# Arubugam Suppiah v Curt Evert Borgensten
# [2001] SGHC 199

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| **Case Number** | : OS 600167/2001, SIC 600944/2001 |
| **Decision Date** | : 25 July 2001 |
| **Tribunal/Court** | : High Court |
| **Coram** | : Woo Bih Li JC |
| **Counsel Name(s)** | : Suresh Nair (Allen & Gledhill) for the plaintiff; Peter Gabriel and Diane The (Gabriel Peter & Partners) for the defendant |
| **Parties** | : Arubugam Suppiah — Curt Evert Borgensten |

**JUDGMENT:**

***BACKGROUND***

1. The Plaintiff Arubugam Suppiah ('Suppiah') and the Defendant Curt Evert Borgensten ('Borgensten') are shareholders of a company incorporated in the Bahamas called Johnson Industries Ltd ('JIL') in the following proportions:

Borgensten : 70%
Suppiah : 30%

2. JIL owns 100% of a company incorporated in Singapore called Johnson Industries Pte Ltd ('JIPL').

3. JIPL in turn owns various companies.

4. As a result of various disputes between Suppiah and Borgensten, the following actions were commenced in Singapore:

(a) Suit No 435 of 1999
(b) Originating Summons No 443 of 1999
(c) Originating Summons No 1348 of 1999

5. These actions were settled under a Deed of Agreement dated 4 February 2000 ('the Deed').

6. The relevant terms of the Deed are as follows:

<u>Clause 3.1</u>

In consideration of the payment of the non-refundable Option Price in accordance with this clause and the grant of the Option in accordance with clause 4, the parties hereto agree to all the terms herein

<u>Clause 3.2</u>

Borgensten shall pay Suppiah the Option Price in the following instalments:

(a) The first payment of the sum of Singapore Dollars One million (S$1,000,000.00) on the date hereof to Suppiah; and

(b) a second payment of the sum of Singapore Dollars One

million (S$1,000,000.00) on or before six (6) months from the date hereto.

Clause 8

It is hereby agreed that Borgensten shall be entitled to appoint and remove all of and any number of the directors to the Board of Directors of JIL and JIPL other than the director appointed by Suppiah provided always that Suppiah shall be entitled to appoint and remove one (1) director (himself or his representative) to the Board of JIL and JIPL. Suppiah shall only be entitled to appoint the said one director each to the Board of JIL and JIPL for so long as he owns the Suppiah Shares and Borgensten hereby undertakes to procure such appointment by Suppiah to be effected at the respective companies. The quorum for board of directors meeting in JIL and JIPL shall be any two directors.

Clause 9

9.1 Borgensten hereby irrevocably and unconditionally grants to Suppiah after the finalisation of the accounts of JIL for the financial year ending March 2000 and in any event after 30 June 2000 if such accounts are not finalised by then, the option to require Borgensten to purchase from Suppiah the Suppiah Shares, free from all lien charges and any encumbrances and with all rights attached thereto as at the date of exercise of the Put Option. This Put Option may be exercised by Suppiah in respect of all (and not part only of the Suppiah Shares) by the service of a written notice on Borgensten in the form of Schedule Two. Upon receipt of such notice, Suppiah shall be authorised to instruct the auditors of JIL to determine the Specified Price.

Borgensten shall pay for the Suppiah Shares the Specified Price over a period of twenty four (24) months in eight (8) equal quarterly instalments, the first such being paid within thirty (30) days of the Specified Price being determined and Suppiah shall transfer the Suppiah Shares to Borgensten in eight (8) equal parts as and when payment of an instalment is made by Borgensten.

Clause 10.1.2

Suppiah and Borgensten shall use all endeavours to finalise the accounts of JIL for the financial year ending March 2000 as soon as possible. Borgensten shall take all necessary steps to ensure that JIL and JIPL provides all directors in JIL and JIPL with quarterly management accounts, such quarterly accounts to be provided within 90 days of the expiry of such quarter. For the purposes of this clause the first quarter for which management accounts are to be provided shall be the quarter commencing 1$^{st}$ April 2000. Further, Borgensten shall take all necessary steps to ensure that the unaudited annual accounts of JIL and JIPL shall be made available to all directors in JIL and JIPL within 90 days of the closing of the financial year. Borgensten shall ensure that each of the directors gets a copy of the audited accounts of JIL and JIPL within 14 days of the audited accounts being made available.

Clause 11

> Each Party undertakes to the other that it shall from time to time on written request by any Party at the requesting party's cost do or procure the doing of all such acts and will execute or procure the execution of all such documents as any Party may reasonably consider necessary or desirable for giving full effect to this Deed or securing to the others the full benefits of all rights, powers and remedies conferred upon the others in this Deed.

7. As can be seen, under Clause 3.2 of the Deed, Borgensten was supposed to pay Suppiah $1m on the date of the Deed and another $1m on or before 4 August 2000. The first $1m was paid but not the other $1m ('the said $1m'). By a letter from Suppiah's solicitors dated 7 August 2000, payment of the said $1 million was requested. Suppiah also exercised his Put Option requiring Borgensten to purchase his shares in JIL. Borgensten failed to pay the said $1m.

***WRIT OF SUMMONS NO S612/2000/H***

8. Suppiah then commenced action on 15 August 2000 by filing Writ of Summons No S 612/2000/H for the said $1m.

9. Suppiah subsequently applied for summary judgment and at the adjourned hearing of the application for summary judgment on 13 November 2000, an Assistant Registrar allowed the application and judgment was entered against Borgensten.

10. The next day, Borgensten filed an appeal. The appeal was heard before me on 21 November 2000. On 28 November 2000, I dismissed Borgensten's appeal.

11. By a letter dated 4 December 2000, Borgensten's solicitors requested further arguments to be heard. On 15 January 2001, I heard further arguments and affirmed my original decision.

12. In the meantime, after the judgment on 13 November 2000, Suppiah's solicitors applied on 16 November 2000 for an order that Borgensten attend and be orally examined before the Registrar as to:

> (a) whether any and what debts are owing to him;
> (b) whether he has any and what other property or means of satisfying the Judgment.

13. The application was heard on 16 November 2000 and allowed ('the 16/11/00 and 1st EJD Order'). The examination was fixed for 5 December 2000. The Order of Court was served on Borgensten by leaving it at JIPL's premises on 27 November 2000.

14. Borgensten did not attend court on 5 December 2000, as ordered. Instead, on 2 December 2000, Borgensten applied for an extension of time to comply with the 16/11/00 and 1st EJD Order. The reason given in the affidavit for the application for an extension of time was that winding up proceedings had been started in the Bahamas by Suppiah and that until that was resolved, Borgensten would not be able to attend any proceedings in Singapore. Borgensten's application for extension of time was fixed for hearing at the same time as the EJD hearing, i.e 5 December 2000.

15. At the hearing on 5 December 2000, an Assistant Registrar made an order ('the 5/12/00 and 2nd EJD Order) including the following:

> '(1) The Plaintiff is to serve on the Defendant's solicitors an exhaustive list of questions which they wish to ask the Defendant, such list to be served on or before 12 December 2000 by 4.00pm. The Plaintiff shall also serve on the Defendant's solicitors a list of documents that they require production of, such list to be served on or before 12 December 2000 by 4.00pm.
>
> (2) The Defendant is to file and serve an affidavit which sets out each question and the Defendant's answer to the question, such affidavit to be filed and served on or before 5 January 2001 by 4.00pm. The Defendant is to produce such of the documents requested for as are in his possession, custody and power to the Plaintiff's solicitors at their office on a date and time to be agreed that is on or before 5 January 2001.
>
> (3) The date fixed for the examination of the abovenamed Defendant/Judgment Debtor be adjourned to 9 January 2001 at 2.30pm. In the event that the Defendant is unable to comply with these directions within the time frame stipulated, the Defendant should take out an application for an extension of time and justify why an extension is needed.'

16. Pursuant to the 5/12/00 and 2nd EJD Order, Suppiah's solicitors wrote to Borgensten's solicitors on 12 December 2000 setting out the information and documents that were required from Borgensten.

17. By a letter dated 3 January 2001, Suppiah's solicitors reminded Borgensten's solicitors that under the terms of the 5/12/00 and 2nd EJD Order, Borgensten was required to produce the documents requested in their letter dated 12 December 200 by 5 January 2001.

18. Borgensten did not provide his affidavit of assets as ordered. Neither did he provide any documents. Instead, on 5 January 2001, Borgensten's solicitors filed an application asking for an extension of time to comply with the 5/12/00 and 2nd EJD Order. One of the reasons given by Borgensten was that he was suffering from some 'acute illness' which prevented him from travelling to Asia.

19. At the adjourned hearing on 9 January 2001, Borgensten did not attend and was represented by his solicitors. The hearing was adjourned for two weeks and Borgensten was ordered to furnish the information and documents requested by Suppiah's solicitors in their letter of 12 December 2000 (apparently with some minor exceptions) by way of an affidavit before the adjourned hearing on 23 January 2001, at which he was to attend for examination ('the 9/1/01 and 3rd EJD Order'). The 9/1/01 and 3rd EJD Order was served on Borgensten on 22 January 2001.

20. Borgensten did not provide any affidavit of assets or documents as ordered. He also did not attend the hearing on 23 January 2001 to be examined although his solicitors did . He did not explain in any affidavit his failure to comply with the 9/1/01 and 3rd EJD Order. The reason provided by Borgensten through his solicitors at the hearing was that he was still considering whether to pay the said $1m or to appeal against my decision.

21. At the hearing on 23 January 2001, an Assistant Registrar ordered as follows ('the 23/1/01 and 4th EJD Order'):

> '(1) The date fixed for the examination of the abovenamed Defendant/Judgment

Debtor be adjourned to 13 February 2001 at 2.30pm.

(2) Unless the Court otherwise orders, the Judgment Debtor shall attend personally on 13 February 2001 at 2.30pm to be examined.

(3) The Judgment Debtor shall file and serve the affidavit ordered to be filed pursuant to the Order of Court dated 9 January 2001 by 4.00pm on 6 February 2001.

(4) The Judgment Creditor may serve the Judgment Debtor with a copy of this Order of Court by delivering a copy of this Order of Court to the Judgment Debtor's solicitors and such service shall be deemed good and sufficient service of the Order of Court on the Judgment Debtor.

(5) The Judgment Debtor's solicitors shall fax a copy of this Order of Court to the Judgment Debtor and the Judgment Debtor shall be deemed to have actual notice of this Order of Court upon such fax being sent by the Judgment Debtor's solicitors.'

***ARBITRATION PROCEEDINGS***

22. While steps were being taken by Suppiah in the Writ action to recover the said $1m, Suppiah also instituted arbitration proceedings.

23. On 6 December 2000, Suppiah's solicitors filed a Notice of Arbitration alleging that Borgensten had repudiated the Deed and claiming damages.

24. I set out below the allegations of the alleged repudiatory breaches by Borgensten as stated in the Notice of Arbitration:

`***Repudiatory Breaches of the Deed***

13. In breach of clause 3.2 of the Deed, the Respondent has to date failed to make payment of the 2nd tranche of $1 million. The Claimant has commenced proceedings in Suit No 612/2000/H for payment of the said sum, and has obtained Judgment on 14 November 2000. The Respondent appealed against the Judgment, to a Judge of the High Court. The appeal was dismissed with costs on 28 November 2000. The Judgment to date remains unsatisfied.

14. By a Notice dated 7 August 2000 ("the Notice"), the Claimant exercised his Put Option pursuant to clause 9 of the Deed.

15. On 18 August 2000, the Claimant, through his solicitors, forwarded a circular members' resolution to the Respondent for his signature, to effect the Claimant's appointment to the Board of Directors of JIL.

16. In breach of clause 8 of the Deed, and despite several reminders, the Respondent failed, refused and/or neglected to sign the resolution and/or procure the appointment of the Claimant to the Board of Directors of JIL.

17. In breach of clause 10.1.2 of the Deed, the Respondent has also failed,

refused and/or neglected to:-

17.1 Use any or sufficient endeavours to finalise the accounts of JIL for the financial year ending 2000 as soon as possible;

17.2 Take all or any necessary steps to ensure that JIL and JIPL provides all directors in JIL and JIPL with quarterly management accounts within 90 days of the expiry of the quarter commencing 1 April 2000;

17.3 Take all or any necessary steps to ensure that the unaudited annual accounts of JIL and JIPL were made available to all directors in JIL and JIPL within 90 days of the closing of the financial year ended 30 March 2000.

18. By 31 August 2000, the audited accounts of JIL had not yet been prepared. The Respondent, as the sole director of JIL, had knowledge of the identity of JIL's auditors. Accordingly, by a letter of that date from the Claimant's solicitors to the Respondent, the Claimant asked the Respondent for the name and address of JIL's auditors by 5.00 pm on 2 September 2000.

19. In breach of the Clause 11 of the Deed and despite several reminders, the Respondent failed, refused and/or neglected to revert to the Claimant on the identity of JIL's auditors.

20. As a result of the Respondent's breaches of the Deed, the Claimant has been prevented from:

20.1 Seeing to the preparation of JIL's audited accounts for the financial year ended March 2000; and

20.2 Instructing JIL's auditors to determine the Specified Price pursuant to Clause 9.1 of the Deed.

21. The Claimant has discovered that, while preventing the determination of the Specified Price and refusing to procure the Claimant's appointment to the Board of JIL, the Respondent has been making concerted efforts to depress the value of the Claimant's shares in JIL's shares for the purposes of the Deed.

22. In the premises, the Respondent has evinced an intention no longer to perform his obligations under the Deed and is in repudiatory breach thereof, and the Claimant has suffered loss and damage. Alternatively, the Respondent has evinced an intention to render substantially different performance from that envisaged under the Deed, and is thereby in repudiatory breach thereof. On 29 November 2000, the Claimant accepted the Respondent's repudiation of the Deed.

23. On 30 November 2000, after the Claimant accepted the Respondent's repudiatory breach of the Deed, the Respondent purported to appoint the Claimant to the Board of JIL pursuant to clause 8 thereof. The Claimant says

that this "appointment" is ineffectual to restore the Deed.'

***INJUNCTION PROCEEDINGS AND ORDERS***

25. On 8 February 2001, Suppiah's solicitors filed an ex parte Originating Summons No 600167 of 2001 ('the OS') for a Mareva Injunction Order against Borgensten pending the conclusion of the arbitration proceedings.

26. The application sought to restrain Borgensten from removing his assets out of Singapore up to the value of $10m or from disposing or diminishing the value of his assets.

27. The $10m figure was based on a figure of about $7.7m being the value attributed by Suppiah to his 30% shareholding in JIL which Borgensten was supposed to buy after the exercise of the Option by Suppiah. This value was based on a set of accounts prepared by JIPL's auditors but not audited accounts.

28. In addition, Suppiah was claiming a further $2m for breach of another provision in the Deed, i.e Clause 7.2, under which Borgensten had agreed that if he brought any action or proceeding in respect of any settled matter (as provided in Clause 5.2 of the Deed), Suppiah would be entitled to exercise the Option at a certain price plus $2m.

29. At the same time the OS was filed, Suppiah's solicitors also filed an ex parte Summons-in-Chambers in the Writ action seeking similar injunctive relief but in respect of the said $1m, interest and costs.

30. The grounds of the applications were similar:

(a) Borgensten's failure to pay the said $1m for which there was a judgment
(b) Borgensten's failure to comply with various EJD Orders
(c) Borgensten's alleged attempt to siphon RM9.8m from JIPL
(d) Borgensten's alleged refusal to appoint Suppiah to the board of directors of JIL, in breach of the Deed
(e) Borgensten's alleged failure to prepare accurate accounts for JIL and its subsidiaries, in breach of the Deed.

31. Both applications were heard before Judicial Commissioner Lee Seiu Kin on 8 February 2001 and he granted the reliefs sought. However, for the Mareva Injunction Order in the OS, he limited the figure to $5m. Mr Nair said that this was apparently because Lee JC said that Suppiah had to give some credit for his shares since he was not claiming the purchase price thereof but damages. However, Suppiah also had a claim for $2m for breach of Clause 7.2 (see para 28 above).

32. For the Mareva Injunction Order in the Writ action, the figure was limited to $1.1m which included interest and costs.

33. Paragraph 2 of each Mareva Injunction Order ('MI Order') required Borgensten to inform Suppiah in writing at once of all his assets, such information to be confirmed in an affidavit within 14 days after the MI Order is served on Borgensten.

34. Furthermore, under each MI Order, Suppiah was granted leave to serve the MI Order by serving the same on Borgensten's solicitors Gabriel Peter & Partners. The service was effected on the same

day as the date of the MI Orders i.e 8 February 2001.

***APPLICATIONS TO APPOINT RECEIVERS AND APPLICATIONS FOR LEAVE TO APPLY FOR ORDERS OF COMMITTAL***

35. Subsequently, Suppiah's solicitors filed two similar applications in the OS and the Writ action on 14 March 2001 for the appointment of receivers over the assets of Borgensten in aid of the MI Orders.

36. The reason given was Borgensten's failure to comply with Paragraph 2 of the MI Orders.

37. Furthermore, for the Writ action, Borgensten had failed to comply with the four EJD Orders which I have already mentioned. He had also failed to comply with a 5th EJD Order made on 13 February 2001 (after the two MI Orders).

38. Under the 5th EJD Order, Borgensten was to file and serve an affidavit disclosing information and documents set out in a schedule and to attend personally at the next hearing on 27 February 2001 at 2.30 pm.

39. His affidavit was not filed or served and he did not appear on 27 February 2001.

40. According to Suppiah's solicitors, an Assistant Registrar had at the 13 February 2001 hearing commented that Suppiah should consider instituting contempt proceedings against Borgensten.

41. On 15 March 2001, one day after the applications to appoint receivers were filed, Suppiah's solicitors filed ex parte applications in the OS and the Writ action for leave to apply for an Order of Committal against Borgensten for his failure to comply with Paragraph 2 of each of the MI Orders and, in addition for the Writ action, his failure to comply with various EJD Orders.

42. The applications for leave came up for hearing before me on 23 March 2001 and I granted leave to apply for Orders of Committal.

43. The applications for appointment of receivers came up for hearing before me on 26 March 2001.

44. Ms Diane The for Borgensten sought an adjournment of this hearing on the basis that her firm had received instructions to set aside the MI Orders. Borgensten was said to be in Switzerland and she expected to have his affidavit for his application filed within a week.

45. Mr Suresh Nair for Suppiah objected to the application. He argued that the MI Orders had been obtained, and served, on 8 February 2001 and yet Borgensten had failed to comply with Paragraph 2 thereof since then.

46. Furthermore, Borgensten had not applied to discharge the MI Orders and even as at the date of the hearing of the applications to appoint the receivers, he still had not done so.

47. Mr Nair also informed me that in the Writ action, he had just managed to obtain a garnishee order absolute earlier on the same morning i.e 26 March 2001 in respect of Borgensten's account with Credit Suisse for $1.06m which did not quite cover the entire judgment sum i.e principal, interest and costs.

48. I refused the application for an adjournment and after hearing arguments on the main

applications, I made an order for an appointment of receivers in the OS action.

49. As for the Writ action, I deferred my decision thereon to give Borgensten a chance to pay the shortfall of about $20,000 rather than incur the costs and expense of a receivership for this relatively small sum.

50. After a few weeks, Mr Nair confirmed that the shortfall had been paid. The application to appoint receivers in the Writ action therefore became academic and I made no order thereon in the Writ action. However the order appointing receivers in the OS remained.

51. In the meantime, on 4 April 2001, Suppiah applied in the OS and in the Writ action for orders of committal to be made against Borgensten pursuant to the earlier orders granting leave to do so.

***BORGENSTEN'S APPLICATION TO SET ASIDE AN MI ORDER AND FOR OTHER RELIEF***

52. Before the applications for orders of committal were heard, Borgensten's solicitors filed an application on 26 April 2001 in the OS for the following relief:

(a) To set aside the MI Order and for assessment of damages
(b) Alternatively for the MI Order to be varied
(c) For the Order appointing the Receivers to be set aside
(d) That the Committal Proceedings commenced by Suppiah be set aside or stayed.

No similar application was filed for the Writ action presumably because the MI Order therein was no longer applicable as Suppiah had been paid the judgment sum.

53. I should mention that the supporting affidavit for Borgensten's application was signed on 24 April 2001, about one month after the hearing on 26 March 2001 for the appointment of receivers, and not within one week as had been represented to me when an adjournment of that hearing was being sought.

54. Borgensten's application to set aside the MI Order in the OS and for other relief was heard by me on 30 April 2001.

55. One of the arguments made by Ms The for Borgensten was that there was no valid cause of action. She argued that the injunction sought was ancillary to the arbitration and that the arbitral tribunal did not have jurisdiction to determine the Specified Price i.e the price at which Borgensten was supposed to buy Suppiah's shares in JIL.

56. Mr Nair countered by pointing out that Suppiah was not claiming the Specified Price in the arbitration proceedings but damages as he had accepted the alleged repudiation of the Deed by Borgensten.

57. It should also be remembered that although the main claim by Suppiah was in relation to the sale of his shares in JIL, he also had another claim in respect of Borgensten's alleged breach in making a claim on matters which had been resolved.

58. Clearly there were serious questions to be tried before the tribunal or Suppiah had a good arguable case, whichever test was adopted.

59. I should also mention another point taken by Ms The. She said that Borgensten has 70% of the shares in JIL. If Suppiah's 30% shareholding is worth $5m, which is the limit in the MI Order in the OS, then Borgensten's 70% must be worth more than $5m.

60. I would reiterate that the $5m limit in the MI Order was not based on the value of Suppiah's 30% shareholding per se (see para 31 above).

61. In any event, if Borgensten's 70% shareholding is truly worth more than $5m, then the MI Order should not prevent him from dealing with his other assets so long as (a) he is able to establish that that was the true value of his 70% shareholding at the time of service of the MI Order on him and (b) he does not do anything to deliberately diminish the value of the shares.

62. If there is any uncertainty or dispute over this aspect of the MI Order, it can be resolved by the court but that was not the dispute before me.

63. I also note that the fifth and last line of paragraph 1(2) of the MI Order state that Borgensten may remove, dispose or deal with his assets so long as his assets remain 'above' S$5m. I think this is an error, probably arising from some standard precedent as I have noticed a similar error arising in another case. It should read 'not less than' S$5m. The error should be corrected as soon as possible, if this has not already been done.

64. The real thrust of Borgensten's application was that there was no real risk of dissipation by him of his assets pending the hearing before the tribunal. For this, he responded to the various grounds relied on by Suppiah for the MI Order.

***Failure to pay the said $1m and the EJD Orders***

65. Borgensten said he could not attend court on the first appointed date of 5 December 2000 as he had to attend to urgent matters in the Bahamas where Suppiah had filed a winding up petition on 8 November 2000 to wind up JIL.

66. In relation to the 5/12/00 and 2$^{nd}$ EJD Order, he said he knew he would not be complying with it. That is why he had instructed his solicitors to file an application for an extension of time with a supporting affidavit from his solicitor Diana The. One of the reasons given in the supporting affidavit was that he was unwell. This was supported by a medical certificate dated 19 December 2000 from Dr Med H.R. Walder. It said:

> '<u>Medical certificate</u>
>
> I hereby certify, that Mr. Curt Borgensten came to my office urgently on Dec 18 2000 due to acute illness.
>
> He is incapable of working and travelling and therefore he can not fly to Asia at the beginning of the coming year as planned.
>
> The incapacity of travelling will last most probably for 3 to 4 weeks.
>
> Mr Borgensten could not foresee this illness at the time of booking his flight to Asia.'

67. Borgensten also claimed that on 16 January 2001, he had credited US$564,272.88 into his US dollar account with Credit Suisse in Singapore and this was converted into S$981,463.55 and credited into his Singapore dollar account with Credit Suisse on 23 January 2001. On 6 February 2001, an additional amount of S$73,000 was credited into his Singapore dollar account. The total was about S$1,055,000. He said this was remitted to satisfy the judgment (in the Writ action for the said S$1m, interest and costs) and this was contrary to any allegation of dissipating his assets.

68. Mr Nair pointed out that the medical certificate was wanting. There was no elaboration of the mysterious 'acute illness' that Borgensten was supposed to have been suffering.

69. Furthermore, there was still no explanation for Borgensten's failure to comply with the 3rd and 4th EJD Orders and the subsequent 5th EJD Order.

70. As regards the alleged crediting of US$564,272.88 by Borgensten, Mr Nair referred to a 16 January 2001 notification from HL Bank to Borgensten. The last sentence reads, 'The balance of USD564,272.88 is remitted to Bank of New York, New York for the account of Credit Suisse Private Bank, Singapore Branch favouring yourselves account number 5013'.

71. Mr Nair submitted that this demonstrated that the monies were not remitted to Singapore.

72. Mr Nair also submitted that even if the monies were remitted to Singapore, Suppiah was not informed of this. Suppiah had to initiate various steps to obtain payment.

73. I accepted Mr Nair's arguments.

74. I noted that Borgensten could easily have produced a document from Credit Suisse in Singapore to confirm that the US$564,272.88 had been remitted to Singapore if this was indeed the case.

75. Furthermore, even if indeed this was the case, Borgensten was aware that Suppiah had been compelled to take step after step to try and recover the judgment sum. If Borgensten's intention was really to use the monies to pay Suppiah, he would have told his solicitors to inform Suppiah's solicitors accordingly so that it would be unnecessary for the latter to continue taking so many steps.

76. It was the good fortune of Suppiah to have managed to garnish the monies in the account with Credit Suisse later. From the records, the Garnishee Order Nisi was obtained on 14 March 2001 only. Also, as I have mentioned, the monies garnished still left a shortfall as there was interest and costs to be paid. In my view, Borgensten had never intended the monies to pay the judgment sum. Yet when the monies were garnished, he sought to turn this around to his advantage by saying that the monies were intended to pay the judgment sum.

***Attempt to siphon RM9.8m from JIPL***

77. According to Borgensten, he had not attempted to siphon monies from JIPL.

78. In 1997, JIPL sold 50% of its subsidiary Johnson Industries Holdings AG to a Finnish company for RM27.7m. Of the sale proceeds, RM9.8m was transferred to Johnson Coating Invest AG ('JCI') a Swiss company and RM4m was transferred to Third Heritage Sdn Bhd. The balance was transferred to JIPL.

79. Borgensten was obviously aware hat JCI had no interest or right to the RM9.8m. He did not dispute that he was the holder of 48 out of 50 shares in JCI.

80. However he claimed that actually the RM9.8m was a loan from JIPL (the vendor of the shares) to JIL (the Bahamas company and parent of JIPL) and from JIL to JCI. He claimed that Suppiah was in charge of finance in JIPL and should have seen to it that the books of JIPL had been properly kept.

81. It appeared that there was no contemporaneous record in JIPL or JIL or JCI to show the reason why RM9.8m had ended up in JCI.

82. Borgensten also said that the alleged loan was eventually repaid, if not entirely, then substantially.

83. Much time was spent to demonstrate that most of the alleged loan was eventually paid. However it did not address the point as to why JIPL should go about making a loan in the first place and why in the indirect manner alleged by Borgensten i.e from JIPL to JIL and then from JIL to JCI instead of from JIPL to JCI directly.

84. The fact that the alleged loan was eventually substantially repaid did not address the questionable circumstances surrounding the loan in the first place. It may have been that something more sinister was intended and then reversed on the transaction being uncovered or it may all have been innocent. However the matter was not as straightforward as Borgensten was suggesting.

***The appointment of Suppiah as director of JIL***

85. Borgensten alleged that he had never refused to appoint Suppiah as director of JIL, which appointment he was required to do under the Deed. He claimed that he was in the process of arranging the appointment of Suppiah but he was involved in an extensive overseas business trip and as such could not attend to the matters raised in the letters from Suppiah's solicitors.

86. He also claimed that a more important reason why he was hesitant to appoint Suppiah as a director was because he had discovered that Suppiah had been acting against the interests of JIL and JIPL in matters of a subsidiary of JIPL. This concern was raised by his solicitors in a letter dated 26 November 2000.

87. I did not accept these explanations.

88. Allen & Gledhill, acting for Suppiah, had requested Borgensten to, inter alia, appoint Suppiah to the board of JIL in their fax/letter dated 24 August 2000 and forwarded a written resolution to this effect for Borgensten's signature. Gabriel Peter & Partners responded on 28 August 2000 to say that Borgensten was arranging for this to be done.

89. When Allen & Gledhill chased for this to be done, Gabriel Peter & Partners responded on 14 September 2000 and gave the same excuse.

90. After some more chasers from Allen & Gledhill, Gabriel Peter & Partners responded on 20 November 2000 to say for the first time that Borgensten was 'at the moment involved in an extensive overseas business trip'. This was almost three months after the request was first made by Allen & Gledhill on 24 August 2000.

91. In Gabriel Peter & Partners' fax dated 26 November 2000, they then raised also for the first time the allegation that Suppiah had not acted in the interest of JIL and JIPL and said that Borgensten would be seeking redress and 'cannot in the meantime appoint your client as a director in JIL'.

92. In response, Allen & Gledhill replied on 29 November 2000 and treated Borgensten as repudiating the Deed in view of (a) his failure to pay the said $1m at that time, (b) his failure to appoint Suppiah as a director of JIL and other alleged breaches.

93. Significantly, Borgensten then signed a resolution dated 30 November 2000 to appoint Suppiah as a director of JIL notwithstanding the excuse that Suppiah had not been acting in the interests of JIL and JIPL.

94. There was yet another point. Although Borgensten was too busy to appoint Suppiah as a director of JIL, he had no difficulty in arranging for the appointment of one Stephen Buhrer to the board of JIL on or about 5 September 2000 (see para 8 of Suppiah's 1st affidavit in the OS).

95. The above facts speak for themselves.

***Accounts of JIL and JIPL***

96. Under Clause 10.1.2 of the Deed, Suppiah and Borgensten were obliged to:

> (a) Use all endeavours to finalise the accounts of JIL for the year ending March 2000 as soon as possible,
>
> (b) Take all necessary steps to ensure that JIL and JIPL provide all directors in JIL and JIPL with quarterly management accounts, such accounts to be provided within 90 days of the expiry of such quarter, with the first quarter being the quarter commencing 1 April 2000.

In addition, Borgensten was obliged to:

> (c) Take all necessary steps to ensure that the unaudited accounts of JIL and JIPL shall be made available to all directors of JIL and JIPL within 90 days of the closing of the financial year, and
>
> (d) Ensure that each of the directors gets a copy of the audited accounts of JIL and JIPL within 14 days of the audited accounts being made available.

97. Suppiah had alleged that Borgensten had breached all these obligations.

98. Borgensten said that JIPL's accounts were messy. Suppiah was aware of this as he was the Group Financial Officer at the material time. JIL's accounts could not be finalised until JIPL's accounts were finalised.

99. Furthermore, he claimed he had appointed a Swiss firm of accountants Juris Treuhand AG and Ernst & Young to audit the books of JIL even though JIPL's accounts had not yet been finalised.

100. He also claimed that, as at 6 April 2001, there was some problem in getting the March 1999 accounts of JIPL finalised apparently because of some differences about the payment of audit fees.

101. I did not reach any tentative conclusion on Suppiah's allegation on this issue at the stage of the hearing before me.

102. However, Suppiah had also complained that Borgensten was in breach of Clause 11 of the Deed (see para 6 above) by refusing to supply him with the name of JIL's auditors, which he had requested to move things along, until after Suppiah had commenced winding up proceedings in the Bahamas. There was some merit in this complaint and Borgensten's omission did not reflect well on him.

103. Ms The argued that even if Borgensten had failed to appoint Suppiah as a director of JIL and had failed to provide accounts, such conduct did not demonstrate that Borgensten was likely to dissipate his assets to avoid an award against him.

***General***

140. Ms The relied heavily on the case of *Heng Holdings SEA (Pte) Ltd v Tomongo Shipping Co Ltd* [1997] 3 SLR 547 ('Heng Holdings').

105. In that case, the question arose whether there was evidence or sufficient evidence that the defendants would dissipate or at least were likely to dissipate their assets so as to defeat or frustrate the realization of a judgment that the plaintiffs might eventually obtain against them.

106. At paras 48 to 50, L P Thean JA said:

> ' 48. The learned judge in refusing to set aside the Mareva injunction said:
>
> > In considering whether there is a risk of dissipation of assets, the court is entitled to take into consideration the past conduct of the defendants. In this case, there was first, the fact that the defendants had not been forthcoming at all in responding to the plaintiffs' claim. They had largely ignored it. There was then the history of their defaults in discharging their debts. There had been instances when they paid up only when execution proceedings had been taken against them. So far as their accounts are concerned, they do show the company as owning substantial fixed assets, but most of these assets have been mortgaged to secure overdraft and other facilities. What is of particular interest are receivables in substantial amounts shown as due from the holding company (nearly $9m) and 'related parties' (nearly $6.4m). These receivables are noted in the accounts as unsecured, interest-free and with no fixed term of payment. Such financial practices of the defendants are in my view particularly relevant when considering the question of risk of dissipation.
>
> 49. With great respect, we are unable to agree with the learned judge. First, the fact that the appellants had largely ignored the respondents' claim does not show that a judgment in favour of the respondents would not eventually be satisfied. We agree that the appellants had not been prompt in responding to the claim. The evidence suggests that the appellants were aware of the claim as early as November 1995 and they appeared to have done nothing to settle the claim or discharge their obligations under the indemnity. The only replies the

respondents obtained from them before the action was commenced were the two faxes in September 1996 stating that the appellants were not in a position to put up security and that the respondents should proceed to do so themselves. However, we are unable to infer from the mere fact that the appellants were uncommunicative and reluctant to fulfill their contractual obligations that they would dissipate their assets so as to prevent a judgment obtained against them from being satisfied.

50. The same is true of the second reason given by the learned judge, namely, the past instances when the appellants' creditors had to resort to execution proceedings against them to recover payment of their debts. The respondents had shown various instances where the appellants had failed or refused to pay and discharge their debts or liabilities until their creditors put in force execution proceedings. All these, of course, do not speak well of the appellants and show undoubtedly that they are very bad paymasters, and that they are in a habit of not paying or refusing to pay their debts, until the bailiff is at their doorsteps with the writs of execution. Nonetheless, all these facts do not give rise to an inference that the appellants would dissipate or were likely to dissipate their assets so as to frustrate any judgment in favour of the respondents.'

107. However there were other factors in that case. At paras 46 to 47, Thean LA said:

' 46. The appellants' main contention before us is that the respondents had not shown that there was a real risk of dissipation of assets by the appellants. The appellants had taken no action at any time to dissipate any of their assets. On the contrary, they had made a further major investment in the course of their business by acquiring some shophouses in McKenzie Road at a price of S$10.7m for redevelopment in mid-1996. They relied on their audited accounts for the financial year ending 30 September 1995 which showed that their financial position was sound. The audited balance sheet showed their fixed assets having a value of about S$24m, which included a six-storey building in Bukit Timah Road called Tong Nam Building. The balance sheet also showed their current assets with a value of over S$15m, against their current liabilities to the extent of over S$12m and non-current liabilities of over S$2m. It was therefore argued that they clearly had sufficient assets to satisfy the respondents' claim of S$1.3m. They explained that they had been slow in satisfying the claim and in providing substituted security because their existing bank lines had been fully utilised and they needed time to negotiate fresh lines of credit.

47. We agree with this submission. On the evidence, the appellants are a company with substantial fixed assets and they appeared to be carrying on business in the normal way. There was no evidence of any real risk that the appellants' assets would be dissipated or were likely to be dissipated such that a judgment obtained against them would go unsatisfied.'

108. In *Choy Chee Keen Collin v Public Utilities Board* [1997] 1 SLR 604, Thean JA said at paras 20 and 21:

' 20. In *The Niedersachsen; Ninemia Maritime Corp v Trave Schiffahrtsgesselschaft mbH & Co KG* [1984] 1 All ER 398, Mustill J, whose judgment at first instance was upheld on appeal, held that the plaintiff would

have to adduce 'solid evidence' to support his assertions of a real risk of dissipation. He said, at p 406:

It is not enough for the plaintiff to assert a risk that the assets will be dissipated. He must demonstrate this by solid evidence. This evidence may take a number of different forms. It may consist of direct evidence that the defendant has previously acted in a way which shows that his probity is not to be relied on. Or the plaintiff may show what type of company the defendant is (where it is incorporated, what are its corporate structure and assets, and so on) so as to raise an inference that the company is not to be relied on. Or again, the plaintiff may be able to found his case on the fact that inquiries about the characteristics of the defendant have led to a blank wall. Precisely what form the evidence may take will depend on the particular circumstances of the case. But the evidence must always be there.

21. At the minimum, a plaintiff in seeking a Mareva injunction must furnish 'some grounds for believing that there is a risk' of the assets being dissipated (per Lai Kew Chai J in *Art Trend Ltd v Blue Dolphin (Pte) Ltd* [1983] 1 MLJ 25 at p 29; [1982-1983] SLR 362 at p 367). A mere possibility or unsupported fear of dissipation is insufficient: *O'Regan & Ors v Iambic Productions Ltd* (1989) 139 NLJ 1378, at p 1379 where Sir Peter Pain said:

> There are numerous paragraphs in the authorities relating to Mareva injunctions which make it plain that unsupported statements and expressions of fear carry very little, if any, weight. The court needs to act on objective facts from which the court can infer that the defendant is likely to move assets abroad or dissipate them within the jurisdiction. Here, there is nothing of that nature in the documents at all …'

109. The facts before me were quite different from those in *Heng Holdings*.

110. First, Borgensten is a Swedish national resident in Switzerland. At the time of the application for the MI Orders, Suppiah believed Borgensten had a residential property in Sweden and possibly in Switzerland as well as shares in JIL, JCI and German companies. Also, Borgensten was supposed to have an account with HSBC in Singapore.

111. It is now known that he also has an account with Credit Suisse in Singapore.

112. The whereabouts of the real properties were unknown. Also, the true values of these real properties and of the shareholdings were unknown and the amount in the HSBC account was also unknown.

113. Furthermore, the situation was not confined to Borgensten's failure to pay the judgment sum in the Writ action.

114. He had failed to comply with five EJD Orders.

115. He gave a lame excuse about his acute illness in respect of non-compliance with the 5/12/00 and 2nd EJD Order.

116. He did not give any reason at the material time for his non-compliance with the 3rd to 5th EJD Orders. He sought to explain this away by saying that he had remitted monies to Singapore to pay the judgment sum which explanation I did not accept.

117. He had failed to comply with Paragraph 2 of each of the MI Orders requiring him to disclose his assets.

118. The circumstances regarding the alleged loan of RM9.8m to JCI were questionable.

119. He had failed to appoint Suppiah as a director of JIL in breach of his obligation under the Deed. Worse still, he gave false excuse after false excuse for this failure.

120. He had failed to co-operate with Suppiah by providing the names of JIL's auditors when initially requested.

121. In my view, the evidence taken together was solid evidence that Borgensten's probity was not to be relied on and that there was a real risk that he would dissipate his assets to thwart any judgment or award that Suppiah might obtain. The steps taken against him were the result of his recalcitrance and not to pressurise him unfairly.

122. Accordingly, I dismissed Borgensten's application to set aside the MI Order in the OS and for other relief. It is this decision which Borgensten has appealed against.

***APPLICATION TO RESTRAIN BORGENSTEN FROM LEAVING SINGAPORE***

123. On 27 April 2001, Suppiah applied for the following main orders:

> '1. The Defendant be restrained from leaving Singapore until:
>
> > (a) he complies with Order 2 of the Order of Court herein dated 8 February 2001; and
> >
> > (b) he delivers to the Receivers, Messrs Ong Yew Huat and Nagaraj Sivaram, all documents of title to all shares held legally and/or beneficially by the Defendant in Johnson Industries Limited and Johnson Coating Invest AG; and
> >
> > (c) he has been examined by the Receivers as to his assets;
>
> 2. That he do forthwith delivered (*sic*) up his passport to the Sheriff who shall serve this order upon him provided that the Sheriff shall return his passport to him upon his compliance with the foregoing.'

124. The application was heard before Lee JC the same day and the main orders sought were made and subsequently executed.

***HEARING OF APPLICATIONS FOR COMMITTAL ORDERS***

125. The first hearing of the applications for committal orders was on 8 May 2001.

126. Borgensten took the witness stand to explain why he had failed to comply with the EJD Orders and the MI Orders. His evidence did not assist him.

127. Mr Gabriel submitted, inter alia, that the Receivers had given Borgensten up to 7 May 2001 to provide his affidavit on his assets and he had replied to say it would be provided by 9 May 2001.

128. Mr Nair submitted, inter alia, that the only reason why Borgensten was filing his affidavit was because he had surrendered his passports pursuant to the 27 April 2001 Order. Also an affidavit from him on his assets did not cure past breaches.

129. I adjourned the hearing to 2.15 pm of 10 May 2001 to see if the promised affidavit on assets would be filed by 9 May 2001. It was done but the affidavit appeared to be on Borgensten's current assets and not as at the date of service of the MI Orders i.e 8 February 2001.

130. At the resumed hearing on 10 May 2001, Mr Gabriel submitted that there was no material change in Borgensten's assets since 8 February 2001 and undertook on Borgensten's behalf that another affidavit would be filed by 14 May 2001 4 pm to state his assets as at the date of service of the MI Orders. This was subsequently done.

131. I imposed a fine of $10,000 on Borgensten for the application in the Writ action. I took into account, inter alia, his failure to comply with five EJD Orders and Paragraph 2 of the MI Order but, on the other hand, I also took into account that Suppiah had been fully paid his judgment sum by the time the application for committal was heard by me.

132. For the application in the OS, I imposed a fine of $20,000 as Borgensten had been in clear breach of Paragraph 2 of the MI Order pending the determination of the substantive disputes. If not for his eleventh hour affidavit on his assets, he ran the risk of an order of committal being made against him.

***FURTHER ARGUMENTS ON BORGENSTEN'S APPLICATION TO DISCHARGE THE MI ORDERS***

133. Peter Gabriel & Partners subsequently requested further arguments on Borgensten's application to set aside the MI order in the OS and for other relief. I granted the request and further arguments were heard on 1 June 2001.

134. The main purpose of the further arguments was to refer to a set of audited accounts of JIPL for the financial year ending 31 March 1998 which were signed by Suppiah and another director of JIPL.

135. Mr Gabriel, who appeared with Ms The for Borgensten at this hearing, argued that by signing the audited accounts, Suppiah had accepted the accounts which showed no money owing to JIPL by JCI. Hence Suppiah could not complain about the siphoning of monies by Borgensten from JIPL to JCI.

136. However the accounts were qualified by the auditors. Paragraph 3 of the auditors' report states:

> '3. The balance sheets of the Company and the Group included an amount due by the holding corporation amounting to $10,844,000 and $10,887,000 respectively as at 31 March 1998. These balances included a transfer of an amount owing by a related party corporation of $8,377,000. We were unable to

> independently ascertain the validity of this transfer. In addition, there is no available audited financial statements for us to assess the financial strength of the holding corporation. As mentioned in note 13 to the financial statements, subsequent to 31 March 1998, an amount of $2,380,000 was received by the Company and the holding corporation also made payments on behalf of the Company amounting to $758,466. Due to the complexity of the transfers of balances giving rise to the outstanding balance and due to the inadequate documentary evidence to support the subsequent transactions refer (*sic*) to in note 13, there were no practicable audit procedures we could carry out to obtain satisfactory assurance as to the validity and recoverability of the balance owing by the holding corporation. Consequently, we were not able to satisfy ourselves as to the validity of the transfer of $8,377,000 from the related party corporation to the holding corporation and the full recoverability of the balance of $10,844,000 and $10,877,000 due by the holding corporation to the Company and to the Group, respectively.'

137. In my view, the accounts with the auditors' qualification gave rise to more questions than answers.

138. By signing the accounts, Suppiah did not necessarily accept Borgensten's position.

139. Furthermore, Mr Nair pointed out (in his written response to the request for further arguments) that developments since my decision on 30 April 2001 revealed yet another illustration of the lack of probity on Borgensten's part.

140. In Borgensten's 2nd affidavit filed on 1 November 2000 in the Writ action, he had referred to a claim by him against Suppiah for a property in Malaysia. He said, '… At the end of the day, it is without a doubt that the Property was beneficially owned by me'.

141. Yet when Borgensten eventually filed his affidavit of assets in the OS on 9 May 2001, he said of that property, 'The Plaintiff is holding the property on trust for me and in turn, I hold the said property in trust for Johnson Industries Pte Ltd'.

142. Mr Gabriel did not even venture any explanation for this contradiction.

143. It was clear to me that Borgensten had done an about-turn yet again.

144. In the circumstances, I affirmed my earlier decision.

Sgd:

WOO BIH LI
JUDICIAL COMMISSIONER

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