sell BTEC. On the subject of the possibility of consultancy he said this:

> Q. So when Tony looks at you -- this is in the car ride, to ask for consultancy services; is that correct?
>
> A. Yes.
>
> Q. So Stephen Hwang is present?
>
> A. Yes.
>
> Q. When it is proposed that you provide consultancy services, is it in your personal capacity or is it on behalf of Beyonics?
>
> A. At that moment in time we have not discussed whether it's personal capacity or on behalf of Beyonics.
>
> Q. Right.
>
> A. But for sure Beyonics is not in the business of providing consultancy services.
>
> Q. So at that point in time you didn't think there was anything wrong if you provided consultancy services at a personal level instead of on behalf of Beyonics?
>
> A. It's just a general discussion, I never promise him anything, I just hear what he say. There's no discussion further than that. I never agree with him at that car ride meeting.
>
> Q. My question is not about whether you agreed. My question is whether you thought it was wrong to provide consultancy services personally instead of on behalf of Beyonics.

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130 Tony Lee AEIC 82–88.

131 T9/5/10–24/17.

> A. I never thought of whether it's wrong or not wrong. My primary objective is to sell the factory, do the pairing as what they suggested, to ensure Beyonics can supply the first stage work and sell the factory to KODEC and NEDEC and gain profitability for Beyonics as a whole.

317 Mr Tony Lee's evidence in cross-examination again was broadly consistent with his evidence in chief.[132] In particular, both witnesses confirmed that the suggestion of compensation for consultancy services was proposed by Mr Lee, that no further details were discussed and Mr Goh did not at that time accept the offer. On the subject of a possible payment by Seagate to Nedec/Kodec, it was common ground between the witnesses that Nedec/Kodec indicated a need for US$5 million and that Mr Goh advised that it was unlikely that Seagate would be prepared to provide more than US$2.5 million. Mr Hwang and Mr Lee were aware that Mr Goh was to make a presentation to Seagate at the EBR meeting on 18 November 2011 and that this presentation would include a submission for funding from Seagate to Beyonics. It was agreed that when dealing with the proposed BN Alliance, Mr Goh would also canvas the possibility of a payment to Nedec/Kodec in support of the Alliance.

318 The Plaintiffs submit that the e-mails passing between Beyonics and Nedec/Kodec after the 28 October meeting and the evidence relating to the 10 November meeting demonstrate that "*Mr Goh and Mr Tony Lee clearly had something to hide*".[133] Mr Goh's visit to Langfang was unnecessary and the fact that it took place is, it is said, evidence that it was contemplated that Mr Goh would work in some way with Nedec/Kodec. Mr Goh's evidence that his primary purpose for making the visit was to seek to further the potential sale of

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132 T12/87/9–111/20.

133 Plaintiff's written closing at 323–331.

BTEC was inconsistent with the fact that nothing concrete on this subject was discussed during the visit. Mr Goh was evasive in cross-examination and denied that he even discussed meeting the deadlines for qualification and that Mr Goh assumed the position of mastermind with regard to relations between Nedec/Kodec and Seagate.

319 Whist there is substance in the submission that Mr Goh was evasive in cross-examination and making due allowance for this, I consider that the Plaintiffs' assertions are over exaggerated. It is necessary to have regard to the contemporaneous documents in their entirety and not to emphasise individual phrases and sentences deprived of their overall context. It is plain that by 10 November 2011 Mr Goh, whether rightly or wrongly, had formed the view that BTEC should take part in the proposed BN Alliance, if suitable terms could be agreed, and that he was also continuing to the Board's strategy of seeking to divest itself of the PES division. He had made enquiries of Mr LH Lee and his team at BTEC to ensure that BTEC could meet the production levels suggested and had a pricing structure in mind.

320 The success of the BN Alliance was therefore important to BTEC's business and it would only be successful if Nedec/Kodec moved forward rapidly to gain qualification for manufacturing 2nd Stage Brinks 2H baseplates. Accordingly, by 10 November it was essential that BTEC and Nedec/Kodec worked together to make the BN Alliance successful. More specifically it made commercial sense to work together so as to ensure that the partnership obtained the best possible deal with Seagate. I do not read anything more into the meeting of 10 November, so far as it related to the proposed BN Alliance, than an appreciation by both parties that they should work together for their common good. Mr Goh's participation was crucial to this. I do not however accept that he was the mastermind behind the project. He was highly experienced in the

field and his contribution was likely to be a valuable one but it was no more than this.

Events leading up to the EBR Conference

321 At some point in time before 10 November 2011 Beyonics were invited by Seagate to attend an "Executive Business Review" ("EBR") to discuss the Beyonics Group's strategy in relation to production of baseplates after the floods. In cross-examination Mr Billy Chua explained the purpose pf the meeting as follows:[134]

> Q. Mr Chua, can I ask you to pick up 27AB, page 17703. These are the EBR slides. Can I just confirm you were at the meeting where these slides were presented? Have you got page 17703?
>
> A. Yes.
>
> Q. This is the EBR meeting of 18 November.
>
> A. Okay.
>
> Q. Can you remember whether you were present?
>
> A. Yes.
>
> Q. Do you remember these slides being presented?
>
> A. Yes, they look familiar.
>
> Q. Yes. Do you remember what was the purpose of the meeting?
>
> A. It's for Beyonics to report on the status after the flood situation of their factory and also the proposed plan on how to make the recovery.
>
> Q. Thank you. Looking at page 17707, it would appear that it was also for Beyonics to present on the proposed pairing with NEDEC/KODEC; right?
>
> A. Yes.

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134 T7/110–25/112/10.

> Q. Who from the Seagate side attended that meeting?
>
> A. Should be at least my VP, HC Toh and me from Seagate.
>
> Q. Would I be right in saying that apart from the status update following the floods, you and Mr Toh wanted to know what was the status of the discussions between Beyonics and NEDEC on the proposed pairing?
>
> A. Yes.
>
> Q. Would I be right in also saying that Seagate would have expected Mr Goh to engage in discussions with NEDEC before this meeting so that it could incorporate NEDEC's requirements or concerns in this presentation?
>
> A. I will say yes.

322 Mr Goh was asked to give a presentation at that meeting and he gave unchallenged evidence that about a week before the meeting Mr HC Toh of Seagate called him and asked that, in addition to other things, he should prepare an indication about the financial assistance that the Beyonics Group and Nedec/Kodec needed to make the BN Alliance work.[135]

323 In order to prepare the presentation, he had discussions both internally and with Nedec/Kodec. Dealing first with the discussions with Nedec/Kodec, on 11 November 2011 there was an exchange of e-mails between Mr Tony Lee and Mr Goh.[136] The first, from Mr Lee, apologised for being anxious but said that he was "*waiting for good news from Seagate and from you*". Mr Goh replied that he had had a discussion with Mr Toh of Seagate about the possible volume of supply "*but did not tell him the investment yet as I need to meet them nxt week for executive discussion, then I talk money*". Mr Lee then drew Mr Goh's attention to the fact that he, Mr Lee, was going to meet Mr Scott Lamb of

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135 Goh AEIC 221.

136 27AB 17600–17601.

Seagate at Samsung the following week and sought guidance from Mr Goh as to what he should tell Mr Lamb about the progress of the BN Alliance and included a tentative schedule of planned production leading up to 1 million a month the following year. Mr Goh responded, "*U just give him this plan first, 2 m needs to come up with investment money, please do not discuss with him, u needs to discuss with him the 1.90 price*".

324 The figure 1.90 was a reference to the price of US$1.90 per baseplate that was being proposed to Seagate for the Brinks 2H baseplates manufactured under the BN Alliance. This had first been mooted in Mr Lee's e-mail to Seagate on 3 November 2011[137] (see [309] above) and I do not accept Mr Goh's assertion[138] that it was not discussed at the meeting on 10 November. It must have been to have been included in the e-mail the following day. The Plaintiffs contend, correctly, in my view, that these e-mails demonstrate that Mr Goh was "*pulling the strings behind the scenes amidst the KODEC Group's negotiations with Seagate*". The question that I shall have to answer is whether this was solely in furtherance of a desire on the part of Beyonics and Nedec/Kodec to get the BN Alliance to work to their best common benefit or whether it was part of a conspiracy on the part of Mr Tony Lee and Mr Goh to promote Nedec/Kodec's business at the expense of Beyonics' business.

325 On 15 November 2011 Mr Lee updated Mr Goh on his meeting with Mr Scott Lamb.[139] Mr HC Toh had informed Mr Lamb about the question of increasing production to 2 million a month and that Mr Lamb had assumed that

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137 26AB 17496.

138 T9/11/16–17.

139 27AB 17599.

Mr Billy Chua was working with Mr Goh on this. Mr Lee reported that he had told Mr Lamb that without investment support "*from Beyonics and Seagate*" Nedec/Kodec could not "*ramp up*" to that figure. He ascribed the idea of such a ramp up as having come from Mr Goh on the basis of 1 million 1st Stage baseplates coming from Beyonics and the other from Nedec/Kodec but emphasised that Nedec/Kodec did not have the funds available for the necessary investment for this to be done. He also indicated that the proposed price was US$1.90 of which Beyonics would supply 1st Stage products at US$1.25. He was effusive, perhaps over effusive in his praise of Mr Goh and told Mr Lamb "*that discussion with me is not important but Seagate people have to discuss this plan with Mr. Goh who we gave full trust to*".

326 It is clear from this exchange that Mr Goh and Mr Lee were working closely together but there is nothing to indicate that there was anything underhand in this. It was in both companies' best interests to work together to get the best deal possible. It would have made no sense for questions of pricing and investment contribution to be negotiated on two fronts. The proper inference from all these e-mails is that the parties had agreed at the 10 November 2011 meeting that Mr Goh should take the lead on these matters. Objectively, this made sense. Mr Goh had many years' experience in the field and, more specifically, had had many years working with Seagate. He was due to have a one to one meeting with high profile representatives of Seagate the following week. If the BN Alliance could be made to work in quantities that were achievable (with or without further investment) at a price that was acceptable to both, then the interests of both companies would be well served. I am unable to read into these e-mails that the relationship between Mr Goh and Mr Lee had gone any further than this.

327 Of course, if Mr Goh had appreciated from the start that the whole idea of entering the BN Alliance was not in the best interests of the Beyonics Group because the alliance would take work away from BTEC which there was a real prospect it could have obtained directly from Seagate, then things would be different but, for the reasons given in [304] to [320] above, this was not the case.

328 Internally Mr Goh and Mr LH Lee and his team were having discussions on production. In this context it has to be noted that, at that time, Mr Goh and Mr LH Lee were under a double fetter on their freedom to propose any capital investment into BTEC. First, there was the Board resolution of 28 September 2010 to restrict capital investment (see [227] above) but also clause 25.29 of the Facility Agreement with the Banks restricted the freedom of the Beyonics Group as a whole to approve significant capital expenditure.[140]

329 On 11 November 2011 Mr Goh sent an e-mail to Mr LH Lee headed "*Capacity, What if*"[141] seeking Mr Lee's comments on a proposed plan which included 1 million of 1st Stage production for Nedec/Kodec and asked "*Please do the calculation, thinking and I want to have a discussion at 5pm. Next week, Seagate holing [sic] EBR again, I need to ask for money and increase of price and I need to give them proposal*". Mr Lee responded fully that afternoon[142] drawing attention to the fact that there were 50 CNC machines available for purchase if Beyonics was to move quickly. It appears from the e-mail that, at that date, Mr Lee was estimating that the then current capacity for 2nd Stage baseplates (and automotive) was 2.9 million per month and that to meet Mr

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140 1AB 239.

141 27AB 17554–17555.

142 27AB 17553-17554

Goh's proposed plan would need a capacity of around 3.3 million. This would require an investment of US$4.18 million.

330 The figure of 2.9 million differs from the capacity figure previously given by Mr Lee to Mr Goh of 2.4 million (see [291] above). It was the subject of cross-examination but there was no great clarity as to how the change arose.[143]

331 Apparently following the discussion arranged for 5.00pm, Mr Lee e-mailed Mr Goh again at 5.25pm[144] with various suggestions as to how to meet the capacity demands without further investment. He indicated that unless an investment in 13 CNC machines was considered, it would be necessary to reduce the machining capacity (*ie,* 2nd Stage) to both Seagate and Hitachi. He also indicated that an investment in an additional RO system would be needed to avoid a possible bottleneck in the e-coating process. Subsequently he stated that a new RO system investment would cost some US$80k with some installation costs. The exchange ended with a reply from Mr Goh at 6.28pm when he stated:

> So, 13 cnc plus ro system, take down 300, this is the plan, right?

332 The following morning, 12 November 2011, Mr Lee came back with an itemised proposal[145] in response to Mr Goh's last email the night before indicating that even with a take-down of 300,000 in BTEC's commitment to its customers, there would have to be investment cost, for an increased capacity of 200,000, of US$1,960,238 which included over US$1.1 million for 13 CNC

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143 T4/42/1–43/16; T5/97/6–106/19.

144 27AB 17588–17589.

145 27AB 17608.

machines as well as the US$80,000 for the new RO system. He updated this on 16 November 2011[146] following a teleconference on 15 November in which he sought to avoid the investment in new CNC machines and yet still increase capacity by 200,000. This was estimated to require a reduced investment of US$1.33 million which would give an overall capacity (excluding the 1 million e-coated products to be sent to Nedec/Kodec) of 3,192,000 which still is indicative that Mr LH Lee considered that BTEC's maximum machining capacity was under 3 million per month.

333 In none of these documents is there any suggestion that there was scope for increased capacity on the machining side of the business without a sizeable capital investment and this was only to obtain an increase of 200,000–300,000 a month. In particular, there is no suggestion that there was available capacity to carry out the 2nd Stage work on the 1 million 1st Stage baseplates to be supplied to Nedec/Kodec.

334 Mr Goh sent an e-mail to Mr Chay on 15 November 2011.[147] This is the first document recording any exchange between Mr Goh and the other board members since the possibility of the BN Alliance first arose. It does not expressly mention the BN Alliance. The relevant portions read:

> We have a major issue, this is a good news, but I need your input.
>
> Seagate/WD/Hitachi all needs our support for the HDD base, and we are in the process to increase price by 0.30+ - per pcs;
>
> Seagate now, asking us to put investment, and they are willing to fund it, I work out around US$ 6 million……

146 27AB 17642.

147 27AB 17629.

> The issue I am having is the bank loan going forward, we are no allow to increase fixed assets investment. …

335 He then goes on to discuss various options. There are no documents before the Court which amplify upon this request for input. In cross-examination Mr Goh said that he had had conversations with Mr Chay on the limitations on capital expenditure but did not suggest that at this time he mentioned the BN Alliance to Mr Chay or that he asked the Board to reconsider its policy on investment in the light of the floods.[148]

The EBR Conference

336 Following various internal discussions Mr Goh prepared (or had prepared for him) the presentation which he was going to give to Seagate on 18 November 2011 and a draft set of the slides was sent to Seagate on 16 November.[149] There was some dispute as to precisely which set of documents was sent but there is no dispute over the documents that were presented on 18 November. Mr Billy Chua recalled that he and his Vice-President, Mr HC Toh, were present. Mr Goh recalls that, in addition, a Mr David Mosley, the President of Seagate's Global Operations attended.[150]

337 Under the heading "Action taken by Seagate/ Beyonics", the first three bullet points on the presentation slides read:[151]

> • Re-activate BPM to support Seagate for Muskie, Timberland and Sentosa.

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148 T8/56/20–63/19; T11/69/17–70/2.

149 27AB 17630.

150 Goh AEIC 255.

151 27AB 17703–17713.

> • Re-activate BTEC to support Seagate for Brink 2H and Pharaoh 2D to 1million per month – Nov 11, 2011.
>
> • Team up with [NEDEC/KODEC] for bigger capacity for long term supply.
>
> • …….

338 Under the heading "Investment Proposal", Mr Goh separated his proposals into three sections, BPM, BTEC and KODEC/NEDEC. For BPM he identified the need for an investment of US$5.8 million to include 40 CNC machines, for BTEC the sum was US$3.3 million to include 13 CNC machines and for KODEC/NEDEC the sum was US$2.5 million for Conversion/Fixture/Tooling. The total for BPM and BTEC was thus US$8.8 million.

339 Under the heading "Why Beyonics/Kodec/Nedec", amongst the bullet points are:

> • Speed. Beyonics/Seagate to help Kodec to gear up mass production within 3 months (upon confirmation)
>
> • Ready mold support from BTEC to Kodec.
>
> • Kodec has 2 million machining capacity – Golden opportunity
>
> (i) 8 super line concept
>
> (ii) 96 CNC and 8 SPM

340 Under the heading "Pros and Cons" he identified certain challenges that Nedec/Kodec faced in relation to conversion of machining and obtaining approval for 1st Stage manufacture, and also the fact that there would be higher transportation costs from BTEC to Nedec/Kodec and then to Nidec. Under the heading "Capacity Analysis" he estimated that by April 2012 BTEC would be producing 3 million 2nd Stage baseplates per quarter and 3 million 1st Stage for completion by Nedec/Kodec. In the longer term, whilst capacity for 2nd Stage

at BTEC was to remain at 3 million per quarter, the estimated capacity for the BN Alliance project was 6 million a quarter.

341 Under "Pricing Proposals" he sought an increase in the price for all baseplates supplied by BTEC and BPM, and in the case of Brinks 2H the increase was from US$1.436 to US$1.840. This increase was part of an overall increase in pricing agreed by Seagate across the board, known as the "cost adder", which, in the case of the Brinks 2H product, at that time, amounted to US$0.404.[152] Finally, under "Cash Flow Analysis", the slide indicated that the funding sought by Beyonics for CNC machines was to be repaid after 18 months with a shipment guarantee of 60 million baseplates with no price reduction.

342 In his evidence in chief Mr Billy Chua said that the question of what payments would be made was a matter for Seagate but that he had concluded from the presentation that there would be no conflict for Beyonics and Nedec/Kodec to work together.[153] In cross–examination he gave the evidence cited in [321] above confirming that Seagate expected Mr Goh to incorporate Nedec/Kodec's requirements into his presentation. He went on to confirm that Seagate expected Beyonics to focus on the 1st Stage and Nedec/Kodec on the 2nd, that there would be a collaboration between the two with Seagate to help Nedec/Kodec qualify and that no new investment was needed for BTEC so far as production of the required number of 1st Stage baseplates was concerned.[154] Mr Goh was cross-examined and accepted that he was supporting the decision to form the partnership as a business decision because he had excess capacity

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152 Shaw AEIC 90–92.

153 T7/19/21–21/13.

154 T7/110/25–123/5.

for the 1st Stage work; he explained how he reached the figure of US$1.84 and the purpose of the proposed deferred payment scheme. He ended this section of cross-examination by saying that Seagate did not commit itself to any aspect of funding but that the matter should be followed up on by Beyonics.[155] In substance therefore the slides speak for themselves.

343 Following the presentation Mr Goh e-mailed Mr Tony Lee to tell him that the BN Alliance was to proceed, that Mr Lee should plan to come to Singapore the following week with a Mr Kim and that Mr Lee should work with Mr Billy Chua to obtain the US$2.5 million. He set out a proposed timetable leading up to full production.[156] Mr Goh also gave evidence that it was at this time that he agreed to provide consultancy services to Nedec/Kodec in order to help them qualify so as to ensure the sales of 1st Stage baseplates to them.[157]

344 On 21 November 2011 Mr Tony Lee informed Mr Goh that Mr Kim, the CTO of Nedec/Kodec, would be unable to travel to Singapore and that he would therefore come alone. He asked whether it would be in order for him to contact Mr Billy Chua and Mr Scott Lamb in relation to the US$2.5 million and stated "*Though you called a "Go" sign to me, there is nothing concrete for U$2.5M from Seagate upto today. So, I just want to get your guidance how to move further*". Mr Goh responded saying "*Let discussion this Thursday. Do not worry for the US$ 2.5 m, will get it*".[158]

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155 T9/126/15–146/24.

156 27AB 17599.

157 Goh AEIC 315–316.

158 27AB 17598.

345 The meeting fixed for the following Thursday (24 November) was to involve Seagate, Beyonics and Nedec/Kodec ("the Tripartite Meeting"). By a later e-mail on 22 November Mr Tony Lee stated, "*I heartily appreciate your guidance in the business. I truly learn a lot from you*". On Mr Billy Chua's advice, he asked for a meeting with Mr Goh in advance of the meeting with Seagate, that he would send Mr Goh a copy of the presentation being prepared for the Tripartite Meeting which would draw upon the EBR meeting material and that he accepted Mr Goh's assurance on the US$2.5 million.[159]

346 On 22 November 2011 Mr Billy Chua and Mr Tony Lee exchanged e-mails concerning a presentation Mr Lee had been asked to prepare covering six matters including the timeline for the production of 2nd Stage baseplates using Beyonics' castings and the volume plan for January to March and April to June.[160]

347 Again the presentation slides provide the best evidence of what was discussed at the meeting.[161] They cover in detail Nedec/Kodec's "Capacity, Lead time & Concerns". In particular, it itemises the investment needed to implement the BN Alliance at a total cost to Nedec/Kodec of US$5,085,000 and requests support from Seagate of US$2.5 million.[162] Mr Billy Chua gave evidence in chief that by the end of that meeting the BN Alliance had been agreed upon[163] and, in cross-examination, explained how Seagate would assess requests for

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159 27AB 17598.

160 27AB 17716–17719.

161 40AB 26644–26663.

162 40AB 26652.

163 T7/24/16–22.

funding and that the funding of US$2.5 million was eventually agreed upon by 12 December 2011.[164]

348 The exchange of congratulatory e-mails[165] between Mr Goh and Mr Tony Lee supports the conclusion that it was at this meeting that the BN Alliance, although agreed in principle earlier between Beyonics and Seagate at the EBR meeting, was finally agreed by all three parties.

349 It was immediately after the Tripartite Meeting that Mr Goh met with Mr Tony Lee and Mr Jun Choi, the Quality Engineering Manager of the Langfang baseplate factory, and gave them advice on how to improve procedures at that factory. It was on that occasion that Mr Goh first proposed to Nedec/Kodec terms for the payment to him for the consultancy services he had agreed to provide to Nedec/Kodec which he requested should be paid through Wyser.[166] Mr Lee said that the original suggestion of a consultancy payment had come from him on 10 November[167] and was accepted by Mr Goh following the EBR meeting on 18 November.[168]

350 There is no record of any discussions between the parties about, or any proposals for, payment until this meeting although it appears that the principle of some payment had been agreed between Mr Hwang and Mr Goh prior to

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164 T7/130/24–132/23; 27AB 17973.

165 27AB 17752.

166 Goh AEIC 320–321.

167 Tony Lee AEIC 85.

168 Goh AEIC 315.

24 November 2011.[169] In cross-examination Mr Goh said this about his acceptance of the consultancy:[170]

> Q. Two days later, you have the 24 November 2011 meeting. Three parties: Seagate, Beyonics, NEDEC/KODEC; right?
>
> A. Yes.
>
> Q. The first time all three sitting together. I take it this is the meeting at which Seagate gives approval to this partnership, having heard from you on 18 November?
>
> A. Seagate had initiative on October 27 or 24 with KODEC and NEDEC, and Seagate had made a presentation which is Mr Billy Chua had testified in this court, he asked Tony Lee whether to choose Beyonics or MMI and also there's some other pairing going on. Foxconn and Nidec, MMI and Shinsung. So on this meeting is to gather all the three party and make sure we know which role that we are playing. For Beyonics, we support first stage work. For KODEC, they do second stage work. For Seagate, they need to get approval of the plant. Of course, there are many, many detail as to what need to be done at the first stage work correlation between the two parties, spec and Tony in KODEC, they need to get equipment set up, operation readiness, they need to get FA, SBR qualified through Seagate as well as to NCC. So the meeting is to set up, say, "Okay, three party, that's what we are going to do and each one play your part". Ultimately what Seagate want is deliver the part from KODEC/NEDEC to NCC.
>
> Q. Right. And after this meeting you agreed to play the part of consultant to NEDEC/KODEC; correct?
>
> A. After this meeting, I have considered request from Seagate, also after consider EBR meeting, also consider the grant that Beyonics will receive that benefit Beyonics as a whole. Then I decided if I do not render these services, the grant will go away, they will not increment the sales quantity for Seagate, there is no incremental price increase for Seagate, and we lose potential 6 million on the income. So for me, with a strong request

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169 27AB 17752.

170 T9/157/5–158/24.

> by Seagate, I then decided to offer on the urgent basis to support KODEC and NEDEC second stage qualification process.

351 I shall review the history of the negotiations leading up to the signing of the Wyser Agreements and the cogency of the evidence relating thereto below when I shall have to consider the overall effect of the events surrounding the Wyser Agreements on Mr Goh's relationship with Nedec/Kodec. It is however relevant to put a marker down that it is not suggested that Mr Goh knew, at this point, whether Nedec/Kodec would agree to pay him personally for consultancy services, or, if they did, what sort of sums would be involved.

352 First, I shall complete the narrative of the BN Alliance. Following the Tripartite Meeting, the grant to Nedec/Kodec was approved and a timetable for payment agreed.[171] On 29 November 2011[172] Mr Goh briefly updated the Beyonics Board on the fact that the BTT factory in Thailand was a total loss, that steps were being taken to support Seagate in Malaysia and that a price increase had been agreed to. There was no mention of the BN Alliance. A slightly fuller update was provided by Mr Goh to Mr Shaw on 5 December 2011[173] which amongst other things stated that Seagate wanted to:

> "up some quantity in China; they are willing to pay for fixture and CNY costs; an approx. 1.1 million; shall be done.
>
> We need to purchase an approx., 40 CNC machines to support them; otherwise they are angry; but we are working with them to support the funding through reduce the current [payment rates]; this is giving us 10 million cash to support the cash flow.

Again there was no reference to the BN Alliance.

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171 27AB 17973.

172 27AB 17804–17823.

173 27AB 17856.

353 The matter was however fully discussed at the Board meeting on 13 December 2011 where Mr Goh gave a presentation, supported by slides.[174]

354 The following points were made in those slides in relation to BTEC:

> Seagate, WDC, Hitachi and NMB are asking for base plate supply urgently. Our position is that we were making losses and are unable to commit any investment unless customer pay for fixtures and increase of price.
>
> BTEC
>
> i. Hitachi GST is seeking 1m a month Jupiter business and we have agreed to support.
>
> ii. Business partnership with Nidec/Kodec [*sic*] to supply 1m/month e-coated part to help Seagate Brink2H program
>
> iii. Gearing up 10m/qtr capacity to support Seagate with Nidec/Kodec partnership;
>
> Note: Nidec/Kodec has machinery capacity due to Samsung HDD was sold to Seagate. Nidec/Kodec is Samsung's HDD base supplier
>
> We have secured the following for last month:
>
> i. Hitachi: US$1m for Jupiter program;
>
> ii. Seagate US$1.1 m for fixtures and incentive;
>
> iii. WDC US$600k, fixture cost support
>
> iv. All base plate pricing have increased by 20-30% wef Dec 2011
>
> v. Seagate funding to purchase 40 CNC machines by adjusting [payment dates]
>
> vi. Total investment for CNC machines and SPM is estimated at US$5m.
>
> Note: Expected cash flow improve by US$5m-6m

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174 27AB 17995–18005.

355 Professor Chua Tat-Seng was present at the meeting and gave evidence which confirms that Mr Goh made this presentation[175] and, amongst other things, that he had said that the PES division's strategy was to continue to maintain its current production with limited investment because it had to balance the objective of maintaining its current capacity with the need to ensure that it broke even and that Seagate had proposed a business partnership with Nedec/Kodec with BTEC producing 1 million baseplates per quarter for supply to Nedec/Kodec. Professor Chua stated that the Board agreed with the strategy to enter the BN Alliance and gave his reasons in paragraphs 43–45 of his AEIC:

> 43. As a director of the BTL Board, I believed that it was in the interests of the Beyonics Group to agree to the Seagate Initiative to pair up with another baseplate manufacturer and to enter into the B-N Alliance because:
>
> (a) It would be consistent with the BTL Board's decision to sell the loss-making PES Division and not make further substantial investments in the PES Division (see paragraphs 18 to 29 above);
>
> (b) The Baseplate Supply Crunch was likely to be temporary and would last for a period of only approximately 12 months. This meant that the likelihood of the Beyonics Group making profits from substantial investments into the PES Division (for example, by increasing its capacity for Second Stage Works) for the sole purpose of capitalising on the Baseplate Supply Crunch was very low;
>
> (c) In light of the fact that the BTL Board had already decided not to make further investments into the PES Division, a partnership with another baseplate manufacturer was the best way to increase the Beyonics Group's short term profits as it would allow the Beyonics Group to utilise BTEC's excess capacity for First Stage Works and substantially increase its revenue from carrying out First Stage Works for Seagate's Brinks 2H Programme; and
>
> (d) Further, the Beyonics Group's entry into the B-N Alliance allowed the Beyonics Group to undertake commitments for other end customers and to negotiate grants for that purpose.

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175 Prof Chua AEIC 34–42.

> During the 13 December 2011 Board Meeting, Mr Goh had also informed the BTL Board that the Beyonics Group had secured a grant of US$1 million from Hitachi for the Jupiter baseplate programme and a grant of US$600,000 from Western Digital for an increase in orders for Western Digital baseplates. That was in addition to the grant of US$1.1 million and working capital financing that the Beyonics Group had secured from Seagate.
>
> 44. I was also of the view that it would have been impossible for the Beyonics Group to turn down a request by Seagate, one of the biggest players in the HDD industry, that the Beyonics Group enter into the B-N Alliance.
>
> 45. An important factor that I considered was that Seagate was a major customer of the Beyonics Group's EMS Division, which was central to the Beyonics Group's entire business especially since the BTL Board had decided to divest the PES Division. It was therefore very important for the Beyonics Group to maintain a good business relationship with Seagate to safeguard the EMS Division's revenues. One of the ways to achieve that would be to as far as possible accede to Seagate's requests.

356 This evidence was not challenged on cross-examination and I accept it. He did however amplify on the Board's approach to further investment:[176]

> Q. Dr Chua, did the board consider that it may have to review its decision on limited investment given this exceptional event in Thailand that has resulted in a serious supply crunch?
>
> A. I think we -- we discussed that at length, I suppose. Because this is an opportunity to -- I mean the, the -- the OEM are prepared to give us additional -- kind of better – better kind of a pricing and also prepare to give us some grant to help us beef up, but we know this supply chain is actually short-term. Because I think earlier you -- you kind of asked me about that, how do we come out with one year. So I think the general consensus is this supply chain is going to last for a year, but if we start to put in a big investment, what happen a year later? So we'll still be faced with the same problem. So I think the board has considered all of these cases. So the suggestion, in fact, put forward by Mr Goh, I thought it was kind of a reasonable working one, it's

176 T11/118/18–120/1.

> that the OEM subsidise part of our, kind of, expansion and so on in order to supply them with additional units, and then -- and then we try to kind of meet their requirements as much as we can to -- to pull through this period together.
>
> Q. Do I take it that you assume that Mr Goh and his team would already produce as much as they reasonably can in the circumstances?
>
> A. Yeah, given that the -- the Thai plant is also -- is also, kind of, out of action, yeah, because of the flood, so -- yeah.

357 This evidence is consistent with the long term strategy of the Board and its earlier conclusion that there was no prospect of long term profitability in baseplate manufacturing.

358 There was a further Board meeting on 29 December 2011 at which Mr Goh again made a presentation with slides.[177] These refer to the payment, *inter alia*, of US$1.7 million from Seagate and the US$5 million cash flow support from Seagate to fund 40 CNC machines.

359 In early January 2012 the Board discussed the terms of the BN Alliance and took legal advice.[178] The BN Alliance was finally reduced to writing by an agreement dated 10 January 2012[179] which records that Beyonics and Seagate had agreed on 18 November 2011 (the date of the EBR meeting) that there should be a strategic partnership with Nedec/Kodec. The price at which BTEC would supply the 1st Stage products to Nedec/Kodec was fixed at US$1.26 per piece.

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177 28AB 18387–18388.

178 28AB 18675–18680, 18684, 18688.

179 1AB 547.

360 But Mr Goh never alerted the Board to the possibility that he might be entering a consultancy agreement with Nedec/Kodec, far less to any sums of money that he might be paid for doing so. It is an important part of the Plaintiffs' case that Mr Goh's actions in agreeing to enter the BN Alliance and in proposing that the Board should approve it was tainted by the sums he was to receive under the Wyser Agreements. The Plaintiffs contend that these sums were bribes from Nedec/Kodec to pursue the BN Alliance when he knew, or where it should have been obvious to a reasonable person, that the Alliance would work to the benefit of Nedec/Kodec and to the detriment of BTEC. Accordingly, had Mr Goh been honest about the Wyser Agreements and informed the Board about them, they would have reviewed the matter more critically. Mr Shaw made clear in his evidence that on the basis of what the Board was told, its decision was not irrational. His complaint was that they were not told the full story because of the dishonest Wyser payments.[180]

> Q. I suggest to you, Mr Shaw, that the board, with all its experience, rightly or wrongly, agreeing that they would not invest, that they would do the first stage work in partnership with NEDEC/KODEC, and that Seagate would be approached for financial assistance, made a decision which you appear to disagree with, and that's all there is to it.
>
> A. I agree that if this was all the board knew, this was not a irrational decision, this was not a bad decision on their part. However, the NEDEC/KODEC partnership should have been resisted at all cost, but they were not told the full story. They were not told that Goh had entered into this NEDEC/KODEC partnership under secret terms where he personally benefited. They would not -- no board would have agreed to that. He grossly violated his fiduciary responsibility as a director and a CEO of a company by having a handshake -- actually, not a handshake, a contractual deal with a competitor to

180 T2/199/2–24.

> divert business of his own company to them so that he could benefit. It's disgusting behaviour.

The Wyser Agreements

361 Mr Goh gave Mr Tony Lee a first draft of Mr Goh's proposals for payment to him for the consultancy work he was going to do for Nedec/Kodec after the Tripartite Meeting on 24 November 2011 (see [345] above). No copies of that draft exist but it is apparent that they were discussed at the meeting with Mr Lee as recorded in his e-mail of the following day:[181]

> Furthermore, regarding the contract draft you gave to me yesterday, I think I need your revised one even by an e-mail for further confirmation. Anyway, please rest assured, I will follow up accordingly and Mr. Hwang basically agreed with you before.

362 Mr Goh sent the revised draft on 28 November 2011 but, again no copy exists. Mr Tony Lee gave evidence of his recollection that both the drafts proposed that Wyser should charge a base consultancy fee of US$200,000 and a monthly fee of US$20,000 and that he understood that the base fee related to consultancy in respect of improvements to the Langfang factory so that it could obtain Seagate qualification and the monthly fee was to assist in resolving production issues during mass production.[182]

363 In Mr Lee's e-mail of 28 November 2011[183] acknowledging safe receipt of the revised draft he requested:

> Regarding "Wyser" case, is it possible for us to remit USD500,000 to you and you remit USD300,000 to the account which we indicate?

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181 27AB 17752.

182 Tony Lee AEIC 107–110.

183 27AB 17759.

> Please kindly inform whether it is possible or not.

364 Mr Lee then says that he informed Mr Goh that the US$300,000 was to be remitted to a bank account in Hong Kong held by Mr Hwang. He explained that the reason for this was to save on corporate taxes that would have been levied in South Korea if Nedec/Kodec had transferred to Mr Hwang directly but that he merely told Mr Goh that it was for "corporate reasons".[184]

365 On 12 December 2011 Mr Billy Chua e-mailed Mr Tony Lee setting out the terms on which Seagate would pay the US$2.5 million contribution towards the tooling investment. In essence, US$1.5 million was contingent on qualification and the remaining US$1 million on completion of the first shipment of 1.5 million baseplates.[185]

366 There then follows a rather curious exchange of e-mails on 13 and 14 December 2011 when Mr Tony Lee sought to use Mr Goh's address to assist in setting up Mr Hwang's account in Hong Kong.[186] No clear explanation was given for this exchange.

367 On 19 December 2011 Mr Tony Lee again e-mailed Mr Goh[187] to inform him of the details of the payments to be made by Seagate followed by the comment:

> For Wyser payment settlement, it seems it is to be executed in Feb. as originally scheduled even though we wanted to expedite it. (Not yet fixed, just an idea)

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184 Tony Lee AEIC 112–113.

185 27AB 17973.

186 27AB 18011.

187 27AB 18038.

368 Mr Tony Lee explained that this was a reference to the fact that Nedec/Kodec only wanted to pay Mr Goh once the grant had been received from Seagate. Qualification at Langfang took longer than expected and on 9 February 2012 Mr Tony Lee e-mailed Mr Goh[188] to explain the delay in payment but indicating that draft agreements had been prepared. On 20 February 2012 Mr Tony Lee sent those drafts to Mr Goh under cover of an e-mail[189] which explained that he had amended the clause providing for a monthly consultancy fee of US$20,000 to a payment of US$0.02 per piece shipped from BTEC to Langfang. There were two draft agreements.[190] Both were dated 24 November 2011, the date of the Tripartite Meeting. The material provisions of the first were:

> 1. Wyser assists in securing 6 million baseplates capacity business starting from April 2012 for the Seagate Brink 2H program for an approximately US$ 45.6 million sales per year supplying at least 1 million pieces of e-coated baseplates to Kodec;
>
> 2. Wyser assists in securing US$ 2.5 million as the co-sharing grant of fixture and tooling cost funded by Seagate
>
> For item 1) a monthly sales and management support service fee of US$ 0.02/pc X monthly Brink 2H shipping quantity ….. starting from February 2012 til March 2013;
>
> For item 2) US$ 500,000 payable in 2012 immediately upon receipt of payment from Seagate

369 The second was a short agreement whereby Wyser agreed to transfer US$300,000 of the US$500,000 to Mr Hwang. Mr Goh did not object to the proposed change in the way the consultancy fee was to be paid and on

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188 29AB 19490.

189 29AB 19534.

190 29AB 19535–19537.

27 February 2012 asked for the agreements to be sent to his home address. Mr Tony Lee offered to hand deliver them as he was coming to Singapore the following week. He said that the agreements would be divided into three rather than two since the lump sum as originally agreed upon was to be paid by Nedec whereas the US$0.02 would be paid by Kodec who was responsible for the Langfang factory.[191]

370 Copies for signature were said to have been given to Mr Goh on 6 March 2012 and were in the form of the three agreements as foreshadowed by Mr Tony Lee. Copies of the agreements were attached to an e-mail from Mr Tony Lee to Mr Goh on that day.[192] The two agreements relating to payments to Wyser were both signed by Mr Goh and Mr Tony Lee,[193] although the date stamp by Mr Tony Lee's signature is 5 April 2012. The third agreement relating to the payment from Wyser to Mr Hwang was never signed, apparently because Mr Tony Lee did not believe that he had authority to sign since Mr Hwang was to be the recipient of the funds.[194]

371 Mr Goh was duly paid the lump sum and transferred the excess US$300,000 to Mr Hwang. He also received around US$88,000 in monthly fees.[195]

372 There is one further matter that should be noted. On 17 April 2012 a Ms. Mila Hwang of Nedec/Kodec sent an e-mail to Mr LH Lee of BTEC saying:

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191 29AB 19544.

192 Tony Lee AEIC 130; Goh AEIC 340; 30AB 19684–19687.

193 1AB 380–381.

194 Tony Lee AEIC 130.

195 Goh AEIC 342.

> WYSER INTERNATIONAL LIMITED Please tell us the address and bank (SWIFT CODE) information.

373 This was followed a few minutes later by a further e-mail from Ms Hwang saying:

> Sorry… mistakenly sent email about Wyser Corporation which is our agent for WD not BTEC.
>
> Please disregard it… and sorry for the mistake.

374 Mr LH Lee informed Mr Goh about the mistaken e-mail:

> Just for your information a mistaken mail sent from NEDEC about Wyser Corporation which is NEDEC agent for WD
>
> Looks like NEDEC is working with WD Hard Disc business.

375 Mr Goh merely replied "ok".[196]

376 Mr Tony Lee was however informed about the incident and he e-mailed Mr Goh with a copy of the e-mail exchange between Ms Hwang and Mr LH Lee the same afternoon from his mobile phone saying:[197]

> Below e-mail was sent.
>
> Really sorry for this terrible mistake. When see you I will apologise a lot more.

377 Both Mr Goh and Mr Lee were cross-examined at length on the circumstances surrounding the Wyser Agreements. I do not propose to increase the length of this already overlong judgment by reciting each excuse that they sought to put forward to justify the way in which the payments were structured. The feeblest excuse put forward by Mr Goh was that the payment to him was

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196 31AB 20493.

197 31AB 20515.

proper because Beyonics was not in the business of providing consultancy services.[198]

378 True, it is, that before the BN Alliance was proposed, Beyonics were not in the business of providing consultancy services, but neither was Mr Goh. The request by Mr Tony Lee for Mr Goh to provide consultancy services in support of the BN Alliance was to further the joint venture between Nedec/Kodec and BTEC. If consultancy services were justified, they were only justified if the time spent, not only by Mr Goh but also by others at BTEC in assisting Nedec/Kodec to obtain qualification, worked to BTEC's benefit. It should have been wholly apparent to Mr Goh, Mr Tony Lee and Mr Hwang that any payment for consultancy services should be paid to BTEC and not to Mr Goh, save with the express approval of Beyonics.

379 Moreover, I am entirely satisfied that it was in fact wholly apparent to them. No legitimate reason was provided for structuring the payment of US$300,000 from Nedec/Kodec to one of its directors, Mr Hwang, through a third party, Mr Goh. It was, in my judgment, an opportunistic method of surreptitiously transferring corporate funds for the personal use of a director. It therefore suited Nedec/Kodec for the agreements to remain secret. Equally, whereas Mr Goh informed the Beyonics Board fully as to the nature of the BN Alliance at the Board meeting on 13 December 2011, he did not mention the fact that he was going to be paid for consultancy services. He again did not tell them when the terms of the BN Alliance were being discussed with the Board in late December 2011 and early January 2012.[199] The furthest Mr Goh went was

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198 T9/19/18–21/5.

199 T11/126/17–25.

to suggest that he told Mr Chay informally about the consultancy in December 2011 but even then he accepts that he did not tell him anything about the payment arrangements. A passage of cross-examination speaks for itself:[200]

> Q. So at this board meeting where you have this presentation paper, I take it you agree that you did not disclose to the board that you were planning to be paid for every first stage baseplate sold to NEDEC/KODEC; right?
>
> A. I have said earlier in my AEIC, I have discussed with Mr Chay that I rendering a service as a consultant -- consultant for this helping KODEC to gear up for the second stage work.
>
> Q. But Mr Chay doesn't know that this service that you provide comes with payment and that the payment goes directly to you?
>
> A. At that time, the payment has not constructed yet because Mr Tony Lee has keep changing as to what is the proposal that he want to do. But I cannot tell him, and honestly speaking, at that time I still act on the best interests of the company to get this pairing going on so that we can have a full capacity, as well as we will try to sell BTEC to KODEC.
>
> Q. But you agreed that at no time prior to your departure, did any board member know that you were receiving money personally for any services to NEDEC/KODEC?
>
> A. I have said that I have informed Mr Chay. I don't think I have any problem to tell Mr Chay and any board members because at that time it's a transition in -- somewhere around February. And I have said earlier, there's a 65 million on the table that I am trying to gear for this company. So if I present that 65 million, the potential gain from the shareholders, I don't believe they will reject my proposal.
>
> Ct. I am sorry, Mr Goh, I don't think that was an answer directed to the question that you were asked.
>
> A. Okay.

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200 T10/11/7–13/3.

> Ct. I wonder if you could listen to the question and answer the question directly, please. Would you like to repeat the question?
>
> A. I had say --
>
> Ct. Would you like to repeat the question, please?
>
> Q. Do you agree that at no time prior to your departure did you tell any board member that you were going to receive money directly from NEDEC/KODEC for services allegedly provided to NEDEC/KODEC?
>
> A. I did not tell because there's no final agreement yet.
>
> Ct. Again, that wasn't the question. The question was: at no time prior to your departure, in other words, all the way through to 2013, did you tell the board that you were going to receive money directly from NEDEC/KODEC?
>
> A. I have indicate to Mr Chay that I will render consultancy to KODEC/NEDEC group, but I did not tell the amount.

380 Furthermore, when the new management in the form of Mr Shaw and Channelview took office in February 2012, Mr Goh did not tell them about the proposed agreements and he told no one when the agreements were eventually signed in March 2012. The sums of money he was to receive were not small. Mr Goh's employment contract required him to devote "*his time, attention and skill substantially to the affairs of the Company and its subsidiaries*".[201] By no stretch of the imagination could it be said that the payment for consultancy fell outside the meaning of "substantially".

381 Finally, the e-mail exchange on 17 February 2012 between Ms Mila Hwang and Mr LH Lee and Mr Tony Lee's "terrible mistake" reaction to it is further proof, if more was needed, that all the parties knew the agreements were clandestine agreements which should be kept secret. There is no escaping the

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[201] 1AB 5.

conclusion that Mr Goh's involvement in the Wyser Agreements was reprehensible.

382 A consequence of the decision in the 672 Action however, where a similar conclusion was reached, is that Mr Goh was ordered to disgorge and has disgorged the sums he received under the agreements. Even had I come to the conclusion that the agreements were above board, it would not have been open to me to revisit that order. That would be a collateral attack on the 672 Judgments. But what I do have to do is to assess the impact of the circumstances surrounding the Wyser Agreements on the issues arising in this action. They cannot be ignored as part of the matrix of facts but, equally, they have to be taken in context. The mere fact that Mr Goh did not act in good faith towards Beyonics in the arrangements he made to receive the payments under the Wyser Agreements does not necessarily mean that he acted in bad faith towards Beyonics in relation to the BN Alliance and the other issues arising on the pleadings in this action.

The potential purchase of BTEC by Nedec/Kodec

383 Whilst the discussions leading up to the BN Alliance agreement were taking place there was no significant progress on the proposed purchase of BTEC by Nedec/Kodec which had been the original reason for the first meetings between Mr Goh, Mr Stephen Hwang and Mr Tony Lee. However, on 20 December 2011 a visit was arranged between Mr Goh and Mr Tony Lee for Mr Hwang and Mr Tony Lee to visit BTEC in China to discuss (amongst other things) "*M&A*".[202]

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202 27AB 18149–18150.

384 By an e-mail dated 3 January 2012 Mr Tony Lee reported on a meeting he had had the day before with Semco (Samsung Electronic Manufacture):[203]

> I had a meeting with SEMCO last night and I felt something was going on with them. Very recently..did they approach you to buy your [Changshu] factory? Or Did they approach you for die-casting material purchase like us? If so.. how much is proceeded?
>
> Sir..as we are considering SEMCO to be our partner as an SI (strategic investor) for our IPO in 2014.. if they approach your Changshu..we need to set up a new strategy for us
>
> Sir.. your comment will really be appreciated.
>
> I will keep the information to myself confidentially..sir

385 This was the first in an exchange of e-mails between Mr Tony Lee and Mr Goh which the Plaintiffs contend demonstrates a relationship between them which was far closer than that which merely being partners in the BN Alliance required. Mr Goh was, they assert, exchanging confidential information which would not normally be disclosed to a competitor, far less to a competitor who was a potential purchaser of part of one's business.

386 Mr Goh responded the following day:[204]

> Dear Tony; Semco has contacted our staff, but my instruction is to reject them as discussed early.
>
> If you are considering Semco as SI, this is fine with me as you know them well.
>
> [[He then proposed three possible options by which Kodec could acquire BTEC and continued]
>
> Two issues:
>
> 1. Selling BTEC; Beyonics needs cash; what is your idea price for the BTEC;

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203 28AB 18449.

204 28AB 18448–18449.

2. Is Semco is going to pay cash for the investment;

Let discuss on Jan 10

387 Within half an hour Mr Tony Lee come back to Mr Goh:[205]

Sir.. Your rejection to SEMCO is a superb strategy. End of last year, I had a meeting with NCFL (NIDEC Phillipines) and they said they considered to buy BTEC but failed because MMI/JCY strongly offended to NIDEC not to buy it.

They said MMI/JCY even threatened NIDEC that they will not supply baseplates to Nidec.

Furthermore, SEMCO told me that they are almost on final stage in purchasing Alphana and soon they may finalize it. FYI, Seagate turned positive for SEMCO's Alphana purchase.

Your 3 options are all feasible, I assume, sir.

Sure things are

1. SEMCO is going to pay cash for investment. Upto now is U$10M. however, we are pushing upto 20M or even more.

2. BTEC price.. On Jan.10 because I HATE to say any impolite thing to you.sir

This afternoon, I and my boss, Stephen will have a meeting with SEMCO top management for further discussion.

388 Mr Goh replied later that morning:

Ok, you just think the cost of investment with 1 m per month; during my discussion with NMB (A German motor manufacturer, Minebea, with a plant in Thailand)[206] in order to produce 1 m base a month, you need a total investment of US$ 25-30 million investment; you know the number well, currently BTEC has the ability to produce 3m to 2.5 m a month.. My target price is US$40m, this is FRIEND PRICE, IF SEMCO, WE ARE GOING TO ASK FOR 50m; you and me shall discuss… if you are interested, However my investor might think MORE

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205 28AB 18448.

206 T13/2/5–3/16.

389 The following day Mr Tony Lee reported to Mr Goh on the meeting he and Mr Hwang had with Semco:[207]

> SEMCO meeting with Stephen and Mr SG Hong (HDD MBA top management Senior VP). Please understand I signed NDA yesterday for all meeting details. Kindly keep these to yourself
>
> == Strictly Confidential ==

390 Mr Lee then proceeded in ten numbered paragraphs to disclose information which on its face was confidential either to Semco or Nedec/Kodec or both. In particular details are given of the sums which Semco were proposing to invest in Nedec/Kodec. Item 6 reads:

> 6. SEMCO asked us the price of BTEC and I answered U$55M which they say TOO high, I explained your logic – U$25M for 1M pcs production and consider depreciation

391 Both Mr Goh and Mr Tony Lee were cross-examined extensively on this exchange of e-mails. Whilst a certain amount of heat was generated in consequence, not much light was thrown on the circumstances surrounding the interchange.[208] The only answer worthy of note was Mr Goh's answer to a question about the "FRIEND PRICE":[209]

> Q. We'll move on, Mr Goh. Let's look at your reply at the top of the same page, page 18448. The first two lines, you are actually giving some advice on how much investment is required. In the third line, you tell him about BTEC, how much it can produce. At the end of the third line, you say: "My target price is US$40m, this is FRIEND PRICE, IF SEMCO WE ARE GOING TO ASK FOR 50m ..." Mr Goh, isn't it clear here that you are preferring the KODEC Group?

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207 28AB 18447.

208 T10/13/14–24/22; T13/1/16–30/7.

209 T10/21/2–22/4.

> A. First of all, I repeat again, SEMCO has no intention to buy. The paragraph stated here, I'm trying to ask BTEC to pay my target price. The words I use "friend price" or "bad price" or "high price" or "low price" or "reasonable price", the choice of word I use try to make sure that this 40 million, he can accept. That's only choice of word and some other people say it's reasonable price. So the word I choose is to make sure that Mr Tony Lee and Mr Stephen Hwang is willing to pay 40 million for BTEC.
>
> Q. Don't you agree, Mr Goh, that if you give your potential buyer here, KODEC, the impression that you are preferring them by selling at a lower price, they won't try that hard to give you the best price possible?
>
> A. I disagree with your statement.

392 From the e-mails themselves, the following is apparent. First, Mr Tony Lee was disclosing information to Mr Goh which was confidential to Nedec/Kodec concerning discussions he had had with Semco and was seeking advice from Mr Goh as to possible ways in which the acquisition could be financed. Secondly, Beyonics had in the past had contact with Semco but Mr Goh, for reasons which are unclear, had concluded that they were not serious potential buyers of the PES division, something which he had apparently told Mr Tony Lee. Third, Mr Goh was assisting Mr Tony Lee by focusing on ways to obtain the necessary financing to enable Nedec/Kodec to fund the purchase of BTEC. Fourth, Mr Goh was providing reasoning to Mr Tony Lee to justify his target price of US$40 million and in doing so was working on the basis that the capacity at BTEC was between 2.5 and 3 million per month which is consistent with the figures he had been provided with by Mr LH Lee (see [332] above). Fifth, Mr Tony Lee had represented to Semco that the asking price for BTEC was US$55 million which it was not and this could only have been done to try to scare off Semco as a possible bidder.

393 The e-mails undoubtedly demonstrate that Mr Goh and Mr Lee were working closely together but, in the main, it was Mr Lee rather than Mr Goh

who was imparting confidential information. It was Mr Lee that was being proactive and Mr Goh reactive during the interchange. Save for the "FRIEND PRICE" comment, there is nothing in Mr Goh's comments that suggests impropriety. He was offering some suggestions to Mr Lee as to possible ways in which the prospects of a deal could be moved forward but was not helping him to put any of these suggestions into effect.

394 The Plaintiffs invite the Court to conclude that this exchange of e-mails demonstrates that Mr Goh was not acting in Beyonics' best interests. They rely in particular on the "FRIEND PRICE" comment, the failure to alert Semco to the correct asking price and the advice given with regard to financing.

395 As to the "FRIEND PRICE" comment, Mr Lee was not prepared at that time to state a price. It is not unusual in negotiations for statements to be made which, although not true, have a sufficient ring of truth about them to be calculated to induce the opposite party to accept them as being true and to act upon them. Neither Mr Goh nor the efforts of consultants appointed by Mr Shaw, which I shall consider later, achieved a bid of anywhere near US$40 million. The eventual bid made by Nedec/Kodec was around US$30 million. Viewed in the round, I accept Mr Goh's evidence that this was an attempt on his part to make Mr Lee comfortable with offering a price in the region of US$40 million and that that this was not a preferential price. Indeed, if Nedec/Kodec had offered such a figure at the time, either the then current Board or, indeed, Mr Shaw and the Channelview Board a month later, would not, I believe, have viewed it as being an unreasonably low figure.

396 This conclusion also casts light upon the fact that Mr Goh did not approach Semco. Semco is recorded by Mr Tony Lee as saying that the price was "TOO high". Mr Goh knew that and would have placed himself in an

impossible position both with Nedec/Kodec and with Semco had he sought to open negotiations with Semco by telling them that the asking price was not as high as US$55 million. I do however accept that the e-mails demonstrate that Mr Goh was prepared to advise Mr Tony Lee as to possible ways forward but that was not contrary to Beyonics' best interests if it served to promote the take-over.

397 On 8 January 2012 Mr Lee e-mailed Mr Goh to update him on a further meeting with Semco on 7 January 2012. Again Mr Tony Lee discloses information with regard to a potential investment by Samsung into Nedec/Kodec and that due diligence was to start on 18 January. He also talks about a possible relationship with Nidec; points 6, 7 and 8 read as follows:[210]

> 6. We told them further about our move to merge BTEC and told them we will have a meeting with you on Jan 10
>
> 7. SEMCO and NEDEC got to the conclusion that once SEMCO buys Alphana, NEDEC's baseplate for 3.5" supply is a MUST. They welcome once we proceed with BTEC purchase.
>
> 8. SEMCO and NEDEC agree to exchange information of Alphana & BTEC buyout under NDA

398 On 10 January 2012 Mr Goh met with Mr Tony Lee and Mr Hwang at the Shangri–La hotel in Suzhou. There is no written record of this meeting but Mr Tony Lee gave evidence that he asked for exclusivity from Mr Goh with regard to the possible take-over. It is unclear whether this was agreed to but Nedec/Kodec proceeded on the basis that it was and Mr Goh did not dissent.[211] By 20 February 2012 matters had advanced with regard to investment in Nedec/Kodec as Mr Tony Lee informed Mr Goh that a potential investment by

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210 28AB 18706.

211 T13/40/21–41/10.

Nidec (rather than Samsung) was proceeding "rapidly and concretely".[212] Points 2 and 3 read:

> 2. In case anyone approaches you for BTEC, please just reject them and please consider us as top priority as agreed on Jan 10 in Shangri-la Suzhou.
>
> 3. Sooner or later we may ask for due deligence [*sic*] process on BTEC. WE need to talk this matter more seriously and closely, sir.

399 On 28 February 2012 Mr Tony Lee again e-mailed Mr Goh, this time to appraise him of the possibility of a different investor (unnamed) providing 60% of the purchase price of BTEC, working on a total price of US$40 million.[213] He also forwarded some slides which Nedec/Kodec had prepared for the purpose of pre-due diligence discussions with Semco.

400 All these interchanges emanated from Mr Tony Lee. Mr Tony Lee contended that all of this information was generally known in the field at the time and that the purpose was to assure Mr Goh that Nedec/Kodec was taking steps to obtain the necessary finance.[214] This would seem to be something of an overstatement but nothing turns on this. The fact is that Mr Tony Lee was treating Mr Goh as a confidant but there is no indication that Mr Goh had sought this information or that he was proactive in seeking more.

401 On 30 March 2012 Mr Goh e-mailed Mr Tony Lee to inform him that he, Mr Goh, was in discussions with a private equity fund, Gazelle, both about possible funding to assist Nedec/Kodec to purchase BTEC but also that Gazelle

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212 29AB 19545.

213 30AB 19583.

214 T13/41/11–43/23.

might itself be interested in purchasing BTEC. Mr Goh made it plain that if there was any chance that Nedec/Kodec did not make an offer, an alternative would have to be found. It ended by saying, "*I will let you have the first right and waiting for your final decision by mid April*."[215]

402 By e-mail dated 22 April 2012, Mr Tony Lee sent Mr Goh a draft Letter of Intent[216] ("LOI") to purchase BTEC for his comments and on 23 April 2012 the formal LOI was sent.[217] This indicates a willingness, subject to certain terms and conditions, to pay between US$28 million and US$31 million in cash for BTEC subject to due diligence. The offer was to remain valid until 22 May 2012. He followed up on this on 30 April 2012 with a request to proceed with due diligence as "*your Primary Preferred Bidding Party*".[218]

403 In order to place subsequent events into context, it is necessary to step back in time to the end of January 2012, before the take-over of Beyonics by Channelview became effective in February 2012.

404 On 31 January 2012 Mr Goh e-mailed Mr Shaw raising various matters of concern to him relating to the forthcoming acquisition[219] which, with hindsight, can be seen as the beginning of an increasingly unhappy relationship between the two. But on the same date he sent Mr Shaw a copy of an Information Memorandum which had been prepared in November 2011 for the purpose of soliciting offers for parts of the PES division ("the PE

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215 30AB 20002.

216 31AB 20880–20881.

217 32AB 21226–21228.

218 32AB 21486.

219 29AB 19358.

Memorandum")[220]. Mr Shaw does not recall reading it at the time but accepted that he would have done so. He regards the document as being somewhat amateurish, akin to a teaser that would be distributed to interested parties to gauge their interest.[221] There was however no reason for Mr Shaw to focus unduly on this document because on 1 February 2012 he advised Standard Chartered Bank that Channelview itself would start the process of divesting PES in February 2012 and use the cash proceeds to pay down part of the loan.[222]

405 Mr Goh however did not update Mr Shaw or the Board of Channelview as to the steps he was taking to sell BTEC to Nedec/Kodec or, indeed, any of the other steps he was taking during this period to promote the divestment of the PES division.

406 Mr Shaw decided to appointed external advisers, Business Development Asia LLC ("BDA"), to assist in seeking a purchaser for these assets. On 28 March 2012 BDA sent Mr Shaw an engagement letter[223] appointing them as exclusive advisors to Beyonics in connection with the divestment of the PES division. This was to include identifying, screening and contacting potential purchasers and assisting and advising Beyonics with any potential sale. For confidentiality reasons, BTEC and BPM were to be referred to under the codename "Pinot" and two other companies in the PES division as "Syrah". The overall project was therefore to be known as "Wine".

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220 29AB 19360–19372.

221 T2/172/12–180/13.

222 Shaw AEIC 171; 29AB 19383–19388.

223 32AB 21547–21552.

407 After reading the BDA proposal, Mr Goh e-mailed Mr Shaw on 5 April 2012[224] informing him that by the end of the month he would obtain LOIs from three companies interested in purchasing the PES division: Avatron, Gazelle Capital and Nedec/Kodec. He concludes:

> I strongly suggest NO agreement be entered with them till June; **please delay** for one-two months.
>
> [emphasis in original]

408 Mr Shaw considered that engaging BDA "*would ensure an independent, consistent and coordinated approach in negotiations to secure the best price possible*"[225] and was frustrated both by Mr Goh's refusal to approve this and by the fact that unknown to Mr Shaw, Mr Goh had been in discussions with potential purchasers. For his part, Mr Goh had never employed such consultants in the whole of his working life and regarded them as an expensive luxury.[226]

409 There was thus a clash of business cultures and a lack of confidence between the two. It was with this background that Mr Goh gave the Nedec/Kodec LOI to the Board under cover of an e-mail dated 24 April 2012[227] together with a further LOI in respect of a joint venture in which Beyonics were involved known as Patco. This e-mail referred not only to the two LOIs but also to the receipt of the insurance money for BTT as well as the potential sale of other assets including BPM which he anticipated together would raise more than the US$61 million needed to pay off the banks. He was plainly frustrated with the new Board's attitude as he ended the e-mail:

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224 30AB 20061.

225 Shaw AEIC 175.

226 T10/82/14–18; 30AB 20061.

227 32AB 21297.

> As of now, we do not have the proper board due to the whitewash; therefore, I am sending this as an urgent matter need to address at the shareholder level.

410 By a separate e-mail on 24 April 2012[228] Mr Goh told the Board that he proposed sending the LOI that he had obtained to the banks to inform them of the progress to reduce leverage and thus win their confidence. Mr Shaw, in return, instructed him not to do so.[229]

411 On 2 May 2012 Mr Goh forwarded a further LOI, this time from a company called Magne Industries ("Magne") for the sale of BPM.[230]

412 A meeting with BDA was arranged for 9 and 10 May 2012.[231] By an e-mail of 3 May 2012 Mr Shaw explained to Mr Lee the objectives of that meeting, which included signing off on the BDA engagement letter by both Mr Shaw and Mr Goh and authorising BDA to approach Nedec/Kodec and Magne to invite them to "*reevaluate their bid with the aim of increasing it*". He further indicated that neither company would be given exclusivity at that time.

413 Mr Goh continued to oppose the appointment of BDA expressing his reasons forcefully in an e-mail to the Board dated 4 May 2012, complaining that Mr Shaw was considering only his own opinion and was driving events without consultation.[232]

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228 32AB 21305.

229 32AB 21305.

230 32AB 21498.

231 32AB 21553–21554.

232 32AB 21545–21546.

414 Matters came to a head on 22 May 2012 after representatives of BDA had met with Nedec/Kodec who were unaware that BDA had been appointed. They told BDA of their expectation that they were the only ones discussing a deal for BTEC.[233] In consequence Mr Shaw e-mailed Mr Goh and said:

> Let me repeat to be clear:
>
> BDA has been appointed for Pinot + Syrah. All buyer discussions go thru BDA. I should be included in any talk or correspondence. That includes Nedec and Malaysian bidder. These 2 do not if have exclusivity at this time. They will only be invited for DD at later date if their bid is highest. You should inform Nedec + Malaysian of BDA role.

415 Mr Goh replied saying that he would "*stop all discussion base on this e-mail*".[234]

416 BDA's attempts to induce Nedec/Kodec to increase its offer were unsuccessful. Full details of the exchanges between BDA and Nedec/Kodec in June and July 2012 are contained in Mr Tony Lee's AEIC at paragraphs 140 to 153.[235] Suffice it to say that although BDA was prepared to permit Nedec/Kodec to conduct due diligence it was not prepared to offer them exclusivity and by an e-mail dated 6 July 2012 Nedec/Kodec declined to proceed on that basis.[236]

417 The minutes of the Channelview Board meeting of 7 August 2012 record that BDA continued to discuss the potential sale of BTEC and was waiting for bids to be submitted. In September they were in discussions with MMI who, according to Mr Shaw, had indicated that they would pay at least US$30

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233 33AB 22092.

234 33AB 22094.

235 See also 38AB 25514–25519.

236 38AB 25514.

million.[237] However, the best offer that BDA was able to obtain, according to Mr Goh, was between US$25 and 28 million from MMI.[238] It was also in September that BDA reverted to Nedec/Kodec[239] but Mr Tony Lee gave evidence that by that stage the HDD market had collapsed. In their LOI dated 29 November 2012 Nedec/Kodec reduced the sum they were prepared to offer to between US$13-15 million.[240]

418 In the event Channelview were successful in raising the money necessary to pay the bank loan well in advance of the due date by other means and attempts to divest BTEC ceased.

419 The Plaintiffs' case against Mr Goh in relation to his dealings with Nedec/Kodec are set out in paragraph 36(8) of the Statement of Claim and are succinctly encapsulated in paragraph 636 of the Plaintiffs' written closing:

> 636. Mr Goh was instrumental in pushing for the sale of BTEC to the KODEC Group in negotiations which were not at arm's length. It would have been clear to Mr Goh that this sale, if it had gone through, would have killed two birds with one stone: it would have strengthened the production capabilities of the KODEC Group, and devastated that of the Beyonics Group. Given that the Beyonics Group had already lost BTT to the floods, if BTEC were sold to the KODEC Group, only BPM would be left. Indeed, it could not have been sensible to break up the PE Division and sell it off in parts: if the Beyonics Group was a "*secondary supplier*", its PE business would have been even more insignificant if it was only left with BPM.

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237 38AB 25103.

238 Goh AEIC 413.

239 38AB 25511–25513.

240 Tony Lee AEIC 151–153; 38AB 25521–25522.

420 The facts as disclosed by the documents considered above demonstrate that in seeking to interest Nedec/Kodec in making an offer for parts of the PES division before the floods, Mr Goh was implementing the then-Board's strategy. Once Nedec/Kodec had indicated an interest only in acquiring BTEC Mr Goh continued discussions on that basis but also entered discussions for the sale of BPM with other parties and obtained an LOI from Magne for the purchase of BPM. He was thus not ignoring BPM. The Board's strategy was to divest the PES division which, by then, in essence, was BPM and BTEC as BTT had already been lost as a result of the floods. This strategy was also the strategy that Mr Shaw had proposed to the banks as a means for repaying the loan. It remained part of the new Board's strategy until at least the autumn of 2012 following the efforts of BDA during that summer and autumn.

421 Mr Goh carried out these negotiations without informing either Board of the progress made until he had a LOI. This appears to have been his working style which was acceptable to the old Board but not to Mr Shaw.

422 He undoubtedly became close to Mr Hwang and Mr Tony Lee and information was exchanged which would not have been had the proposed transaction been an arm's length transaction through, say, BDA. But it bore fruit in that Nedec/Kodec sent the LOI proposing a figure of between US$28–31 million.

423 The Plaintiffs contend that Mr Goh favoured Nedec/Kodec by offering them a preferential price and a first right of refusal.[241] I do not accept that he offered them a preferential price. The "Friend Price" of US$40 million can be

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241 Statement of Claim at 36(8)(iii).

seen in the light of all the facts as being an inducement to Nedec/Kodec to offer a price in that region which was at the higher end of a reasonable price. This is demonstrated to be so by the fact that Nedec/Kodec's offer was around US$30 million as was the projected offer from MMI which subsequently was made at between US$25–28 million (see [417] above). Mr Goh cannot be criticised for using marketing tactics to seek to induce a higher offer, nor can he be criticised for acting in a way which, entirely in accordance with both Boards' strategies, resulted in the highest offer for BTEC which was obtained either by him or by BDA.

424 He might be criticised for failing to keep the two Boards fully informed as to the progress of the various negotiations he was involved in but this is the way in which he had been allowed to work as CEO over the years. Any such criticism could equally be directed at the old Board for allowing him this freedom.

425 He might also be criticised on the basis that he became too close to Nedec/Kodec such that his judgment as to what was in the best interests of the Beyonics group became blurred. I shall consider the merits of these criticisms below.

The Consultancy

426 There were moments during the trial when I was uncertain whether the Plaintiffs' case in relation to the payments Mr Goh received under the Wyser Agreements was that he was paid a far greater sum than the work he did or whether he did work under those agreements which extended beyond that which was necessary to make the BN Alliance work to the benefit of Beyonics. In the former case, the excess payment would support their case that the sums were

bribes. In the latter case, it would support their case that Mr Goh was, in effect, working for Nedec/Kodec rather than Beyonics.

427 In truth, I think it was probably both. Paragraph 30 of the Statement of Claim pleads that Mr Goh received the payment of US$0.02 per piece as gratification for procuring and/assisting to procure the diversion of 2nd Stage work that should have been carried out by BTEC to Nedec/Kodec pursuant to the BN Alliance. This is referred to as "Bribe 1". The case therefore is that no payment of this nature was justifiable. In paragraph 33 of the Statement of Claim the allegation is that the net US$200,000 that Mr Goh received pursuant to the other Wyser Agreements was gratification for procuring or assisting to procure the US$2.5 million grant from Seagate. Again therefore their case is that no payment of this nature was justifiable and hence this payment is referred to as "Bribe 2".

428 However, in paragraph 36 of the Statement of Claim it is alleged that Mr Goh assisted Nedec/Kodec to become qualified as a supplier to Seagate in competition with BTEC with the intention of supplanting BTEC as a supplier to Seagate. Reliance is placed not only on advice given to Nedec/Kodec to achieve qualification for second stage work (para 36(5)) but also on advice relating to qualification for 1st Stage work (para 36(10)) and on a proposed IPO by Kodec (para 36(15)).

429 The Defendants' position is that Mr Goh became involved in assisting Nedec/Kodec to obtain the US$2.5 million grant at the request of Seagate as part of the overall package to be provided to Beyonics and Nedec/Kodec and that it was in Beyonics' interest for him to do so. Further, he provided consultancy services to Nedec/Kodec under the Wyser Agreements to advance the progress of the BN Alliance and therefore the interests of Beyonics.

430 Whilst the above analysis of the facts goes some way to resolving these issues, the amount and nature of the advice and assistance given by Mr Goh and others to Nedec/Kodec also have a part to play.

431 Dealing first with the qualification for the 2nd Stage work, Mr LH Lee gave evidence that there were a number of visits both by Nedec/Kodec personnel to BTEC's Changshu plant and by Beyonics personnel other than Mr Goh to the Langfang facility.[242] In particular, there was a visit by seven people from Langfang to Changshu on 13 December 2011. These were mainly technical representatives and included Mr Imsoo Seo. A further visit was made by four people, including Mr Tony Lee, on 5 May 2012 and Mr Imsoo Seo returned on 20 December 2012. There were eight visits by BTEC personnel to Langfang between 5 January 2012 and 19 October 2012. Mr LH Lee states that the purpose of those visits was "*for the Beyonics Group's personnel to teach and give guidance … on manufacturing and supplying baseplates for Seagate HDDs*".[243] Mr LH Lee continues in his AEIC to give details of the assistance that was provided and concludes by giving his opinion that "*without BTEC's assistance it would have taken the NEDEC/KODEC Group more than 6 months to be qualified to carry out the Second Stage work on Brinks 2H baseplates …. However, with BTEC's assistance [Nedec/Kodec] was qualified within 4 months, by April 2012*".[244]

432 Mr Goh also visited Langfang subsequent to his initial visit on 10 November 2011 and gave advice both over the telephone and by e-mail. Mr

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242 LH Lee AEIC 62–63.

243 LH Lee AEIC 62.

244 LH Lee AEIC 78.

Imsoo Seo, who was the quality general manager of the Langfang facility, gave evidence about his interaction with Mr Goh from late November 2011 until December 2012 both with respect to obtaining qualification to produce the 2nd Stage baseplates and in dealing with production issues which arose during mass production.[245] Mr Imsoo Seo gave detailed evidence as to the nature and extent of the advice.[246]

433 I do not need to consider the details of this evidence or the oral evidence that was given in relation to it as I am wholly satisfied that Mr Goh and other personnel at BTEC did give a considerable amount of advice and assistance to Nedec/Kodec to assist them both in qualifying to produce the 2nd Stage baseplates and in ironing out production difficulties. Had the Wyser Agreements been entered into with Beyonics, the sums involved would appear to me to have been in proportion to the involvement of Beyonics personnel both with regard to the lump sum and the US$0.02 per piece. It is to be noted that, in fact, the US$0.02 sum was financed by Seagate as the price per piece was increased from the US$1.90 previously proposed to the eventual agreed price of US$1.92.

434 But, of course, the Wyser Agreements were with Mr Goh and he therefore benefitted at the time from the work he and others at BTEC did to assist Nedec/Kodec, but Beyonics did not.

435 The Plaintiffs however contend that, even if some of the advice and assistance given by Mr Goh was in furtherance of the BN Alliance and even if entering the BN Alliance was itself not contrary to Beyonics' best interests, the

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245 Imsoo Seo AEIC 33.

246 Imsoo Seo AEIC 29–113.

relationship between Mr Goh and Nedec/Kodec went far beyond that which was necessary to make the BN Alliance successful. Mr Goh was, they contend, working for the benefit of Nedec/Kodec and contrary to the best interests of Beyonics. They rely not only on the extent of Mr Goh's involvement in the 2nd Stage process, which they contend was excessive, but also his involvement in other aspects of Nedec/Kodec's business at the time.

Other assistance by Mr Goh

436 In addition to his involvement in obtaining the US$2.5 million grant, the consultancy work and the part he played in promoting the potential purchase of BTEC by Nedec/Kodec, the Plaintiffs rely on two other matters: assistance given by Mr Goh to Nedec/Kodec to develop its capability for 1st Stage work and Mr Goh's promotion and/or facilitation of Nedec/Kodec as a baseplate supplier for Seagate programmes.[247]

(1) Assistance with 1st Stage work

437 It is clear from the documents that from an early stage in the discussions leading up to the BN Alliance agreement, the parties contemplated that Nedec/Kodec would seek to qualify with Seagate for 1st Stage production. They had in the past been qualified for 1st Stage production for Samsung but Samsung used a different e-coating process. It was acknowledged at the EBR meeting on 18 November 2011 that this would be a challenge.[248] Indeed it appears from an e-mail sent by Mr LH Lee to Mr Michael Ng, Mr Goh's successor as CEO of Beyonics, that qualification for the 1st Stage for Brinks 2H had not been

247 Plaintiff's written closing at 610.

248 27AB 17708.

achieved by June 2013 and was not estimated to happen until July or August 2013.[249]

438 During Mr Goh's visit to the Langfang plant on 10 November 2011 he was aware of and commented on the e-coating process and was aware that Nedec/Kodec were planning to qualify for 1st Stage work as early as April 2012 so that they could produce a further 1 million baseplates per month, in addition to the 1 million that were to be produced under the BN Alliance.[250]

439 Mr Tony Lee proposed a visit by him and others to the Changshu plant in an e-mail dated 28 November 2011 to discuss, amongst other things, "*Die casting quality, e-coating, deburring, etc for 3.5*".[251] However this was with a view to Nedec/Kodec discussing the quality of BTEC's 1st Stage process[252] and was a necessary part of the BN Alliance as Nedec/Kodec had to be satisfied that the 1st Stage parts produced for them by BTEC would be of an acceptable quality for the 2nd Stage work to be done.

440 The Plaintiffs also drew my attention to an e-mail dated 18 January 2012[253] from Mr Tony Lee to various people at Nidec, which he forwarded to Mr Goh, which answers five questions Nidec had posed of Mr Lee to assist Nidec and Seagate working together with Nedec/Kodec. The first four related to 2nd Stage work but the fifth related to e-coating. The response to that question made it clear that at that time it was only the 2nd Stage that was being carried

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249 40AB 26479.

250 27AB 17717.

251 27AB 17757.

252 T12/148/25–149/19.

253 29AB 19022–19023.

out on Beyonics' e-coated baseplates so that Nedec/Kodec was "*not quite much attentive on this subject*" (*ie*, 1st Stage). It did however indicate that Nedec/Kodec intended to transfer one of its e-coating lines at Langfang to Seagate's standard and that it was intending to install a new such line at its KPI facility in the Philippines. For this purpose, Mr Lee had already consulted with Nidec in the Philippines and proposed "*to get further consultation from Mr. Kesbahn Rai because we determined to make our new e-coat line meet Seagate's standard*". He was to meet Mr Rai the following week.

441 Whilst this demonstrates that Mr Lee was keeping Mr Goh informed as to the steps Nedec/Kodec were taking, it does not support the allegation that, at that time, Mr Goh was being asked to, or did, consult with them on 1st Stage work.

442 Mr Goh did however become involved in the Nedec/Kodec's plans for the line at KPI. On 4 March 2012, Mr Tony Lee asked if a visit could be arranged for him and Mr Hwang to visit BPM's facility in Malaysia to have a tour of the e-coating line there because they were "*preparing new e-coating line in KPI*".[254] By this date Nedec/Kodec had indicated that it was not interested in buying BPM but the parties were meeting in Singapore at that time in relation to the BN Alliance. Mr Goh agreed to this visit[255] but did not accompany them. He did however offer to advise on the e-coating facility. In cross-examination Mr Goh was reluctant to accept that he had been involved in advising on 1st Stage work but accepted that "*if he had any question … I will answer him*".[256]

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254 30AB 19666–19667.

255 30AB 19666.

256 T10/42/1–44/5.

There was no need for Mr Goh to accede to this visit otherwise as a gesture of goodwill and he must have appreciated that the purpose was to assist Nedec/Kodec's plans to build a 1st Stage line at KPI. But equally he must have appreciated that to refuse would cause offence to Mr Lee and Mr Hwang.

443 Thereafter, in April 2012, Mr Goh became involved as a go-between (to use a neutral term) in Nedec/Kodec's quest to obtain quotations for the new KPI e-coating line. On 19 April Mr Goh sent an e-mail[257] to Mr Lee indicating that he had spoken to his vendor asking him "to quote the line for you in Kodec", stating that the system was the same as one which Mr Lee had seen at another Beyonics plant called Wealth Preview. Mr Lee responded the same day in an e-mail with an attachment entitled "KPI E-coating bidding invitation – 120314--1" which said:[258]

> Thanks for your kind introduction of e-coating manufacturer.
>
> Can you please deliver this invitation file to the factory? The invitation file is enclosed.
>
> LOI is going to be in your e-mail account when you come to your office on Monday morning, sir.

444 This Mr Goh did.[259] It is plain from the invitation that the proposed purchaser was Kodec and that Mr Tony Lee's name was given as a contact. The proposed vendor was an Indonesian company, PT Ovindo MetaItama Technik ("Ovindo"), and Mr Goh's contact there was a man called Johnny. Thereafter until 18 June 2012 Mr Goh liaised with Johnny and with Mr Lee. This not only involved transmitting proposed designs for the line but also involved Mr Goh

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257 31AB 20641.

258 31AB 20641.

259 32AB 21215–25.

in discussions with Johnny and in receiving quotations.[260] On 7 June Johnny e-mailed Mr Goh to plan a visit to Singapore on 15 June to "*visit you and discuss regarding to [sic] the philippines line system*".[261] The first quotation was received by Mr Goh on 14 June 2012[262] and Mr Goh replied, "*Thanks, just in time. I am meeting with them next week*".[263] It is to be noted that this quotation is not addressed to Kodec but to "Beyonics Technology Limited. Attn: Mr Goh".[264]

445 He then visited Mr Lee following which he received a further quotation, dated 18 June 2012, again addressed to Beyonics.[265]

446 Mr Goh claimed that he did not discuss the first quotation at the meeting with Mr Lee and that he was, throughout, merely acting as a messenger rather than seeking to facilitate the process of negotiation.[266]

447 I have no hesitation in rejecting this evidence as it is wholly inconsistent with the contemporaneous documents. Mr Goh was quite clearly playing an active role in introducing Nedec/Kodec to Ovindo and in doing what he could to further relations between the two. He accepted that he had no obligation to

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260 32AB 21634–37; 33AB 21654; 33AB 21743-4; 34AB 22453; 34AB 22913-30; 34AB 22931; 35AB 23148–68.

261 34AB 22453.

262 34AB 22913.

263 34AB 22931.

264 34AB 22914.

265 35AB 23148–68.

266 T10/128/7–129/6.

do this under the Wyser Agreements[267] because it was nothing to do with the BN Alliance and assisting competitors in this way would not form part of the normal function of the CEO of a company such as Beyonics.

448 However, Mr Tony Lee gave evidence that he also consulted others to introduce him to potential manufacturers of e-coating lines and that Nedec/Kodec did not end up buying a line from Ovindo. Relevant passages from his cross-examination read as follows:[268]

> Q. Can you close this bundle. Can you go back to 31AB, page 20641. This is about the E-coating line for KPI in Philippines.
>
> A. Mmm-hmm.
>
> Q. If you look at the email at the top, 21 April 2012, you request that Mr Goh send an attachment to the supplier, the E-coating manufacturer.
>
> A. Mm. Yes.
>
> Q. Can you explain to us why is it you asked Mr Goh to do this instead of sending the invitation file yourself?
>
> A. *He was not the only party who participated in this, like, bidding or offering. I asked Nidec. I asked John Young. I asked Mr Goh. I asked many people, even two Korea manufacturers of E-coating line, I asked. It's just -- it was okay. I asked him to just introduce me an E-coating line -- E-coating line manufacturer, and that manufacturer was very, very lousy. That's all.*
>
> Q. Which one was lousy, sorry?
>
> A. Mr Goh's introduction one.
>
> Q. I see. Ovindo. Right. Did you know that Mr Goh had obtained a quotation from Ovindo?
>
> A. I think I received. So he obtained, I think.

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267 T10/122/21–23.

268 T13/88/2–89/13; T13/90/20–91/13.

Q. Do you recall him sending you the quotation or informing you of the quoted price?

A. I -- I originally files I received I passed to the person in charge because E-coating is not general side one, chemical thing. And but I remember it's a high -- high.

Q. It was above a million?

A. About 1 million -- 10 million -- sorry, 1 million. More than US$1 million.

Q. Yes. Did you inform Mr Goh that you would want the price reduced?

A. I said, "No, your price is too high".....

...

Q. In the end, did you buy an E-coating line from Ovindo?

A. No.

Q. Did you buy from another source for KPI?

A. Yes, yes. KPI is mainly to Nidec 2.5 inches and maybe totally unrelated to Beyonics' business. It's M8 factory, M8 Samsung factory programme only.

Q. Oh, the programme M8?

A. Only. Single item.

Q. Mr Goh here dealing with the E-coating manufacturer, what he's doing here, did you consider it as part of the services he had to provide under the Wyser agreement?

A. No.

Q. So did you wonder why he was doing all of this for the KODEC Group?

A. I asked, "Can you please just help me" or just like, you know, "Introduce me", yeah.

[emphasis added]

449 Drawing this all together, Mr Goh acted unsuccessfully as an intermediary between Nedec/Kodec and Ovindo between 19 April and 18 June 2012. He was not merely a messenger but played an active part in seeking to bring the two together with the intention that KPI should purchase an e-coating

line from Ovindo for the M8 programme. However, this programme related to 2.5" HDDs[269] not to 3.5" HDDs which Beyonics manufactured for Seagate. It is perhaps not a coincidence that the assistance provided by Mr Goh started immediately before the LOI was sent from Nedec/Kodec to Beyonics (22 April 2012) and ended just before Nedec/Kodec were refused exclusivity (6 July 2012). Mr Goh's assistance thus fell within the period that he was actively encouraging the purchase of BTEC by Nedec/Kodec.

450 I shall consider the relevance of this episode to the issues in the case below.

(2) Promotion and/or Facilitation of the development of Nedec/Kodec as a supplier to Seagate

451 Under this heading the Plaintiffs draw together a number of incidents to support their assertion that Mr Goh was "*undoubtedly grooming the Kodec Group…Mr Goh was involved in numerous ways to open the door to new business opportunities for the Kodec Group with Seagate*".[270]

452 The first incident related to the provision of office space in Singapore. In March 2012 Seagate suggested that Nedec/Kodec should set up an office in Singapore to facilitate dealings with Seagate. Mr Goh offered them some free space but Mr Tony Lee rejected it and took space in Seagate's building.[271] This happened during the BN Alliance and I do not see that there was anything untoward in the offer made by Mr Goh in those circumstances.

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269 See, *eg*, 26AB 17218–17219.

270 Plaintiff's written closing at 658.

271 30AB 20028; T13/47/6–48/1.

453 In paragraph 664 of their written closing the Plaintiffs list four e-mail exchanges during the period of the BN Alliance where Mr Goh gives a measure of advice to Mr Lee or liaises with Seagate on Nedec/Kodec's behalf. Although these are all minor incidents they do to a limited extent support the Plaintiffs' assertion that Mr Goh worked more closely with Mr Tony Lee than the BN Alliance demanded but I also have to take into account that these were also during the time that Mr Goh was actively encouraging Nedec/Kodec to make a bid to purchase BTEC. Taking matters in the round, I consider that the matters relied upon by the Plaintiffs fall far short of persuading me that Mr Goh was "grooming" Nedec/Kodec.

454 What he was doing was to take active steps both to make the BN Alliance work for the joint benefit of BTEC and Nedec/Kodec, and also for him under the Wyser Agreements, and to encourage the possible purchase of BTEC which was in accordance with Beyonics' policy at the time. He did on occasions go beyond that which was strictly necessary but I am unable to conclude that there was anything sinister in this.

Beyonics' loss of the Seagate HDD business

455 On 2 July 2012 Seagate held an internal meeting involving a presentation to the Commodity Council (which consisted of higher management) to discuss baseplate strategy. Mr Billy Chua gave a presentation supported by slides.[272] These identified three phases following the floods; the Recovery Phase (January – June 2012); the Alignment Phase (July – December 2012) and the Consolidation Phase (January – June 2013). The object of the Alignment Phase was to "*re-align suppliers' prog build in the various country*

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272 40AB 26885–26890.

site to support the appropriate Motor suppliers in the region for close supply chain". The Consolidation Phase was to "… *start consolidation of Baseplate suppliers. To maintain a stronger & dedicated supply chain*". The overall objective was to "*[e]nsure a competitive environment with Fewer suppliers while balancing quality, cost and capacity factors*".

456 Significantly when considering the Consolidation Phase in more detail a slide indicated "*Reduce Bey[onics] thro' Nedec integration*". Mr Billy Chua gave evidence that this comment was based on the impression he had that there would be a merger between the two.[273]

457 This was followed by a further presentation from Mr Chua on 13 September 2012 at the "Mech CMT Review" on baseplates.[274] This was another internal review which put forward two options: Option A, Hold and Wait and Option B, Remove & Rebuild. Under the former, all suppliers would be maintained although with a lower allocation. Under the latter, orders for baseplates from Beyonics would cease at the 3rd quarter of 2013 (January to March 2013) and contained the comment "*Eliminate Beyonics in near term. May expect impact to their PCBA business to STX. Need to verify*". PCBA is a reference to "printed circuit boards" which was a part of Beyonics' EMS business for which Seagate (STX) was a major customer. Orders for baseplates from Nedec/Kodec were however projected to increase.

458 These two presentations were the subject of evidence from Mr Billy Chua. The market for baseplates was beginning to decrease. Much of the new

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273 T7/50/8–16.

274 40AB 27030–27036.

capacity developed after the floods had been in China whereas all of the motor assemblers were still located in Thailand so there was a need to reduce supply from China.[275] The reason he gave for maintaining or increasing the supply from Nedec/Kodec whilst reducing that from Beyonics was said to be based not only on Nedec/Kodec's supply of baseplates for Seagate programmes but also their continued, much greater, production of baseplates for Samsung programmes.[276] The difference between Option A and Option B resided in uncertainty as to future demand and Mr Chua was concerned that any proposal to reduce Beyonics' orders for baseplates would have an adverse impact on relations with Beyonics in the EMS field so he felt the need to flag this up.[277]

459 There was then a third presentation on 20 November 2012 where again it was proposed that core suppliers should be maintained at the expense of the secondary suppliers. Nedec/Kodec was indicated as a core supplier because of its involvement in Samsung (SKDC) products whereas Beyonics was said to be a secondary supplier.[278]

460 The upshot of all of this was that Seagate began discussions with Beyonics about the future. These were conducted by Mr Michael Ng who had been brought in to Beyonics to replace Mr Goh as CEO. He reported directly to Mr Shaw about two meetings that he had with Seagate on 28 December 2012 and 8 January 2013.[279] The following observations were reported to have been made by the Seagate team at the first meeting:

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275 T7/52/13–53/7.

276 T7/59/6–60/14.

277 T7/66/21–68/9.

278 41AB/27112–4; T7/74/7–23.

279 39AB 26104–26105; 26196–26197.

(a) There was a weakness in demand.

(b) Beyonics was no longer competitive.

(c) Beyonics no longer had the edge in terms of technical know-how.

(d) Beyonics was reluctant to invest to keep up with technology.

(e) The MBAs such as Nidec had acquired their own baseplate manufacturers.

(f) Seagate had been telling Beyonics to divest the baseplate business over the last couple of years.

(g) The larger baseplate manufacturers such as MMI would remain relevant whereas the smaller manufacturers would not.

(h) Kodec had invested more heavily in new machinery – 400 CNC machines compared with 40 at Beyonics.

(i) The fact that Beyonics did not restart BTT in Thailand was a major setback. "The Tampoi solution (i.e BPM) just does not work well for them".

(j) The PCBA side of the business was performing well.

And, at the second meeting:

(k) The outlook for HDD was dismal.

(l) There was a price erosion.

(m) The only MBA in China was Nidec and that China had too much baseplate capacity.

(n) Kodec would soon be qualified to do 1st Stage work.

(o) Beyonics had been informed since September that they would not be a supplier after March 2013.

(p) Mr Ng's request for an extension until the end of 2013 was officially "a No" but Mr Billy Chua had said he would do his best to help.

461 Mr Ng went on to suggest to Mr Shaw ways of mitigating Beyonics' inventory exposure and to the potential for obtaining other business from Hitachi. Mr Ng did not give evidence and Mr Billy Chua was not asked about these documents so they are the best record of the events. Mr Shaw approved Mr Ng's proposed course of action.

462 The last shipment of baseplates from Beyonics to Seagate was in August 2013.

463 It can be seen from the above that there were many factors involved in Seagate's decision to terminate the supply of baseplates from Beyonics, both from BPM and from BTEC. One of those was the fact that Nedec/Kodec had become qualified to carry out the 2nd Stage work and was going to qualify to carry out the 1st Stage work. This was therefore a cause of Beyonics losing the Seagate work but it was only one of a number of reasons.

Capacity

464 One of the pillars on which the Plaintiffs' case is built is that in October 2011, when the floods occurred, there was sufficient capacity at BTEC not only for the 1st Stage work on the Brinks 2H products to be done but also the 2nd Stage as well. Hence, rather than going along with the Seagate's proposal for the BN Alliance, Mr Goh should have pushed for the whole Brinks 2H programme to be allocated to BTEC. If this had been done, Beyonics would have remained the supplier for this programme, Nedec/Kodec would not have qualified to carry out the 2nd Stage work for that programme and when the time came to assess whether BTEC should continue to receive orders from Seagate, the decision to terminate Beyonics as a Seagate supplier would have been different.

465 The question of capacity has arisen a number of times in the above narrative. It is now necessary to decide, on the balance of probabilities, what was, at any given time, the actual maximum capacity for machining (2nd Stage plus automotive) at BTEC and whether that capacity was different to what Mr Goh and Mr LH Lee perceived to be the actual maximum capacity. An attempt was made through the evidence of Mr LH Lee to reconstruct, after the event, what was in fact the actual maximum capacity at the time. However, this evidence it is only relevant if either Mr Goh or Mr LH Lee had any reason to turn their mind to the question as to whether their perception of actual maximum capacity was significantly understated.

466 The background for this is set out in [258] to [284] above. After the floods, Hitachi were pressing BTEC to manufacture baseplates for their Jupiter 1 programme, and in his e-mail on 18 October 2011, Mr LH Lee set out in a chart his proposals for accommodating Hitachi's needs which involved a

reduction in the Brinks 2H production for Seagate.[280] This was inconsistent with a belief on his part that there was additional available capacity at that time. He followed this up with a detailed breakdown of capacity on 22 October 2011.[281] He expressly stated that with the CNC machines then available BTEC could produce 2.4 million pieces per month. He again indicated that to commit to the Jupiter program would require reducing the Brinks 2H production. This is consistent, and only consistent, with an understanding on Mr LH Lee's part that the maximum machining (*ie,* 2nd Stage) capacity at BTEC at the time was 2.4 million per month.

467 On 27 October 2011 Mr LH Lee and Mr Goh discussed the possibility of additional manufacture for Hitachi's Eagle programme and Mr Lee assured Mr Goh that although BTEC's capacity was at its limit, he should be able to handle the Eagle order as well. Again there was no suggestion to Mr Goh that there was additional capacity; indeed, to the contrary. The following day Mr LH Lee confirmed to Mr Goh that the maximum 2nd stage production at BTEC was indeed 2.4 million per month.[282]

468 On 31 October 2011 Mr LH Lee cautioned that to take the Eagle order would mean reducing the Seagate order by 500,000 per month unless there was a further investment in equipment estimated to be S$6 million, including 60 CNC machines.[283] Again this is wholly inconsistent with any belief on Mr Lee's part that there was spare capacity at BTEC.

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280 26AB 17300–17302.

281 26AB 17346–17348.

282 26AB 17465.

283 26AB 17485.

469 By 9 November 2011 it appears that Mr LH Lee had managed to find a way to increase production by March 2012 to 2.7 million per month.[284] Two days later this figure had increase to 2.9 million[285] with an estimate of US$4.18 million for an increase in capacity of 390,000 per month.

470 The following day he reverted to Mr Goh[286] with a further proposal to increase capacity by 200,000 which would involve an investment of US$1.96 million. He updated this on 16 November 2011[287] following a teleconference on 15 November in which he outlined another route by which capacity could be increased by 200,000. This was estimated to require a reduced investment of US$1.33 million which would give an overall capacity (excluding the 1 million e-coated products to be sent to Nedec/Kodec) of 3,192,000 per month.

471 This demonstrates that Mr Lee was focusing hard on capacity at this stage, had devised ways of increasing capacity without further investment to around 2.9 million per month without but needed investment to increase any further.

472 The only contemporaneous document which supports an assertion that the actual maximum capacity was higher than this is in the PE Memorandums. The first of these, dated 23 November 2011,[288] states the CNC machining capacity at BTEC to be 3.5 million per month. Mr LH Lee gave evidence that

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284 27AB 17533.

285 27AB 17553–17555.

286 27AB 17608.

287 27AB 17642.

288 41AB 27422–27430.

he was not involved in the preparation of this document.[289] Mr Goh identified Sim Siew Kiang, the Corporate Finance Controller of BAP, as the author of the document but was unable to shed any light on how the figure had been obtained.[290] The document was subsequently revised by Sim Siew Kiang in a later iteration of the memorandum in March 2012 where the figure was increased to 3.63 million.[291] Sim Siew Kiang did not give evidence before me.

473 Mr Goh gave evidence that "…*when I need to talk to Seagate, I need to ask Mr Lee and my team again*".[292] This appears to be the case from the documents referred to above and is supported by a further e-mail from Mr Goh to Mr Tony Lee on 3 January 2012,[293] the "FRIEND PRICE" e-mail, where he stated "*currently BTEC has the capacity to produce 3m to 2.5m a month*".

474 Taking all this into account the preponderance of the evidence is that Mr LH Lee perceived that the maximum machining capacity at BTEC immediately after the flooding was 2.4 million and that, to accommodate the increasing orders from Hitachi, ways were then found to increase capacity without further investment to around 2.9 to 3 million per month. Mr Lee was continuously involved in determining how to increase capacity further and concluded that all of these would involve investment in new machinery.

475 It was Mr LH Lee's job to manage the Changshu plant and to be fully aware of matters such as capacity. It was also his responsibility to keep Mr Goh

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289 T4/44/11–45/20.

290 Goh AEIC 348; T10/30/4–31/4; T10/32/1–34/24.

291 30AB 19730–19742.

292 T10/34/12–15.

293 28AB 18448.

informed as and when necessary on issues such as capacity. It was not Mr Goh's job himself to assess capacity, whether at Changshu or any of the other 13 factories for which he had overall responsibility. He was entitled to proceed on the basis of figures provided to him by his factory managers, such as Mr Lee.

476 For these reasons I am satisfied that not only did Mr Lee and therefore Mr Goh perceive that the maximum capacity at the time was as stated above, this was, in fact, the maximum capacity.

477 Without evidence as to how the figures in the PE Memorandum were arrived at I am unable to place material reliance on them it in the face of all the other documents containing detailed figures inconsistent therewith. Investment would therefore have been needed to increase the figure above 3 million per month.

478 The BN Alliance required 1 million Brinks 2H products to be produced per month. Whilst BTEC had the capacity to produce 1st Stage products in those quantities, it did not have the capacity to produce that quantity at the 2nd Stage without significant further investment or substantially reducing production for other programmes.

479 In the light of these findings, it is not necessary to consider the evidence of Mr LH Lee that, in fact, the actual maximum capacity was higher.[294] This was an exercise carried out after the event for the purposes of this litigation. In it Mr Lee considers all possible ways that production might have been increased which leads him to the conclusion that the figures stated in the PE Memorandum

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294 LH Lee AEIC 116–169.

did accurately reflect the maximum capacity.[295] He does however accept that to achieve this some further investment might have been required.[296]

480 To my mind, there is a very great difference between an exercise of this nature, carried out after the event with a specific purpose in mind, and the reality of life as it existed in late 2011. Mr LH Lee and his team were focused on production at that time. They knew of the pressure being placed on management to accommodate Hitachi and they knew of the proposal to use spare capacity for 1st Stage work to produce Brinks 2H e-coated products for Nedec/Kodec. They were consistently being asked to increase 2nd Stage capacity and were unable to propose ways of doing so above 3 million per month without further investment. Had it been apparent to anyone in the team that in fact there was additional capacity available I have no doubt it would have been raised and considered.

481 Mr LH Lee was cross-examined at some length on his evidence which demonstrated the lengths to which he had gone to identify the potential for extra capacity.[297] This led me to the conclusion that his evidence was somewhat strained. In the circumstances however, it is not necessary to enter into the details of this.

The 2012 Bonus and payments under the Resignation Agreements

482 The final issues of fact that need to be considered relate to the bonus of S$200,000 awarded to Mr Goh for his performance at Beyonics in 2011 and the

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295 LH Lee AEIC 181.

296 LH Lee AEIC 116.

297 T5/25/15–70/20.

payments made by BAP, BIL and BTS pursuant to the Resignation Agreements reached between Mr Goh and Mr Shaw in January 2013.

483 Questions of bonus payments prior to the takeover by Channelview were delegated by BTL to the Compensation Committee. The Committee was chaired by Professor Chua and the other members were My Chay, Mr Loke Poh Keun and Mr Goh. Professor Chua gave the following evidence in relation to the meeting of that Committee on 4 January 2012:[298]

> 50. On 4 January 2012, BTL's Compensation Committee held a meeting to discuss whether BTL should award bonuses to its key executives. I was the Chairman of BTL's Compensation Committee. The other members of the Compensation Committee at the time were Mr Chay Kwong Soon (the Chairman of the Beyonics Group), Mr Loke Poh Keun, and Mr Goh.
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> 51. During that meeting, Mr Goh updated the Compensation Committee on the BTL's expected performance for Q2 2012. Mr Goh also told the Compensation Committee that BTL had managed to seize opportunities that were presented as a result of the Thailand Floods and that BTL had managed to secure an additional US$4 million in deals from Seagate, Hitachi and Western Digital and an improved margin for the baseplates produced for them.
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> 52. The Compensation Committee recognised that Mr Goh and Mr Tay Peng Huat (BTL's Chief Financial Officer) had on top of their routine duties put in many additional hours and efforts on "Project Merlot". (The codename for the takeover by Channelview). The Compensation Committee also recognised the hard work and contributions of Mr Goh in "*steering the company in difficult times and in negotiating favourable projects*". The Compensation Committee took into consideration the US$4 million that Mr Goh managed to secure from Seagate, Hitachi and Western Digital as well as the $5 million in working capital financing that Mr Goh had obtained from Seagate (which Mr Goh had briefed the BTL Board on at the 13 December 2011 and 29 December 2011 meetings: see above), and the higher sale prices for baseplates which Mr Goh was able to negotiate.

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298 Prof Chua AEIC 50–52.

> 53. For those reasons, the Compensation Committee approved a bonus of S$200,000 for Mr Goh. A copy of the minutes of the meeting of the Compensation Committee on 4 January 2012 is annexed hereto and marked "**CTS-10**".[299]
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> [emphasis in original]

484 In cross-examination Professor Chua confirmed that at no time until he stepped down from the Board was he aware that Mr Goh was rendering services to Nedec/Kodec and that he was unaware of the Wyser Agreements.[300] For his part Mr Goh asserted that he had told Mr Chay about the consultancy but not that he was being paid via the Wyser Agreements.[301] I have considered this evidence above (see [379] above).

485 So far as concerns the payments under the Resignation Agreements, the evidence is straightforward. In early January 2013 Mr Goh indicated to Mr Shaw that he wished to resign both as a director and as an employee of the various companies in the Beyonics Group. By e-mail dated 8 January 2013 Mr Shaw stated that following some discussions between them the previous week, he had reviewed the termination clauses of Mr Goh's employment contracts and made some proposals as to the way forward. Mr Goh responded the same day suggesting termination as of 30 April 2013 and following a further exchange this was agreed.[302] The appropriate letters of resignation/retirement were signed by him on 9 January 2013 and were accepted by Mr Shaw on 14 January 2013.[303] These referred to the fact that his employment would cease on 30 April 2013.

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299 1AB 666–667.

300 T11/126/17–127/21.

301 T11/6/18–7/16.

302 39AB 26200–26202.

303 39AB 26204–26215.

486 The last payment to him was on 31 March 2013 presumably because he was paid monthly in advance. The sums paid which are the subject of this action are:[304]

(a) by BAP: S$35,604.90;

(b) by BIL: S$48,600.00; and

(c) by BTS: RM13,500.00.

487 Mr Shaw was unaware of the Wyser Agreements when he negotiated the Resignation Agreements.

The Defendants' Liability

488 I now turn to applying those findings of fact to an assessment of whether, in law, the Defendants are liable to the Plaintiffs as alleged. I shall consider first the position of Mr Goh since there is little dispute that if he is liable, then so also is Wyser.

489 The allegations against Mr Goh are contained in paragraphs 28 to 36 of the Statement of Claim. Mr Goh's breaches of fiduciary duty (and breaches of his duty of loyalty and fidelity) are, in summary, alleged to be:

(a) Mr Goh either conceived of or facilitated the BN Alliance when it was in the best interests of Beyonics for BTEC to carry out the 2nd Stage work on the Brinks 2H baseplates. He thus wrongly procured the diversion of this work from BTEC to Nedec/Kodec for which he was rewarded under the first Wyser Agreement by the payment of US$ 0.02

304 Statement of Claim at 63.

per piece. The first Wyser Agreement was concealed from the shareholders and directors of the Plaintiffs.[305]

(b) Mr Goh wrongly procured the US$2.5 million grant from Seagate to Nedec/Kodec, a competitor of Beyonics, for which he was rewarded under the second Wyser Agreement by the payment of US$200,000. The second Wyser Agreement was concealed from the shareholders and directors of the Plaintiffs.[306]

(c) Mr Goh wrongly assisted Nedec/Kodec to become a supplier of baseplates to Seagate in competition with Beyonics with the intention of Nedec/Kodec supplanting Beyonics as a supplier of baseplates to Seagate. This assistance lay both in his actions in (a) and (b) above but also in wrongly proposing and pushing for the sale of BTEC to Nedec/Kodec and in advising Nedec/Kodec on matters relating to 1st Stage work and a possible IPO for Nedec/Kodec.[307]

490 These wrongful acts, together or separately, are said to have caused:

(a) the Diversion Loss – loss of profits due to diversion of the 2nd stage work to Nedec/Kodec;

(b) the Total Loss – due to the consequential loss of the Seagate business;

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305 Statement of Claim at 28–31.

306 Statement of Claim at 32–34.

307 Statement of Claim at 36(8)–(15).

(c) Beyonics to pay Mr Goh the bonus of S$200,000 which would not have been paid had they become aware of the breaches; and

(d) Mr Shaw to agree to pay sums under the Resignation Agreements which would not have been done had he become aware of the breaches.

491 It is necessary to consider the various allegations of wrongful behaviour by reference to a series of chronological acts and then to assess, on the basis of the findings of fact, whether those acts, together or separately, were (subjectively and objectively (see [161] above)) in the best interests of Beyonics. These acts are:

(a) Mr Goh's initial contact with Nedec/Kodec concerning the possible sale of the PES division to Nedec/ Kodec.

(b) Mr Goh's initial contact with Nedec/Kodec after the floods and the first proposal of the possibility of the BN Alliance.

(c) Mr Goh's participation in the negotiations leading up to the BN Alliance (including the negotiations for the US$2.5 million grant).

(i) What did he do?

(ii) What should he have done otherwise?

(d) The Wyser Agreements.

(e) Mr Goh's involvement in the continued negotiations for the purchase of BTEC by Nedec/Kodec leading up to the LOI.

(f) Mr Goh's other interactions with Nedec/Kodec.

492 Thereafter it will be possible to address whether the alleged losses were caused by any of those acts held to be wrongful following the structured approach set out in *Winsta* at [188] to [192] above.

Act (1) – Mr Goh's initial contact with Nedec/Kodec concerning the possible sale of the PES division to Nedec/Kodec

493 From late 2010 it was the Board of Beyonics' policy to restrict investment in the PES Division and to attempt to divest itself of it. In April 2011 Seagate acquired Samsung's HDD business and on 22 June 2011 Mr Goh informed Mr Toshihiko of Nidec of the Board's policy of divestment. It was Mr Toshihiko who suggested that Mr Goh should be introduced to Mr Stephen Wang of Nedec/Kodec.

494 In July 2011 Mr Goh became aware of the terms on which SKP were negotiating with the banks for the necessary loan for Channelview to purchase Beyonics and therefore knew that it was also the policy of SKP to seek to divest Beyonics of the PES Division.

495 Mr Hwang and Mr Tony Lee visited BPM in September 2011 and thereafter indicated that any purchase by Nedec/Kodec would only be of BTEC, not of the whole PES Division.

496 The Plaintiffs contended that Mr Goh was wrong to approach a competitor in seeking to implement the Board's policy of divesting itself of the PES Division. I do not accept this. If one is going to divest a division, it does not matter to whom it is sold since, even if at the time the purchaser was a competitor, after the purchase it would cease to be. Indeed, no such limitation was placed on BDA when it was brought in to assist in seeking to divest the

PES division. Plainly, when dealing with a competitor it would be essential to have an NDA in place but this was done as between Beyonics and Nedec/Kodec.

497 There was thus nothing wrongful in Mr Goh's initial contact with Nedec/Kodec.

Act (2) – Mr Goh's contact with Nedec/Kodec after the floods and the first proposal of the possibility of the BN Alliance

498 Immediately following the floods, Mr Goh and Mr LH Lee took stock of the position in the PES Division in light of the fact that BTT in Thailand had lost some 200 CNC machines. Mr LH Lee was in close contact with Nidec, who placed orders with BTEC for baseplates, and was active in obtaining orders for Hitachi baseplates even though this might mean reducing the manufacture of those for Seagate. This was attractive to BTEC as the profit margin on Hitachi baseplates was higher than that for Seagate products. By 26 October 2011 the position had been reached whereby BTEC were being offered contracts from Nidec for the supply of both Jupiter and Eagle baseplates for Hitachi and Mr Goh had been informed by Mr LH Lee's e-mails that this would stretch current capacity at BTEC such that there would have to be a drop in the allocation of Seagate products. Mr Goh therefore had no reason to believe there was any excess capacity for 2nd Stage work. Indeed, the contrary was true.

499 Mr Goh was CEO of the whole Beyonics Group. He could not be expected personally to challenge each assessment of capacity made by those responsible for the running of the various factories. He was entitled to rely on the figures provided by Mr LH Lee who was in overall charge of the BTEC facility.

500 It was at this time that Mr Goh first became aware of the possibility of some form of joint venture with Nedec/Kodec. This had arisen out of the Seagate internal brainstorming meeting in October which Mr Billy Chua had first raised with Mr Tony Lee on 24 October 2011. On 26 October Mr Tony Lee mentioned a possible joint operation in an e-mail to Mr Goh and matters came to a head at the meetings on 27 and 28 October. Having taken advice from Mr LH Lee as to the capacity at BTEC for 1st Stage work, Mr Goh then indicated his willingness to consider entering the joint venture which became the BN Alliance.

501 The Plaintiffs contend that Mr Goh should have been more proactive in his dealings with Seagate prior to 27 October 2011 and that this would have rendered the need for a joint venture unnecessary. Equally he should have rejected overtures about a joint venture and should have made more effort to obtain the whole Brinks 2H order for BTEC.

502 I do not accept that on the basis of the machining capacity as conveyed to Mr Goh by Mr LH Lee and having regard to the potential for that capacity being used to satisfy Nidec's orders for Hitachi baseplates, Mr Goh acted otherwise than in the best interests of BTEC in considering entering a joint venture with Nedec/Kodec for the reasons given in [304] above. So far as he was aware there was no surplus capacity at BTEC for 2nd Stage work but there was spare capacity for 1st Stage work for the volume proposed (one million a month).

503 On the facts as known to him at the time, increasing the capacity for 2nd Stage work to accommodate a further one million a month must have involved a significant capital investment. But he was under a double interdict against further substantial investment in the PES Division, both from the then current

Board's decision and from the proposed terms of the bank loan to SKP. There is no evidence that Mr Goh ever turned his mind to the possibility of seeking that investment but, in the circumstances, there is no reason why he should have done so. Mr Goh was dealing in the art of the possible. In the light of the floods, the projected joint venture with Nedec/Kodec represented a way of using existing capacity at BTEC without further investment but which would yield a profit to BTEC at a financially challenging time.

504 For these reasons and for the fuller reasons expressed in [304] above, I am satisfied that there was thus nothing wrongful in Mr Goh's entertaining the proposal of a joint venture with Nedec/Kodec.

Act (3) – Mr Goh's participation in the negotiations leading up to the BN Alliance (including the negotiations for the US$2.5 million grant)

505 I have considered in [305] to [344] above the events which followed the meetings on 27 and 28 October 2011 until the Tripartite meeting on 24 November 2011. In summary, following the October meetings Mr Goh and Mr LH Lee discussed capacity at BTEC to satisfy Mr Goh that there was capacity to carry out the 1st Stage work for Seagate as well as the 2nd Stage work for Hitachi. At no stage was it suggested to Mr Goh that there was additional 2nd Stage capacity.

506 Mr Goh then attended the meeting with Mr Tony Lee and Mr Hwang at Langfang on 10 November 2011 where Mr Goh was assessing whether Nedec/Kodec could perform the 2nd Stage and offered advice in relation to this. This prompted Mr Tony Lee to raise the question of a consultancy. They discussed the investment necessary to enable Nedec/Kodec to perform the work which Mr Lee estimated at US$5 million and Mr Goh advised that at most Seagate might pay half. Both parties were aware that Mr Goh was to attend the

EBR meeting on 18 November 2011 and Mr Lee asked Mr Goh to negotiate on Nedec/Kodec's behalf for a grant of US$2.5 million.

507 Prior to the EBR meeting Mr Goh was also asked by Mr HC Toh of Seagate to include in his presentation at that meeting details of any investment that would be necessary for Nedec/Kodec to make the proposed BN Alliance work. It is thus not surprising that during his presentation this is what Mr Goh did, as well as promoting various means by which Seagate could support Beyonics directly. When dealing with Nedec/Kodec and the proposed alliance, he identified both the advantages and disadvantages of the alliance, more specifically he referred to the inevitable increase in cost involved in transporting the 1st Stage products across China to Langfang for the 2nd Stage work to be done. At this time the proposed price was US$1.90 per piece compared to US$1.84 which was the increased price that BTEC were seeking from Seagate for Brinks 2H products where both the 1st and 2nd Stage was carried out at BTEC.

508 The Plaintiffs suggested that this was a reflection of the fact that Mr Goh was promoting a higher price for Brinks 2H products produced by the BN Alliance compared with those negotiated for purely BTEC products. He was, but he was able to do this on the basis of transportation costs. Mr Goh was cross-examined on this[308] and explained that he had told Seagate what the financial consequences of the additional transport were and that BTEC was charging the same price for the 1st Stage work to Nedec/Kodec (US$1.26) as it was budgeting for in relation to the Brinks 2H baseplates wholly produced by BTEC. This evidence was not challenged further and satisfies me that Mr Goh

[308] T8/156/14-158/8

was not favouring the interests of the BN Alliance over those of BTEC in this regard.

509 It was at this meeting that Mr Goh agreed with Seagate that, subject to agreement on investment, BTEC would enter the BN Alliance and thereafter decided that he would accept a consultation fee from Nedec/Kodec. This led to the Tripartite meeting in Singapore on 24 November 2011.

510 At the Tripartite meeting all three parties agreed to the BN Alliance and the issue of funding was, in principle, also agreed. Seagate was to provide both a grant and cash flow support to the various Beyonics companies as well as the grant to Nedec/Kodec. Although the necessary agreements had to be drawn up and executed, in substance it was at this meeting that the BN alliance was concluded.

511 It was immediately after the Tripartite meeting that Mr Goh gave Mr Tony Lee the first drafts of what subsequently became the Wyser Agreements. The possibility of him being paid for consultancy work if the BN alliance went ahead must therefore been on his mind during the Tripartite meeting.

512 Any assessment of Mr Goh's activities in this period has to be made in the light of the finding in relation to Act 2 above, namely, that it was in the best interests of Beyonics, both subjectively and objectively, in the light of the facts as they then appeared to Mr Goh (and indeed to Mr LH Lee), to enter negotiations concerning the proposed joint venture.

513 On this basis, the question that has to be asked is what precisely Mr Goh did during this period that was not in the best interests of Beyonics. He was working not only to encourage Seagate to approve the joint venture but also to

obtain the maximum possible funding both for the joint venture and for Beyonics' other business with Seagate. Both because of the requests by Mr Tony Lee and Mr HC Toh that he deal with the question of funding for the joint venture at the EBR meeting and because of the fact that he had an established long term relationship with Seagate, it made sense for him to do this.

514 Did the possibility of him receiving payment for consultancy influence his actions up until 24 November 2011? The possibility must have encouraged him to do his best to ensure that the BN Alliance was a success but, equally, it was in BTEC's best interests that he did his best to ensure that the joint venture was a success. What Mr Goh did during this period was that which he reasonably had to do to with this end in view. If he had not done what he did, he could justly have been criticised for not acting in the best interests of the Beyonics Group.

515 Accordingly, in my judgment, there was nothing wrongful in Mr Goh's actions during the period up to end of the Tripartite meeting when, in substance, the parties agreed to the terms on which the BN Alliance should proceed.

Act (4) – The Wyser Agreements

516 It was following the Tripartite meeting that Mr Goh gave Mr Tony Lee the first draft of the Wyser Agreements and thereafter negotiations took place which led to the final agreements being executed and Mr Goh being paid. For the reasons given in [377]–[381] above, any payment for consultancy services should have been be paid to BTEC and not to Mr Goh, save with the express approval of Beyonics. Equally, there was no legitimate reason for structuring the payment of US$300,000 from Nedec/Kodec to one of its directors, Mr Hwang, through a third party, Mr Goh.

517 Furthermore, I am satisfied that all three of them were aware of both these factors and accordingly Mr Goh was in breach of his duties both as a director and employee of the Plaintiffs in entering the Wyser Agreements without the consent of the Plaintiffs. This should have been done by informing the main Board of the proposed agreements and seeking approval of them.

518 Mr Goh's reprehensible behaviour lay not in seeking payment from Nedec/Kodec for the consultancy work that he and others at BTEC were to provide to advance the BN Alliance but in structuring the payment to Wyser rather than to BTEC. It was plainly in BTEC's interest that it should be compensated for the time and effort its directors and employees expended in providing consultancy to advance the BN Alliance. Further, it is not suggested that in providing the consultancy services Mr Goh was neglecting his duties towards the rest of the PES Division or, indeed, to the EMS Division by focussing his attention on the joint venture for personal gain.

519 Professor Chua said this about the main Board's attitude at the time towards the BN Alliance and his views as to what the Board would have done if Mr Goh had notified the Board of the Wyser Agreements:[309]

> 61. In view of the fact that as I have explained above, the B-N Alliance was beneficial to the Beyonics Group, it was in the interests of the Beyonics Group for the B-N Alliance to succeed. In light of that, in my view, the provision of the consultancy services referred to at paragraph 59 above to the NEDEC/KODEC Group served the interests of the Beyonics Group by enabling the NEDEC/KODEC Group to properly carry out their role under the B-N Alliance.
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> 62. A large part of the EMS Division's business was the manufacture and supply of PCBA for Seagate HDDs. Therefore, the success of the B-N Alliance in producing Brinks 2H

309 Prof Chua AEIC 61–66.

> Baseplates for Seagate HDDs would also have an impact on the quantities of PCBA that the EMS Division could sell. In this connection, Beyonics Technology (Senai) Sdn Bhd was the sole supplier of PCBA for Seagate HDDs.
>
> 63. I understand that Mr Goh did not obtain formal ratification from the BTL Board for his provision of the consultancy services to the NEDEC/KODEC Group and the payment that he received from the NEDEC/KODEC Group as consideration for the provision of those services.
>
> 64. I understand that Mr Goh had spoken informally to Mr Chay, the Chairman of the Beyonics Group about the fact that he would be providing consultancy services to the NEDEC/KODEC Group.
>
> 65. While it would have been ideal for Mr Goh to have formally notified the BTL Board about the Wyser Agreements before he entered into the Wyser Agreements, in my view, it was understandable for him to have made the decision to proceed with what he felt was in the best interests of the Beyonics Group and to put into effect the BTL Board's decision to enter into the B-N Alliance.
>
> 66. As a director of the BTL Board, I would have voted to approve or ratify Mr Goh's entry into the Wyser Agreements, if this matter had been presented before the BTL Board.

520 It will be apparent that I understand and accept Professor Chua's reasoning in paragraphs 61 and 62. Had the Board been informed about the provision of consultancy when it was considering whether or not to enter the BN Alliance agreement it would have seen that the provision of consultancy services was proper.

521 I am however unable to accept that it would have been "ideal" for Mr Goh to have notified the Board. His failure to do so was a gross breach of duty. Equally, whilst I very much doubt that any Board, acting in the best interests of the shareholders, would have sanctioned Mr Goh being paid in this way, the fact remains that Mr Goh did not ask them to sanction his behaviour so the question does not arise.

522 It is not suggested that Mr Goh and the BTEC team rendered greater service to Nedec/Kodec than was proper because of the Wyser Agreements. Hence, as indicated above, his breaches lay in the way he structured the payments to be made to him rather than to BTEC and in his failure to notify the Board of the Wyser Agreements and seek its consent thereto.

Act (5) - Mr Goh's involvement in the continued negotiations for the purchase of BTEC by Nedec/Kodec leading up to the LOI

523 The negotiations between Mr Goh, Mr Tony Lee and Mr Hwang for the purchase of BTEC by Nedec/Kodec continued from 3 January 2012 through to the sending of the LOI on 24 April 2012 to the termination of the negotiations through Mr Goh and his replacement by BDA in June 2012 (see [383]–[417] above)

524 At [420] above, I concluded that in carrying out the various negotiations leading to LOIs not only from Nedec/Kodec but also from Magne was consistent with and in furtherance of the policy of both the old Board and of Mr Shaw and Channelview to consider divesting the PES Division. I did however conclude that Mr Goh could be criticised in two respects in relation to the Nedec/Kodec negotiations. First, he failed to keep the two Boards fully informed as to the progress of the various negotiations he was involved in and, secondly, on the basis that he became too close to Nedec/Kodec such that his judgment as to what was in the best interests of the Beyonics Group became blurred.

525 The Plaintiffs' complaint is that these factors indicate that the negotiations were not conducted at arm's length and that accordingly Mr Goh was in breach of his duties to the Plaintiffs. This however fails to take into account that by reason of the BN Alliance he had inevitably become better

acquainted with Mr Tony Lee and Mr Hwang than would normally be the case in takeover negotiations, even with an NDA in place. There was nothing wrong in exploiting that relationship if to do so would further the possibility of divestment at a favourable price. The fact remains that Mr Goh obtained an LOI for a greater sum than any obtained over the same time frame by BDA. In these circumstances I do not see how Mr Goh can be criticised for acting in the way he did.

526 The criticism that he did not inform either Board of the progress of the negotiations is a criticism that can be directed both at Mr Goh and at the two Boards for giving Mr Goh the freedom to operate as he saw fit and to report only by giving a presentation at Board meetings. It does not relate to the question of whether he acted in good faith in relation to the takeover.

527 Accordingly, Mr Goh did not breach any of his duties as a director or employee of the Plaintiffs in his dealings with Nedec/Kodec over the proposed purchase of BTEC by Nedec/Kodec.

Act (6) – Mr Goh's other interactions with Nedec/Kodec

528 These are the interactions considered in [436]–[454] above. The first relates to the work done by Mr Goh to assist Mr Tony Lee to obtain an e-coating plant for Nedec/Kodec's KPI facility in the Philippines.

529 Between 19 April and 18 June 2012 Mr Goh played an active part in seeking to bring Nedec/Kodec and Ovindo together so that KPI could purchase an e-coating line from Ovindo for the Seagate M8 programme. This programme

related to 2.5" HDDs[310] not to 3.5" HDDs which Beyonics manufactured for Seagate. The assistance provided by Mr Goh started immediately before the LOI was sent from Nedec/Kodec to Beyonics (22 April 2012) and ended just before Nedec/Kodec were refused exclusivity (6 July 2012). Mr Goh's assistance thus fell within the period that he was actively encouraging the purchase of BTEC by Nedec/Kodec. In any event Nedec/Kodec did not do business with Ovindo.

530 Taking such an active part to assist a competitor is not a normal part of the role of a CEO and, *prima facie*, would give rise to a justifiable assertion that it was not in the best interests of the company. However, in the circumstances of this case, the assistance has to be viewed in the context of the relationship which had developed between BTEC and Nedec/Kodec both as a result of the BN Alliance and the proposed takeover. Mr Goh had to take into account the potential for souring relations between the parties if he had refused to allow Mr Tony Lee and Mr Hwang access to BPM's factory against the potential assistance he was giving to a competitor by doing what he did. This is a matter of judgment. Other CEOs might have acted differently but that does not mean that what Mr Goh did in the circumstances was a breach of his duties.

531 In order to reach a conclusion that there was a breach of duty I have to be satisfied that in doing what he did, Mr Goh was acting *male fides*, knowing that what he was doing was not in the best interests of Beyonics, or that, objectively, no CEO could reasonably have believed that what he was doing was in the best interests of Beyonics. Whilst it may have been a wrong exercise of judgment to go to the lengths he did to assist Nedec/Kodec, I am unable to conclude in the circumstances that then existed that his conduct went beyond

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310 See, *eg*, 26AB 17218–17219.

what was reasonably permissible and entered the realms of *male fide* behaviour, either subjectively or objectively.

532 The second complaint relates to the alleged promotion and/or facilitation of the development of Nedec/Kodec as a supplier to Seagate. For the reasons given (see [454] above), in my judgment, there was nothing sinister in what he did. I shall therefore not consider the complaint further.

533 In conclusion therefore the sole breach of the duties imposed on Mr Goh in his capacity both as a director and/or employee of the various Plaintiffs was his participation in the Wyser Agreements. This is not to belittle the nature of that breach, it was an egregious breach and the sums paid under those agreements were disgorged to Beyonics as a result of the findings in the 672 action.

534 That is not however the end of the matter. I have likewise reached the conclusion that there was a breach in this regard and must therefore continue to assess what the effect of this breach was on the issues that are live in this action.

Consequences of the Breach

The Diversion Loss

535 The Diversion referred to in the pleadings is the fact that, pursuant to the BN Alliance, the 2nd Stage work was carried out at Langfang by Nedec/Kodec rather than by BTEC at Changshu.[311] This work could have been carried out more economically at Changshu as Seagate were paying US$1.92 for baseplates

311 Statement of Claim at 29.

produced by the BN Alliance but only US$1.84 for those wholly produced by BTEC. In both cases these prices included the cost adder of US$0.404.

536 Three breaches of duty are relied upon. First, Mr Goh's failure to disclose the first Wyser Agreement,[312] secondly the failure to inform the Board that BTEC had the capacity to carry out the 2nd Stage work at Changshu (or in reckless disregard as to whether there was such capacity or whether it could be achieved)[313] and third, the procurement of the US$2.5 million grant to Nedec/Kodec without notifying the Board of the second Wyser Agreement.[314] The second and third need to be considered before the first. Simply put, the Plaintiffs' case is that Mr Goh either knew that, or ought to have investigated whether, the necessary capacity was available or could readily be made available at Changshu but deliberately failed to do so. He failed to do so as to cause Beyonics to enter the BN Alliance. This was further enabled by wrongfully procuring the US$2.5 million grant and all of this was done for his personal gratification due to the Wyser Agreements.

537 The Plaintiffs have not proved that Mr Goh acted unreasonably in considering whether to enter negotiations for the BN Alliance. He took advice from Mr LH Lee on capacity at Changshu, was told that capital investment would be needed to increase capacity even by a limited amount and was aware that there was a double fetter on significant investment in the PES Division, both by the old Board and by the banks funding the takeover by Channelview. The BN Alliance represented a means of making profitable use of excess

312 Statement of Claim at 31(a).

313 Statement of Claim at 31(b).

314 Statement of Claim at 32–34.

capacity for 1st Stage work. They have also not proved that there was anything wrong in the way in which Mr Goh became involved in the negotiations leading up to the various aspects of financial aid provided by Seagate both to Nedec/Kodec and to the Beyonics Group.

538 There was however a serious breach of duty in Mr Goh's failure to inform the Board of the Wyser Agreements.

539 Following the structured approach of *Winsta*, it is first necessary to ask whether the Plaintiffs have established the fiduciary breach and the loss. They have done the former but only in relation to the Wyser Agreements. However, they have failed to do the latter in that they have failed to demonstrate that BTEC had the capacity to do the 2nd Stage work and thus there was no diversionary loss. Even if Mr Goh did in fact not act in the best interests of Beyonics in entering the Wyser agreements, if the Plaintiffs cannot establish the pleaded loss they cannot recover it.

540 Looking at it the other way round, and assuming that the Diversion Loss could be proved, the second aspect of the *Winsta* approach is to ask whether the Defendants can rebut the presumption that the loss was caused by the wrongful acts. This, in my judgment, they have done. The history of the negotiations leading to the BN Alliance considered in detail above demonstrates that the Wyser Agreements were reactive to the progress of those negotiations and were not proactive in causing the parties to enter the BN Alliance agreement. All three parties had reached agreement at the Tripartite meeting on 24 November 2011 before Mr Goh first provided drafts of the Wyser agreements to Mr Tony Lee.

The Total Loss

541 The Plaintiffs' claim in relation to the Total Loss is founded on the same basic assertion that, if BTEC had carried out the 2nd Stage work rather than Nedec/Kodec, then Nedec/Kodec would never have become a competitor of BTEC and hence, when the downturn came, BTEC would have retained the Brinks 2H work and would have remained a preferred Seagate supplier.[315]

542 Here, undoubtedly, the Plaintiffs have proved loss, in the sense that they did cease to be a supplier to Seagate. The details of this are considered in [455]–[462] above which concludes in [463]:

> It can be seen from the above that there were many factors involved in Seagate's decision to terminate the supply of baseplates from Beyonics, both from BPM and from BTEC. One of those was the fact that Nedec/Kodec had become qualified to carry out the 2nd Stage work and was going to qualify to carry out the 1st Stage work. This was therefore a cause of Beyonics losing the Seagate work but it was only one of a number of reasons.

543 Qualification to carry out 2nd Stage work was a necessary consequence of the BN Alliance but there was no breach of duty involved in Mr Goh's actions in concluding the BN Alliance. The legal question is not whether the fact that Nedec/Kodec had qualified to carry out the 2nd Stage work was a partial cause of the Total Loss; it is whether the Defendants can rebut the presumption that the proven breaches in any way caused the loss. On the findings of fact, this has been done. The Wyser Agreements did not cause the BN Alliance to be formed. Whilst Seagate was aware of the BN Alliance when making its decisions with regard to the future, it was not aware of the Wyser Agreements. The Wyser Agreements can therefore have had no influence on those decisions. Indeed, had

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315 Statement of Claim at 36.

Seagate been aware, it might perhaps have been an additional factor in Seagate not wanting Beyonics to remain a supplier.

Conclusion on Diversion Loss and Total Loss

544 Had the action not been struck out as an abuse of process under the *Henderson v Henderson* doctrine, the Plaintiffs' claims against Mr Goh in relation to both elements of loss based on his breaches of duty would have failed. It follows that their claim against Wyser for dishonest assistance and the claims against both Defendants based on conspiracy by unlawful means would also fail.

The Bonus

545 The matter of the bonus is different. When the Compensation Committee came to consider the question of bonus payments for 2011 at its meeting on 4 January 2012, no one on the compensation committee was aware of the Wyser Agreements. None of them was aware that Mr Goh stood to make the sums he did by way of payment to Wyser. The effect of the 672 Judgment was that Mr Goh and/or Wyser were ordered to disgorge US$166,554.02, which amounts very roughly to S$230,000 (at S$1.40 to US$1). This is to be contrasted with Mr Goh's annual salary in 2012 (before options and bonuses) of around S$1.2 million,[316] and the bonus of S$200,000 which he was awarded.

546 I have referred above to Professor Chua's evidence as to what the attitude of the Compensation Committee might have been had it known about the Wyser Agreements. But it did not. Mr Goh dishonestly concealed those

316 Shaw AEIC at 33.

agreements from the Board and from the Committee. He owed a duty to seek the Board's consent to him entering those agreements and he failed to do this. There is all the difference in the world between a director or employee who is open with his Board of Directors and gives them the option of consenting to agreements such as the Wyser Agreements and one who conceals them from the Board.

547 Bonuses are not paid to dishonest directors or employees. The attitude of the Compensation Committee would, or certainly should, have been different had a "whistle-blower" told them of the Wyser Agreements immediately prior to the meeting on 4 January 2012 and Mr Goh's breaches of duty had thus come to light before the Committee made its decision. It is inconceivable that a responsible Board, acting in the best interests of the shareholders, would either have allowed Mr Goh to keep the sums due under the Wyser Agreements or paid him any bonus.

548 Beyonics have already recouped the sums paid to Mr Goh under the Wyser Agreements but they have, to date, suffered a loss of S$200,000 in respect of the bonus.

549 To adopt the *Winsta* approach therefore, the Plaintiffs have proved the breach, failure to disclose the Wyser Agreements, and the loss, the S$200,000 paid by way of bonus. It is impossible for the Defendants to seek to rebut the presumption that the breach was not the cause of the loss. Accordingly, had the action not been struck out, the Plaintiffs' claim for repayment of the bonus would have succeeded.

The Resignation Agreements

550 These can be dealt with relatively briefly. When Mr Shaw accepted the terms Mr Goh offered for payments under the resignation agreements he was unaware of the Wyser Agreements. Again, Mr Goh, acting honestly, should have disclosed them and, applying the same "whistle-blower" test, if Mr Shaw had been aware, he would have been entitled to refuse to accept Mr Goh's offered terms. Indeed, having seen Mr Shaw in the witness box I have no hesitation in concluding that he would have done so and that he had every right to do so.

551 Whether one looks at this on the basis of a misrepresentation by silence or as a failure of consideration, the result is the same. But for the striking out of the action, the payments made under the Resignation Agreements would fall to be repaid.

Other Matters

552 Expert evidence was adduced by both parties in relation to the assessment of the sums due had the claim for the Diversion Loss and/or the Total Loss succeeded. Both Mr Iyer, a chartered accountant who gave financial evidence on behalf of the Plaintiffs and Mr Dass, also a chartered accountant, who gave equivalent evidence on behalf of the Defendants, gave their evidence fully and fairly and were plainly both well qualified to assist the court.

553 However, both had to prepare their reports on the basis of assumed facts as presented to them by their respective clients and both readily accepted that the financial outcome would be dependent on the facts as found after the trial. Having found on the facts that the alleged losses are unrecoverable, seeking to resolve the various issues that were in dispute between the experts would

necessarily involve making assumptions in conflict with those findings of fact. This is a fruitless task and I shall therefore not undertake it.

554 One thing is however clear in the light of the 672 Appeal Judgment, which is that each of the Plaintiffs must prove its own loss. BAP cannot claim for losses actually suffered by the other Plaintiffs. In particular, BAP cannot claim for any losses suffered by BTEC, a company registered in the People's Republic of China. An issue would thus have arisen as to whether the Plaintiffs' claims against BTEC were governed by the law of Singapore or the law of China.

555 The importance of this lies in different limitation periods under the two laws. The Defendants assert that the proper law is the law of China and that, had there been any loss proved by BTEC, recovery of any such losses would be time barred under the law of China. The Plaintiffs contend both that the proper law is the law of Singapore (where there is no dispute that any claim would not be time barred), but also that the Defendants' analysis of Chinese limitation law is wrong.

556 These are two complex issues and a significant body of expert opinion was served on behalf of the parties by two experts in Chinese law and counsel for the parties debated the matter fully in their written submissions. I intend no disrespect in declining to seek to resolve the debates between them. Anything I say will be *obiter* and I consider that it is better for difficult issues such as these to be resolved in a case where the outcome depends on a finding one way or the other. This is particularly so in the case of the Chinese law issue where a foreign judge is inevitably placed in an invidious position when faced with deciding questions of foreign law.

Conclusion

557 The bringing of this action is an abuse of process under the *Henderson v Henderson* doctrine and will be struck out. Had it not been struck out the Plaintiffs' claims for the Diversion Loss and the Total Loss would have failed but their claims for the return of the bonus and the payments made under the Resignation Agreements would have succeeded.

558 I shall hear the parties on the question of costs.

Simon Thorley
International Judge

Chin Li Yuen Marina, Alcina Lynn Chew Aiping, Siew Guo Wei, Aditi Ravi and Darren Ng Zhen Qiang (Tan Kok Quan Partnership) for the plaintiffs;
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