

Just Gems Limited v Shirley Ooi Ching Ling and Another
[2002] SGHC 19

Case Number : Suit 1479/1999
Decision Date : 31 January 2002
Tribunal/Court : High Court
Coram : Judith Prakash J
Counsel Name(s) : Peter Cuthbert Low with Grace Chacko (Peter Low Tang & Belinda Ang) for the plaintiff; Benjamin Goh (Arthur Loke Bernard Rada & Lee) for the 1st defendant
Parties : Just Gems Limited — Shirley Ooi Ching Ling; Pacific Rim Trading Ltd

Judgment

GROUNDS OF DECISION

1. The problems that led to the institution of this action derived in large part from mistakes as to nomenclature and legal identity. To understand developments, therefore, attention has to be paid to the exact names of the legal entities involved and to the distinct identities of the corporations and their shareholders.

Background

2. The plaintiff is a bearer share company incorporated in the British Virgin Islands in August 1996. Originally known as Hazelwood Holdings Limited, the plaintiff changed its name to Just Gems Ltd in October 1996. Shortly thereafter the interested parties began to refer to the plaintiff as 'Just Gems Inc.' and they continued to do so both in correspondence and in various documents for a considerable period. In fact when this action commenced in 1999, the plaintiff was described as 'Just Gems Inc.' and its name was only amended in the title of the action in mid 2000.

3. The person behind the incorporation of the plaintiff was one Madam Jamilah Binti Abu Bakar, a Malaysian citizen and former banker. She was the first and sole director of the plaintiff and was in possession, through her agent, of the single bearer share issued by the plaintiff. Under British Virgin Islands law, the holder of the bearer share issued by a bearer share company is the legal and beneficial owner of the company. This share certificate does not name the holder of the shares and the ownership of the company changes as the physical possession of the share certificate changes. In early 1998, Madam Jamilah's husband, Mohamad Amin Hashim ('Mr Amin'), wrote a letter in which he described himself as the beneficial owner of Just Gems Inc. By the time this action commenced, however, both he and Madam Jamilah took the position that she was the holder of the share certificate and thus the beneficial owner of the plaintiff.

4. Madam Jamilah procured the incorporation of the plaintiff as she wanted to use it as an investment company to hold shares that she was intending to purchase in two other companies, namely Agate Technologies Inc ('Agate'), a company incorporated in California, U S A, and Pacific Rim Trading Ltd, the second defendant ('Pacific Rim').

5. Pacific Rim is also a company that was incorporated in the British Virgin Islands. It is not, however, a bearer share company. Its constitution is similar to that of Singapore incorporated companies in that its shareholders have to be registered and are issued with share certificates in their individual names indicating the number of shares which they hold. The ownership of the shares passes by the execution of an instrument of transfer by the transferor in favour of the transferee which instrument is then registered in the company's share register. At the same time, the share certificate previously

issued to the transferor is cancelled and replaced by a new certificate in the name of the transferee.

6. At all material times, the directors of Pacific Rim were the first defendant, Madam Shirley Ooi Ching Ling ('Madam Ooi'), and one Mr Francis Khoo. In April 1995, Francis Khoo, Madam Ooi and her brother, Vincent Ooi, had bought into Pacific Rim, then a bearer share company, in order to use it as their corporate investment vehicle to invest in an emerging technology that they had identified. This technology was the development, customisation and marketing of 'hot-swap software' and 'hot-swap removable data storage devices'.

7. In January 1996, Agate was incorporated as the company that would develop the technology. Consequently Pacific Rim became a single purpose investment holding company whose object was to hold the shares of Agate. Pacific Rim acquired, eventually, 4,500,000 Agate shares (becoming the majority shareholder of Agate) and Madam Ooi, Francis Khoo and Vincent Ooi became the three main directors of the company. They also took up some shares in Agate in their own names. In September 1996, Pacific Rim was converted into a registered share company. By then there were apparently six shareholders in Pacific Rim with the major shareholders being Madam Ooi, Francis Khoo and one Soh Boon Hock who together held some eighty percent of the capital. The minority shareholders were Vincent Ooi, Angeline Ooi (another sibling of Madam Ooi's) and one Ms Sim Sin Sin.

8. There are two defendants in this action, Madam Ooi and Pacific Rim. Before me, however, the action proceeded only as against Madam Ooi since Pacific Rim had not entered an appearance to the action. As against Madam Ooi, the action is for the return of the sum of US\$550,000 which the plaintiff alleges it paid to Madam Ooi for a consideration which has wholly failed. The consideration in question was the legal ownership of 22% of the shareholding of Pacific Rim. It is not disputed that the plaintiff has not been registered as a shareholder of Pacific Rim. The dispute is whether that omission entitles it to a refund from Madam Ooi of the monies paid.

The pleadings

9. The statement of claim, as amended halfway through the trial, contains the following material averments:

(1) some time in August 1996, Madam Ooi and/or Francis Khoo made the following representations to the plaintiff:

(i) that Pacific Rim was a company incorporated in the British Virgin Islands and that Madam Ooi and Francis Khoo were its directors, shareholders and controlling persons;

(ii) that Pacific Rim was a single purpose company which owned 4,500,000 shares in Agate and that it was the 'controlling shareholder' of Agate; and

(iii) that Madam Ooi wanted to divest shares in Pacific Rim in order to remove an unnamed shareholder who was giving her a lot of problems.

(2) by an agreement made some time in August 1996 between the plaintiff and Madam Ooi, alternatively, Madam Ooi for and on behalf of Pacific Rim, alternatively Pacific Rim for and on behalf of existing shareholders:

(i) the plaintiff agreed to purchase 22% of the shares of Pacific Rim;

(ii) Madam Ooi undertook to procure the transfer of those shares to the plaintiff;

(iii) the plaintiff would pay Madam Ooi US\$500,000 for the 22% shareholding in Pacific Rim; and

(iv) that 22% of the shares of Pacific Rim 'would represent' one million shares in Agate;

(3) the above agreement was made partly orally and partly in writing and insofar as it was made orally, it was made between (1) Madam Ooi, alternatively Madam Ooi for and on behalf of Pacific Rim, alternatively Madam Ooi for and on behalf of existing Pacific Rim shareholders, and (2) the plaintiff's representative, Madam Jamilah, some time in early August and in late August 1996;

(4) insofar as it was made in writing, the agreement was to be inferred from the following documents:

(i) a memorandum dated 25 September 1996 that was handed to Madam Jamilah by Madam Ooi and Mr Khoo at a meeting on about 26 September 1996 in Singapore;

(ii) a hand-written note by Mr Francis Khoo on the reverse of that memorandum; and

(iii) an undated stock purchase agreement prepared by Madam Ooi and/or Pacific Rim and signed by the plaintiff's representative, Madam Jamilah, some time in late November 1996.

(5) pursuant to the above agreement, and at Madam Ooi's request, the plaintiff made the following payments to Madam Ooi's account with Citibank, Singapore branch ('Citibank'):

(i) US\$200,000 on or about 16 September 1996;

(ii) US\$250,000 on or about 6 November 1996; and

(iii) US\$100,000 on or about 20 November 1996.

(6) Madam Ooi and/or Pacific Rim had refused and/or failed to transfer and/or procure the transfer of the shares to the plaintiff despite numerous requests made by the plaintiff;

(7) in the premises, the consideration for the payment of the sum of US\$500,000 had wholly failed and Madam Ooi had had and received US\$500,000 to the use of the plaintiff; and

(8) as for the balance US\$50,000, the said sum was paid by the plaintiff (and received by Madam Ooi) under a mistake of fact namely that whilst the consideration for the purchase of the 22% share in Pacific Rim was US\$500,000, the plaintiff mistakenly paid Madam Ooi US\$550,000.

10. The plaintiff further pleaded that in breach of the agreement, Madam Ooi and/or Pacific Rim had to that date failed and/or refused to transfer or procure the transfer of the said shares to the plaintiff and that by such conduct, the two defendants had evinced an intention no longer to be bound by the agreement and they had repudiated the same. The plaintiff accepted the repudiation by service of the writ herein.

11. The material averments of the defence are as follows:

(1) some time in the later half of 1996, Madam Jamilah expressed an interest in taking an active role in relation to Agate's operations in Malaysia and to that end, offered to take a stake in Pacific Rim. The shareholders of Pacific Rim were agreeable to selling a portion of their stake in the company to Madam Jamilah;

(2) the negotiations with Madam Jamilah were undertaken by Madam Ooi together with Francis Khoo, both acting for themselves as well as on behalf of the other four shareholders of Pacific Rim. The negotiations culminated in a stock purchase agreement being executed some time in November 1996;

(3) although Madam Jamilah and Madam Ooi were the ones who signed the stock purchase agreement, it was intended that:

(a) the agreement be between the plaintiff as purchaser and the shareholders of Pacific Rim as vendors;

(b) Madam Jamilah and Madam Ooi were both signing in their capacity as representatives;

(c) the price for the purchase was US\$500,000 in full. In return for the payment of US\$500,000, the plaintiff was to get a 20% (not 22%) stake in Pacific Rim.

(4) subsequently, Madam Jamilah and/or her husband deposited sums totalling US\$500,000 into Madam Ooi's account no. 116316-005 at Citibank;

(5) although the payment was made into the bank account of Madam Ooi, it was not made for or to her account but for or to the account of the shareholders of Pacific Rim and Madam Ooi was not entitled to keep the monies for herself, but had collected them on behalf of all shareholders, and had to account (and did account) to the other shareholders for these monies;

(6) Madam Ooi denied that she had received the sum of US\$550,000 referred to in the statement of claim but asserted that even if she had received that sum or any part of it, she did not do so for or to the use of the plaintiff or under any circumstances as would entitle the plaintiff to recover it from her;

(7) Madam Ooi admitted that the sums of US\$250,000 and US\$100,000 were

deposited into her Citibank account on 6 November and on 20 November respectively but denied that the payment of US\$200,000 was made to her account on or about 16 September 1996 or at all. Instead, in addition to the first two payments, Mr Amin had paid a further US\$100,000 on 30 November 1996 and US\$50,000 on 11 December 1996 and this had made up the US\$500,000 purchase price;

(8) instruments of transfer were prepared as to as effect the transfer of the shares in Pacific Rim from the existing shareholders to the plaintiff but because Madam Jamilah signed these instruments in her personal name and did not sign in her capacity as the alleged sole director and beneficial shareholder of the plaintiff, in February 1998, the corporate secretarial services provider of Pacific Rim erroneously registered the shares in Pacific Rim in Madam Jamilah's personal name;

(9) the mistake could have been rectified if the plaintiff had procured the execution by Madam Jamilah of an instrument of transfer in favour of the plaintiff in respect of the shares registered in Madam Jamilah's name but the plaintiff chose not to do this;

(10) as the shares in Pacific Rim had already been registered in Madam Jamilah's name, and as Mr Amin was in early 1998 also claiming to be the sole beneficial owner of the plaintiff, Pacific Rim was advised by its lawyers and corporate secretary to obtain an indemnity from Madam Jamilah, Mr Amin and the plaintiff before effecting a change in the registration of the shares but these parties refused to execute the indemnity;

(11) in the premises, the eventual non-transfer of the shares to the plaintiff was not due to any failure or refusal on the part of Madam Ooi and/or of Pacific Rim but was due to the default, omission and/or refusal of the plaintiff and its representatives to do what was necessary to regularise the erroneous registration of the shares in Pacific Rim in Madam Jamilah's name.

12. The plaintiff filed a reply. In essence this rejected Madam Ooi's version of the events and reiterated that of the plaintiff. It was further averred that the alleged instruments of transfer were not executed and/or signed by Madam Jamilah as alleged and that Madam Ooi imposed upon Madam Jamilah and Mr Amin unwarranted and unreasonable conditions in respect of 'regularising' the alleged erroneous registration of the shares long after they were reasonably due to be handed over to the plaintiff.

Issues

13. As a result of the pleadings, the following issues have to be determined:

(1) What agreement was arrived at between the parties? Was it:

(a) an agreement between the plaintiff and Madam Ooi made in or about August 1996 whereby for the sum of US\$500,000 to be paid to her Madam Ooi undertook to procure the transfer of a shareholding interest of 22% in Pacific Rim to the plaintiff; or

(b) was it a similar agreement between the plaintiff and Madam Ooi on behalf of Pacific Rim or a similar agreement between the plaintiff and Madam Ooi on behalf of existing shareholders; or

(c) was it an agreement made in about November 1996 between the plaintiff and the individual shareholders of Pacific Rim that in return for payment of the sum of US\$500,000, the existing shareholders would transfer to the plaintiff such number of shares that would give the plaintiff a 20% stake in Pacific Rim?

(2) Did the plaintiff pay a total of US\$500,000 or a total of US\$550,000 for the shares and in any event how was such payment made ie in the manner asserted by the plaintiff or in the manner asserted by Madam Ooi?

(3) Were the monies paid into Madam Ooi's bank account made for or to her account or for or to the account of the shareholders of Pacific Rim?

(4) Was the eventual non-transfer of the shares to the plaintiff due to failure or refusal on the part of Madam Ooi and/or Pacific Rim or was it due to the default, omission and/or refusal on the part of the plaintiff and its representatives to take the necessary action to regularise the erroneous registration of the shares in Madam Jamilah's name?

(5) If the non-transfer of the shares to the plaintiff was due to the default of Madam Ooi, what relief is the plaintiff entitled to?

The evidence

Evidence for the plaintiff: (i) Madam Jamilah

14. In her affidavit of evidence-in-chief, Madam Jamilah stated that she was the sole director of the plaintiff and presently held its share certificate and was therefore its legal and beneficial shareholder. Her husband had at times held the certificate of the plaintiff, in particular, when he was planning to establish their children's trust funds. The plaintiff was incorporated on 28 August 1996 by a Singapore company called 'AZEC Worldlink Management Pte Ltd ('Azec'). Madam Ooi was instrumental in the incorporation of the plaintiff. She was then the managing director of Azec.

15. Madam Jamilah's relationship with Madam Ooi started in 1989 when Madam Jamilah was working at the Kuala Lumpur branch of the Bank of Nova Scotia and Madam Ooi was working at the Singapore branch of the same bank. They got to know each other through work and thereafter became friends. They kept in touch even after both had ceased working for the Bank of Nova Scotia. As for Francis Khoo, he was introduced to Madam Jamilah by Madam Ooi some time in 1994.

16. The events leading to this action started in June 1996 when Madam Ooi (who was then in the United States) telephoned Madam Jamilah and asked her to make a direct investment in Agate as Agate needed US\$100,000. Madam Ooi then suggested that Madam Jamilah set up a British Virgin Islands (BVI) company for the purpose of the investment. She advised Madam Jamilah that she could buy a BVI company for Madam Jamilah to use to purchase the shares from Agate. A few days later,

Madam Ooi called again and said that if Madam Jamilah could raise the US\$100,000 she would offer her 750,000 shares at US\$0.12667 per share representing a 10% share in Agate.

17. Madam Jamilah agreed and the US\$100,000 was paid on her behalf by Mr Amin in two equal instalments. The first instalment was paid on 22 August 1996. The money was remitted to Madam Ooi's account with Citibank. The second payment was made on 2 September 1996 by a remittance to Madam Ooi's account with the Citibank branch in San Jose, California. Subsequently, a share certificate was issued by Agate showing that 750,000 shares were held by Just Gems Inc. This certificate was sent to Madam Jamilah in March 1997.

18. Around early August 1996, Madam Ooi telephoned Madam Jamilah several times to discuss 'a proposed divestment of Pacific Rim's shares'. She told Madam Jamilah that she and Francis Khoo directly owned the majority of the shares in Pacific Rim and the proposed divestment exercise was to remove one of the current shareholders and further, that the proposed divestment would involve Madam Jamilah (as director of the BVI company Madam Ooi was setting up for her) in the decision-making of Pacific Rim. Subsequently, Madam Ooi informed Madam Jamilah that the plaintiff had been incorporated and was named Hazelwood Holdings Limited and suggested that the name be changed. It was Madam Ooi who came up with the name 'Just Gems'.

19. Around the time of incorporation of the plaintiff, Madam Ooi telephoned Madam Jamilah again and gave her more details about the proposed divestment. The proposal was that the plaintiff would purchase 124,005 shares in Pacific Rim for the sum of US\$500,000. This purchase, Madam Jamilah was informed, represented some 22% of the shares issued by Pacific Rim. Madam Jamilah stated in her affidavit that the foregoing 'meant that the plaintiff would purchase 1,000,000 Agate shares from the 4,500,000 Agate shares held by [Pacific Rim]. Thus, my understanding based on [Madam Ooi's] representations, was that it was basically an indirect investment into Agate.' It would be noted that there was some confusion in the language which Madam Jamilah used in her affidavit as the first sentence quoted would appear to mean that the plaintiff was to purchase one million shares in Agate owned by Pacific Rim whilst the second sentence quoted referred to an indirect investment into Agate and therefore implied that the plaintiff would purchase shares in Pacific Rim itself rather than in Agate.

20. Madam Jamilah went on in her affidavit to state that Madam Ooi had at first wanted the US\$500,000 price to be paid before November 1996. Madam Jamilah indicated that this was an unrealistic deadline and Madam Ooi's response was to propose that the plaintiff make an initial payment of US\$200,000 and that the remaining US\$300,000 be paid by 31 December 1996. Madam Jamilah accepted this instalment plan. Accordingly, pursuant to the agreement, US\$200,000 was paid into Madam Ooi's Citibank account on or about 16 September 1996.

21. After this payment, Madam Jamilah realised that she had no documentation evidencing the agreement and asked for some. As a result, a meeting was held in Singapore on 26 September 1996 between Madam Jamilah, Madam Ooi and Mr Khoo. At the meeting, Madam Jamilah was handed a memorandum dated 25 September 1996 addressed to her from Madam Ooi. Madam Jamilah asserted that this document contained, amongst other things, the details of the divestment agreement.

22. It should be noted that among the contents of the document were the following:

'Subject: Staging of Equity structure.

1. Jam [ie Madam Jamilah] subscribes 750,000 shares at 0.1267 cents per share. Shares held directly at Agate. Equity position: 8.82% of issued capital of 8.5 mio shares.

2. Secure major stake at the Holding Co. PacRim Trading Ltd. This will ensure pari-passu stake with other major shareholders.

Propose divestment of 1,000,000 shares at \$500,000 (50 cents per share) if done before Nov. 96.

1,000,000 shares would represent 22% of holding at PacRim and place the stakeholder on par with other major stakeholders.

In total, Jam and Co. will hold 30% of Agate Inc.'

23. The next development was that at the beginning of November 1996, Madam Ooi faxed to Mr Amin a document entitled 'Stock Purchase Agreement' (the SPA) which had been signed by Madam Ooi but was not dated. The SPA read as follows:

'STOCK PURCHASE AGREEMENT

This is an agreement, effective _____, 199____, between shareholder/s of Pacific Rim Trading Inc, a BVi Corporation ('The Company'), and Just Gems Inc. (the 'Purchaser'). The parties agree as follows:

The shareholder/s of the Company agree to sell and deliver to the Purchaser One Hundred and Twenty Four Thousand and Five Shares (124,005) of its US\$1 par value common stock (the 'Stock') for an aggregate purchase price of US\$500,000.

We further confirm that Pacific Rim Trading Inc. is a single purpose investment holding company which owns 4,500,000 million shares of Agate Technologies Inc., a California Corporation. Your share purchase will represent a 20% ownership in Pacific Rim Trading Inc.

.....
Shirley Ooi
Pacific Rim Trading Ltd

Just Gems Inc
(Purchaser)'

Madam Jamilah signed the SPA and it was faxed back to Madam Ooi on 26 November 1996.

24. Madam Jamilah went on to detail the payments that were made by her husband to Madam Ooi. She then said that it was only in early 1998 that she discovered that an overpayment of US\$50,000 had been made.

25. After the payments had been made, no further action was taken for some time. Madam Jamilah said that she assumed that the share certificate for the Pacific Rim shares would be sent to her later when it had been finalised. In the meantime, she had been appointed a director of Agate as a result of the plaintiff's direct investment in Agate. Agate was then interested in setting up a Malaysian subsidiary and Madam Ooi asked Madam Jamilah to run this. As a result, in 1997, Madam Jamilah, Madam Ooi and Mr Khoo were in frequent contact with each other.

26. It was not until some time in January 1998 that Madam Jamilah and her husband realised that no share certificate had yet been received from Pacific Rim. Mr Amin wrote to Madam Ooi enquiring about the share certificate and in this letter, dated 23 January 1998, Mr Amin described himself as the

beneficial shareholder of Just Gems Inc. He asked that the share certificate for the shares in Pacific Rim be delivered to him within 14 days. A few days later, Madam Ooi called Madam Jamilah and informed the latter that she had been holding the share certificate in her own name as she was reluctant to transfer it to the plaintiff's name because of cost constraints. Madam Jamilah told Madam Ooi that this was not part of the agreement and that it should not have been done without prior authorisation from Mr Amin or herself. It should be noted that Madam Ooi denies having had such a conversation with Madam Jamilah.

27. On 4 February 1998, Mr Amin wrote to Madam Ooi again as she had not yet formally replied to his January letter. Two weeks later, on 17 February, a response came. In this letter, Madam Ooi confirmed that an entity whom she referred to as 'Just Gems' had 'at the time of subscription' actually acquired '124,001 shares of Pacific Rim Trading Ltd or 20% of the Company which represents 900,000 shares in Agate Technologies Inc. (i.e. 20% of a total of 4,500,000 Agate Technologies Inc shares held by Pacific Rim Trading Ltd)'. She then stated that Pacific Rim's corporate secretary had increased the share issue so that each shareholder in Pacific Rim would hold shares that would reflect his exact holdings in Agate. As a result, 'Just Gems' now held 900,007 shares in Pacific Rim. Enclosed with the letter was a copy of a share certificate purportedly issued on 10 February 1998. Madam Ooi stated:

'Inadvertently, the corporate secretary had reflected the shareholder as Jamilah Abu Bakar instead of Just Gems Inc. ... I am requesting that they amend the records and certificate and this will be forwarded to you when it is complete.'

28. Despite the promise made by Madam Ooi, no share certificate reflecting the plaintiff (whether by its correct name or by the description 'Just Gems Inc') as the holder of 900,007 shares in Pacific Rim was ever sent to the plaintiff or Madam Jamilah or Mr Amin. Around this time, the relationship amongst the parties soured due to problems with Agate and its Malaysian operations. In March 1998, Madam Jamilah was removed from the board of Agate and the Malaysian subsidiary ceased to operate a few months later.

29. Despite several meetings and correspondence between the parties and their various lawyers, the problems relating to the issue of the share certificate were not resolved. In one letter, dated 10 March 1998, Madam Ooi stated that she had made a mistake in assuming that the shares were to be registered in Madam Jamilah's name and that as soon as it was corrected, she would get the certificate to Mr Amin. In another letter dated 22 March 1998, one Stephen M. Wurzburg, the attorney for Madam Ooi, stated that he had in his possession the Pacific Rim share certificate of Just Gems Inc representing 900,007 shares. He said that he was authorised to date the share certificate and deliver it to Madam Jamilah once she and her husband signed and returned the document which the corporate secretary of Pacific Rim would be preparing.

30. By November 1998, Madam Jamilah was fed up. She instructed solicitors to act on behalf of Just Gems Inc and, on 26 November, those solicitors wrote to Madam Ooi, at her address in Singapore, asking for the return of the sum of US\$550,000 which had been remitted to her for the purchase of the shares in Pacific Rim. Despite more correspondence and some attempts at settlement, the matter was not resolved and this action was commenced in October 1999.

31. Although the reply filed by the plaintiff had asserted that Madam Jamilah had not executed or signed any instruments of transfer in respect of the shares in Pacific Rim purchased by the plaintiff, Madam Jamilah made no mention of this matter in her affidavit of evidence-in-chief. She was, however, cross-examined on the assertion. It should be noted that six original instruments of transfer, one for each of the separate transferors of shares in Pacific Rim, were produced in court by Madam Ooi as part of the evidence.

32. Counsel for Madam Ooi drew Madam Jamilah's attention to a memorandum in her handwriting which was entitled 'Hand Written upon Soh Boon Hock's visit with me in July 1997 at Nikko Hotel, KL'. Counsel pointed to certain numbers written in the memorandum and asked Madam Jamilah what she had been recording. Her answer was 'Just the numbers'. When I asked her what numbers the reply was 'The numbers that appeared on the 6 pieces of paper that I signed'. It was put to her that those numbers were the numbers of shares the plaintiff was supposed to receive under the SPA. Madam Jamilah's reply was that it was not so as the SPA stated the number as 124,005, whilst the numbers she had written on the memorandum had added up to a total of 124,001. When asked why she had recorded those documents, her reply was that it was when she saw these numbers that she realised the total number differed from that in the SPA. She was then asked to confirm that the document she signed in Hotel Nikko in July 1997 related to the purchase contemplated in the SPA and her answer was 'Possibly, because I don't know I can't remember'.

(ii) Mr Amin

33. Mr Amin is an advocate and solicitor in West Malaysia. He is the senior partner of his own law firm and is also a director of a BVI company called Parmoor International Limited (Parmoor). Parmoor was incorporated in July 1996 by Azec.

34. According to Mr Amin, his role in this matter was limited to that of 'paymaster' on behalf of the plaintiff. In June 1996, Madam Jamilah informed Mr Amin of her intention to purchase 750,000 shares in Agate using a corporate vehicle and asked him to make payment of US\$100,000 on her behalf. He duly paid that amount by way of two equal payments, one in August and the other in September 1996.

35. In respect of the plaintiff's proposed purchase of shares in Pacific Rim for the sum of US\$500,000, Mr Amin confirmed that he had made payment on the plaintiff's behalf. The payments were made as follows:

(1) on 16 September 1996, he instructed Coutts & Co (Coutts) in Hong Kong to transfer the sum of US\$200,000 from his account to Madam Ooi's Citibank account;

(2) on 6 November 1996, he instructed Coutts to transfer the sum of US\$300,000 to his own Maxisave account with Citibank, Singapore. He had also given instructions to Citibank to transfer US\$250,000 to Madam Ooi's account. However, instead of crediting his account with the amount of US\$300,000, Citibank directly transferred the amount of US\$250,000 into Madam Ooi's account. The remaining US\$50,000 was placed in a Time Deposit account in Mr Amin's name;

(3) on 20 November 1996, Mr Amin made a cash deposit of US\$100,000 directly into Madam Ooi's Citibank account. Thus, he had overpaid Madam Ooi by US\$50,000. At the time, he did not realise that this was an overpayment. It was only discovered by his wife some time in 1998.

36. In court he explained the mistake by saying that he had received constant calls from Madam Ooi asking for money and had become confused. He also used this reason to explain why in a letter dated 10 December 1996 he wrote that to that date US\$450,000 had been paid and the balance of US\$50,000 would be paid in December 1996.

37. Mr Amin informed the court that Parmoor had purchased 200,000 shares in Agate for US\$700,000 in 1997. He brought this up because of what he considered to be attempts by Madam Ooi in her affidavit to confuse the payments made for the Parmoor transaction with those made for the plaintiff's transaction. The payments for the Parmoor transaction were made as follows:

(1) on 24 January 1997, Mr Amin debited US\$15,000 from an account with OCBC Bank in Singapore and transferred it telegraphically to Madam Ooi's Citibank account;

(2) on 25 January 1997, he instructed Citibank to transfer US\$85,000 to Madam Ooi's Citibank account;

(3) on 20 January 1997, he did an international money transfer of US\$100,000 through Bank Bumiputra Malaysia Bhd to Madam Ooi's Citibank account; and

(4) on 7 March 1997, he obtained a bank draft for US\$500,000 in favour of Agate and handed this draft personally to Mr Khoo who then acknowledged receipt of it.

(iii) Catherine Tan Eu Boon

38. This witness was, at the material time, a branch support officer at Citibank. She produced documents relating to Mr Amin's Citibank account for the period September 1996 to December 1996 as well as copies of correspondence from Mr Amin to Citibank instructing the bank to make certain deductions from his said account and credit them to an account with Citibank belonging to Madam Ooi. The documents produced supported Mr Amin's account of the payments made to Madam Ooi from his Citibank account. They also established that Mr Amin's Maxisave account with Citibank was opened on 20 September 1996.

Evidence for the defendant: (i) Madam Ooi

39. In her affidavit of evidence-in-chief, Madam Ooi first set out the background to the formation of Pacific Rim and Agate. She then went on to describe Madam Jamilah as an ex-colleague who, in 1996, had expressed an interest in taking an active role in relation to Agate's subsidiary's operations in Malaysia. To that end, she had offered to take up a stake in Pacific Rim.

40. The negotiations with Madam Jamilah were undertaken by Madam Ooi together with Mr Khoo, both acting for themselves as well as on behalf of the other four investors/shareholders of Pacific Rim. The negotiations culminated in the preparation of the SPA which was duly executed by Madam Jamilah in late November 1996.

41. Although Madam Jamilah and she herself were the ones who signed the SPA, Madam Ooi averred that a perusal of that document would show that:

(1) the agreement was in fact entered into between the shareholders of Pacific Rim (as vendors) and Just Gems Inc (as purchaser);

(2) Madam Jamilah and she herself were signing in their capacities as representatives of Just Gems Inc and of the shareholders of Pacific Rim,

respectively;

(3) the price for the purchase was US\$500,000; and

(4) in return for that sum, Just Gems Inc was to get a 20% stake in Pacific Rim.

42. Madam Ooi stated in 10 of her affidavit that the reason why Just Gems Inc and not Madam Jamilah was reflected in the SPA as the purchaser, was because Madam Jamilah had informed her during the negotiations that Madam Jamilah intended to use a nominee corporate vehicle for the purchase. Madam Ooi continued 'Francis Khoo and I understood from Jamilah that Just Gems Inc was a bearer share company incorporated in the British Virgin Islands, and that she was the sole director and holds [*sic*] its only bearer share certificate'. In court, Madam Ooi conceded that quite apart from anything Madam Jamilah had told her, she herself had known that Just Gems Inc was a bearer company and that Madam Jamilah was its sole director and the holder of the bearer share.

43. Madam Ooi indicated in the same paragraph that they had had no problems with Madam Jamilah's request to name Just Gems Inc as the purchaser since at that time it made no difference to them whether the purchaser was Madam Jamilah herself or her corporate vehicle. In her next paragraph, Madam Ooi stated:

'However, as noted in my previous affidavit filed on 5 June 2000, I have since found out that in fact no such company exists. Rather, there is a company by the name of Just Gems Limited which is incorporated in the British Virgin Islands, but as it is a "bearer share" company, I am not in a position to ascertain who its directors and shareholders are, and whether Jamilah had any link with the said company.'

44. I should note here that it appeared quite clearly from the cross-examination and from various documents that the evidence of Madam Ooi as set out in 43 above was not truthful and that she was trying to convey a misleading impression. It was patent that she had from the beginning been aware of the existence of the plaintiff and that its incorporation (like that of Parmoor) was procured by a company (ie Azec) in which she was a director and played an active part. It was she who had made the initial mistake of referring to the plaintiff in correspondence and documents as Just Gems Inc because she was used to the American nomenclature for corporations ie the use of the word 'Inc' meaning 'incorporated' at the end of a corporate body's name and had forgotten that for a BVI company, the correct descriptive word would have been 'Limited' or its short form 'Ltd'. Madam Ooi admitted she had been used to using the words 'Inc' and 'Ltd' interchangeably.

45. The very first document which shows the name of the plaintiff as 'Just Gems Inc' is the SPA itself and that was a document prepared by Madam Ooi herself not Madam Jamilah. It was prepared around 1 November 1996 and by that time, the change of name from Hazelwood Holdings Limited to Just Gems Limited had been approved (and the suggestion that the company be called Gems Inc had been rejected by the authorities). This was information that was in the possession of Azec and therefore available to Madam Ooi. It is also notable that in the body of the document, Pacific Rim's full name is given as 'Pacific Rim Inc' although in the signing portion this has been corrected to 'Pacific Rim Limited'. Madam Ooi was, clearly, extremely slipshod in the preparation of the SPA.

46. Madam Ooi sought to portray herself as an innocent third party who had been in the dark all along and had only just discovered the true position. That depiction was far from the truth. She should have admitted that a mistake was made in the beginning but instead she sought to capitalise on a mistake for which she herself was responsible and which she perpetuated for many years.

47. To continue with the evidence of Madam Ooi as stated in her affidavit, she then referred to the memorandum dated 25 September 1996 which she described as being 'allegedly prepared by me' and stated that some documents must necessarily have been generated in the course of the various discussions and negotiations between Madam Jamilah, Mr Khoo and herself that eventually culminated in the SPA. This memorandum may have been one of those documents though she did not specifically remember preparing it. Her position was that in any event the memorandum was at the most a preliminary document prepared to aid the negotiation process and it had been superseded by the finalisation and the execution of the SPA. During cross-examination, however, Madam Ooi agreed she was the author of the memorandum though she did not accept that its terms represented the final agreement made.

48. Madam Ooi then went on to deal with the payments made by Mr Amin. She said that subsequent to the signing of the SPA, and in purported performance of Just Gems Inc's obligations under the SPA, Madam Jamilah and/or her husband had deposited sums totalling US\$500,000 into her account with Citibank. She said Madam Jamilah had requested to be allowed to forward the monies payable under the SPA '*through me/my said bank account*' (italics are the witness's). She reluctantly acceded to Madam Jamilah's urging. I note here that there was no reason for her to have given in on a point which made her uncomfortable. She could easily have provided Madam Jamilah with the names of the various shareholders and the amounts payable to them and collected drafts in favour of these persons from Madam Jamilah.

49. Madam Ooi claimed that although the sums totalling US\$500,000 were paid into her bank account, they were not made for her account rather it was Just Gems Inc's manner of performing its obligations under the terms of SPA under which it was to pay a sum of US\$500,000 to the shareholders of Pacific Rim. She was not entitled to keep the monies for herself but had to (and did) account to the other shareholders for the monies collected. This assertion was supported by oral statements by Mr Khoo and Mr Soh that they had received the monies due to them from the sale but no documentary evidence was produced to show the payments either to them or to any of the other shareholders.

50. Madam Ooi denied that the plaintiff had made payments totalling US\$550,000 instead of US\$500,000. She said the US\$500,000 had been paid in four separate tranches. The first tranche of US\$250,000 was paid on 6 November 1996 via a remittance made by Mr Amin from his account with Coutts. The second tranche of US\$100,000 was paid on 20 November 1996 via a bank transfer. The third tranche of US\$100,000 was paid on 30 November 1996 in cash by Mr Amin to Ms Sim Sin Sin (a Pacific Rim investor and also the person running Azec on a day to day basis) who then deposited the money into Madam Ooi's account with Citibank, Singapore. The fourth tranche of US\$50,000 was paid on 11 December 1996 when Mr Amin handed cash of that amount to Mr Khoo who deposited the same into Madam Ooi's account the same day.

51. It should be noted that Mr Amin denied having handed Ms Sim US\$100,000 in cash on 30 November 1996 and that Madam Ooi's bank statements do not show a deposit in this amount having been made on that day. There was a deposit on that day of US\$99,500 in cash which Madam Ooi said represented the US\$100,000 as US\$500 had been deducted by the bank as commission. Why the bank should have done that was not explained nor was any document produced showing the payment of the commission. No such commission appeared to have been charged in relation to the deposit of US\$50,000 on 11 December. Mr Amin admitted having made this payment to Mr Khoo but said that since he had no documentary evidence of the payment having been made, he had considered that payment to be outside the present case. I take his statement to mean that he considered this US\$50,000 to be an overpayment as well but was not making a claim for reimbursement of it at this stage.

52. Madam Ooi then dealt with the plaintiff's claim that it had paid her US\$550,000 by way of three remittances. Two of these remittances were not disputed. These were the sums of US\$250,000 paid on 6 November 1996 which Madam Ooi called 'the first tranche' and the sum of US\$100,000 paid on 20 November 1996 which she called 'the second tranche'. The remittance in dispute was the remittance of US\$200,000 which the plaintiff claimed had been made in September 1996.

53. Dealing with this disputed remittance, Madam Ooi referred to it as 'a sum of US\$200,000 which was apparently paid into a Citibank account no. 01636005 which Jamilah claimed belonged to me'. She stated that she did not have an account bearing number 01636005 with Citibank and that a perusal of the documents put forward in support of the plaintiff's allegation of payment showed that the payment had been made not by the plaintiff but by Parmoor. The Citibank account statements produced by Madam Ooi showed that her basic account number was '116316' and different elements of the account contained the basic number but were characterised by different suffixes and prefixes. For example, her 'Maxisave' account which was a Singapore dollar current account bore the number '0-116316-005' whilst her 'Citiaccess' account which was a US dollar current account bore the number '4-116316-019'. Whatever Madam Ooi understood Madam Jamilah to have claimed, it turned out from the letter Mr Amin had sent to Coutts on 16 September 1996 that he had indicated Madam Ooi's account number as '0116316005' which was her Maxisave account number.

54. Madam Ooi went on to explain that Parmoor was a BVI company owned and operated by Mr Amin. Madam Jamilah had asked her to assist Mr Amin in establishing accounts outside of Malaysia for his business partners and on one of these occasions Madam Ooi had referred Mr Amin to Citibank in Singapore. At this time Mr Amin had remitted US\$200,000 to Citibank in her name with the purpose of eventually opening an account there. He also made the request that the bulk of the monies amounting to US\$190,000 be converted to Ringgit and be disbursed to him. This was effected by the bank and Mr Amin physically carried the Ringgit away with him. The officer attending to this transaction on 19 September 1996 when Mr Amin and she visited Citibank was one Nora Saini. Madam Ooi was subjected to extensive cross-examination on her allegations relating to the payment of US\$200,000 and did not acquit herself well during that cross-examination. I will deal with that when discussing the issues.

55. Madam Ooi then dealt with the transfer of the Pacific Rim shares to Madam Jamilah. In March 1997, Pacific Rim's corporate secretarial work was undertaken by a company in Hong Kong called Accel Secretaries Limited ('Accel'). Madam Ooi then gave instructions to Accel to undertake re-organisation work in relation to the share capital of Pacific Rim. In May, Accel, Mr Khoo and Madam Ooi had a meeting to discuss the reallocation of shares from the existing shareholders of Pacific Rim to Madam Jamilah and/or her nominee.

56. Subsequently, Madam Ooi received from Accel the instruments of transfer that had to be executed by Madam Jamilah in order to bring about transfer of the 20% stake in Pacific Rim from its existing shareholders to Just Gems Inc. As Madam Ooi was in California, she asked Mr Soh to get the documents to Madam Jamilah for execution and then forward them to the corporate secretary for registration. Mr Soh did this. Madam Ooi went on that 'For reasons best known to Jamilah, the Instruments of Transfer [were] duly executed by her signing in her personal capacity (instead of signing for and on behalf of Just Gems Inc)'. I note here that when the instruments of transfer were presented to Madam Ooi and then to Madam Jamilah they had already been completed by Accel and Madam Jamilah's particulars were entered in those parts of the instruments that required a description of the transferee. As these forms were in Madam Ooi's possession before they were seen by Madam Jamilah, it was disingenuous of her to say that Madam Jamilah had signed them in her personal capacity for reasons best known to Madam Jamilah herself. As a director of Pacific Rim and especially as the director who gave instructions to the corporate secretary, Madam Ooi had the responsibility of

ensuring that the forms were properly completed before presentation to Madam Jamilah. Mr Soh's evidence was that Madam Jamilah simply signed the forms as presented to her in July 1997. He did not assert that she had made any changes in them.

57. Madam Ooi explained the ensuing delay in the issue of the share certificate by saying that Accel needed time to familiarise themselves with the matter and to deal with the relatively more extensive corporate filings required by virtue of the fact that shareholders' loans totalling US\$200,000 had to be converted into equity in conjunction with the divestment by the existing shareholders of Pacific Rim of a 20% stake in the company to Madam Jamilah or her corporate vehicle. Accel informed her some time in November 1997 that the share restructuring of Pacific Rim had been held up by the absence of various documents. The conversion of debt into equity was finally completed in January 1998 and this resulted in an additional allotment of 620,003 shares to the then existing shareholders of Pacific Rim (ie Madam Ooi and her original co-investors, not the plaintiff). On 6 February 1998, the share reconstruction was finalised and on 10 February 1998 a share certificate numbered R48 and made out in respect of 900,007 shares was issued by Pacific Rim in the name of Madam Jamilah.

58. In her affidavit, Madam Ooi attributed the registration of the shares in Madam Jamilah's personal name to Madam Jamilah's action in signing the instruments of transfer in her personal name and not in her capacity as sole director and beneficial shareholder. This attitude was in contrast to the contrition displayed by her in March 1998 in correspondence with Mr Amin when she said that she had made a mistake in assuming the shares were to be in Madam Jamilah's name and, as soon as this was corrected, she would get the new certificate to Mr Amin.

59. Madam Ooi dealt with the souring of relations between herself and Madam Jamilah and attributed it to, inter alia, differences in relation to the operations of Agate's Malaysian subsidiary and the manner in which Madam Jamilah was running it. In early 1998, Madam Jamilah and/or Mr Amin began a string of correspondence in relation to the purchase by the plaintiffs of the Pacific Rim shares and that correspondence culminated in them seeking a refund of the US\$550,000 paid. Mr Khoo and Madam Ooi as directors and shareholders of Pacific Rim were open to the possibility of refunding the sum of US\$500,000 to Madam Jamilah although they did not accept that there was any basis to her claim that the SPA had been repudiated. However, given (a) that the corporate entity Just Gems Inc did not exist, (b) the conduct of Madam Jamilah and Mr Amin in both claiming to be the sole beneficial owner of Just Gems Inc and (c) that the Pacific Rim shares had already been registered in Madam Jamilah's name they were advised by their legal advisors to secure an appropriate indemnity from Madam Jamilah, Mr Amin and the plaintiff.

60. Despite various attempts to reach an amicable resolution of the dispute, Madam Jamilah refused to co-operate on the matter and, instead, caused the plaintiff to commence this action against Madam Ooi and Pacific Rim in October 1999.

61. I note here that under cross-examination, Madam Ooi conceded that in asking for an indemnity from Madam Jamilah and Mr Amin in relation to cancellation of the share certificate in Madam Jamilah's name and the issue of a new certificate in the name of Just Gems Inc, she was trying to protect Agate from possible adverse consequences of the mistake that she had made in relation to the issue of the share certificate. She also confirmed that in fact she was the person who should have been responsible to Agate for that mistake. Somewhat later, Madam Ooi conceded that she was also the one who had informed the corporate secretary of Pacific Rim that the person whose name should be registered as the shareholder of the shares in question was Madam Jamilah.

(ii) Mr Khoo and Mr Soh Boon Hock

62. Mr Khoo's affidavit of evidence-in-chief was short. He first explained that Pacific Rim had not entered an appearance to this action as its lawyers had advised it not to submit the jurisdiction of the Singapore courts because relevant court papers had not been properly served on that company. In any case, the plaintiff did not have a case against Pacific Rim because Pacific Rim was not a party to the SPA on which the plaintiff relied.

63. Mr Khoo then referred to Madam Ooi's affidavit of evidence-in-chief and confirmed the matters set out therein to be true. In addition, he stated that he had met with Madam Jamilah on several occasions to negotiate the terms of the purchase by her or her nominee of shares of Pacific Rim from its shareholders. He was not able to confirm that the 'hand-written note' on the back of the memorandum of 25 September 1996 had been written by him. In any case, the note had been generated in the course of discussion and no agreement was contained in it.

64. Mr Khoo was adamant that Madam Ooi had signed the SPA for and on behalf of all the shareholders of Pacific Rim and that she had accounted to him and the other shareholders for the monies paid on behalf of Just Gems through her to the shareholders of Pacific Rim. Mr Khoo said that he had received from Madam Ooi the full amount due to him for the sale of his shares to the plaintiff. He did not say how much that was or offer any documentary proof of the payment. Finally, Mr Khoo echoed Madam Ooi's assertion that the register of Pacific Rim reflected Madam Jamilah as a registered shareholder because she chose to sign the instruments of transfer in her personal name instead of signing them for and on behalf of the plaintiff.

65. During cross-examination, Mr Khoo confirmed that altogether there were three investments made by Madam Jamilah or her husband two of which were direct investments in Agate and the third was an indirect investment in Agate. He agreed that at that time Agate was in urgent need of funds. He also agreed that in 1996 he had been aware of Hazelwood Holdings Limited and that it had changed its name to Just Gems. However, he could not recall exactly whether it was Just Gems Inc or Just Gems Ltd. Until legal action was commenced he regarded Just Gems Inc as Madam Jamilah's company and it made no difference to him whether its name ended with 'Inc' or 'Ltd'.

66. In cross-examination, Mr Khoo asserted that the agreement by the plaintiff to invest in Pacific Rim was not arrived at in August 1996 but around the latter part of October 1996. He did, however, accept that the investment had been agreed to first and only later signified by the signing of the SPA. Mr Khoo's memory proved illusive in regard to the memorandum of 25 September 1996. He could not remember either the memorandum or the meeting that Madam Jamilah asserted had taken place on 26 September between herself, Mr Khoo and Madam Ooi. He was then shown the hand-written note scribbled on the back of the memorandum and he agreed that the handwriting appeared to be his. He then said that he could not recall whether it was exactly on 25 or 26 September when the matter was discussed but that the hand-written note had been written during a meeting between the three of them. When asked why the memorandum had been produced, his response was that it was a proposal for discussion. He agreed that by that date (25 September) Madam Jamilah had paid US\$100,000 in respect of the plaintiff's direct investment in Agate but could not recall whether a payment of US\$200,000 had been made in respect of the investment in Pacific Rim.

67. Whilst Mr Khoo disagreed that the memorandum had been produced to explain to Madam Jamilah, and to document, her investments in Agate and Pacific Rim, he accepted that the first paragraph of it reflected what had been agreed and effected in respect of the investment in 750,000 Agate shares. It was put to him that the second paragraph similarly recorded the agreement in respect of the indirect investment in Pacific Rim. Mr Khoo disagreed and said that it was simply 'a proposal of a million shares at Agate level and that would represent something like 22% ... The idea was for Pacific Rim itself to have an issued capital of 4.5 million shares so that one share in Pacific Rim would be

equal to one Agate share owned by Pacific Rim'. Mr Khoo did accept, however, that the negotiations in respect of the indirect investment did commence prior to 25 September.

68. It was pointed out that in the SPA it had been stated that 124,005 shares of Pacific Rim would represent a 20% holding in that company. Mr Khoo agreed that on that basis a 100% holding would have comprised 620,000 shares. He confirmed that in November 1996 Pacific Rim did not have 620,000 shares. He asserted, however, that the then shareholders had loaned Pacific Rim US\$200,000 and that there were company records concerning the alleged loan. These records were not, however, produced.

69. Mr Khoo's attention was drawn to a document entitled 'Capital Structure and Shareholding' and dated 15 November 1996 which had been prepared in relation to Agate. This document contained a statement that Just Gems Inc, a holding company beneficially owned by Madam Jamilah, had direct and indirect holdings in Agate amounting to 22% of Agate's then issued share capital of 7,550,000 issued shares. He was asked what was the meaning of the statement that Madam Jamilah had 22% of an issued capital of 7,550,000 and his reply was that that was an estimated number. The follow-up question was whether the statement had been an accurate reflection of Madam Jamilah's shareholding and Mr Khoo's answer to that was 'At certain points in time, it was'. Mr Khoo was also shown extracts from a private placement memorandum in relation to the issue of preference shares that was prepared on behalf of Agate in December 1996. Page 18 of this document contained a statement that Pacific Rim owned 4.5 million shares in Agate and below that was a section entitled 'Substantial Shareholder' which stated:

'Just Gems Inc, a company beneficially owned by Jamilah Abu Bakar holds 750,000 common shares or approximately 11% of the currently outstanding 7,050,000 shares. Taking into account, Just Gems Inc ownership interest in Pacific Rim Trading Ltd., Ms Jamilah has an estimated total shareholding of 23% based on an issued share capital of 7,050,000 shares. It is expected that in December 1996, Jamilah Abu Bakar will be appointed as a member of the Board of Directors.'

Mr Khoo stated that he could not recall whether there had been any change in the capital structure of Agate in November or December 1996.

70. Various discrepancies in the two documents mentioned above were conceded to by Mr Khoo. He confirmed that notwithstanding statements made in the November 1996 document that Pacific Rim owned 4.5 million shares in Agate and that the shares had been paid for in cash, as of that date, Pacific Rim did not have a share certificate for those Agate shares. Further, although in the private placement memorandum it had been stated that he himself and Madam Ooi held their shares in Pacific Rim through a corporate entity, as of the date of issue of that memorandum, no such entity existed. Further, the private placement memorandum did not disclose Mr Soh's position as a major shareholder of Pacific Rim but simply stated that Mr Khoo and Madam Ooi were directors of that company with a controlling majority vote.

71. Mr Soh Boon Hock's testimony was brief. He was told in late 1996 by Madam Ooi that Madam Jamilah was interested in investing in Pacific Rim and that the then shareholders of Pacific Rim would transfer some of their shares to either Madam Jamilah or Just Gems Inc on a pro-rata basis. He then referred to an authorisation letter dated 1 November 1996 which had been executed by him giving Madam Ooi full authority and discretion to negotiate on his behalf and to sell his shares in Pacific Rim.

72. In July 1997, he received a call from Madam Ooi who asked him to take some documents to

Madam Jamilah for her signature. These documents were couriered to him by Accel on 14 July 1997. One of the documents exhibited in Mr Soh's affidavit was a note written by Madam Ooi in which she instructed him 'On the "Instrument of Transfer", pls obtain Jamilah's signature as Transferee'. He then arranged to meet Madam Jamilah at the Nikko Hotel in Kuala Lumpur. He could not remember the exact date of the meeting but said it was during the period between 22 July and 24 July 1997. At the hotel, he handed Madam Jamilah the documents entitled 'Instruments of Transfer'. She signed them in his presence and returned them to him. He then sent the documents back to Accel. Finally he confirmed that he had received from Madam Ooi the full amount due to him for the sale of his shares to the plaintiff.

73. During cross-examination, Mr Soh appeared rather vague about his investment in Pacific Rim and Agate. He was not quite sure when he first subscribed for shares in Pacific Rim but thought it was probably in early 1996 and that there had been various stages of subscription during that year. When asked how many shares he had subscribed for he said that when he put in his money as capital he did not know what kind of shares he would get. All he knew was that he, Mr Khoo and Madam Ooi would be equal shareholders. Altogether he put in about US\$120,000 as his share of the capital. However, no shares were issued to him in 1996. When asked about his loan to Pacific Rim, Mr Soh was also vague. He remembered making a loan of US\$25,000 but could not remember whether the money had been lent to Agate or to Pacific Rim.

74. A letter from Accel to Mr Soh dated 14 July 1997 mentioned that Mr Soh's holding of 969,850 shares (share certificate R45) was to be transferred to a corporate entity and asked for certain documents to be furnished in that respect. In cross-examination, Mr Soh was asked whether he had had 969,850 shares in Pacific Rim in July 1997. His answer was 'Yes'. He was not, however, sure whether that number of shares included the shares to be transferred to Madam Jamilah. Nor did he know when the share certificate R45 had been issued. All he knew was that by 1998 he had a share certificate for 969,850 shares in his hands.

75. Mr Soh's understanding was that the assets of Pacific Rim comprised its holding of Agate shares. He admitted that he did not have detailed knowledge of the assets of Pacific Rim and could not remember whether or not Pacific Rim had owned 4.5 million Agate shares in 1996. He knew his US\$120,000 had been used to purchase Agate shares by Pacific Rim some time in 1996 and also that Madam Jamilah was to invest about US\$500,000 in Pacific Rim. Mr Soh was aware that Madam Jamilah's investment required existing shareholders to sell part of their shares to Madam Jamilah but said that concerning himself there was no direct arrangement for him to sell his shares to Madam Jamilah. He had given Madam Ooi the full authorisation to agree, on his behalf, to Madam Jamilah's investment in Pacific Rim and in 1997, he had sold a portion of his shares to Madam Jamilah for about US\$100,000.

(iii) Mr Stephen M. Wurzburg

76. Mr Wurzburg gave evidence on what had transpired after the plaintiff learnt that what should have been its share certificate had in fact been issued in favour of Madam Jamilah. Acting for Madam Ooi and Agate, he had dealt with one Mike Allardice of Accel. It was Mr Allardice's recommendation that in order for Pacific Rim to reissue the share certificate in the name of the plaintiff, Madam Jamilah, her husband and the plaintiff, sign an instruction and indemnity letter that he had drafted. This letter contained an undertaking on the part of Madam Jamilah, Mr Amin and the plaintiff to 'indemnify [Pacific Rim] and all [its] officers past, present and future and to keep [Pacific Rim] and all such officers indemnified against all claims, demands, liabilities, costs and expenses for which [Pacific Rim] or [its officers] may become liable for acting upon our request'. Mr Wurzburg informed Madam

Jamilah that he had an undated share certificate in favour of Just Gems Inc in his hands and would release it in return for the duly executed indemnity.

77. Madam Jamilah employed one William Gould as her counsel and there were various attempts to settle the matter between Mr Gould and Mr Wurzburg. Mr Gould ultimately indicated that Madam Jamilah wished to sell her shares. Agate offered to attempt to find a buyer for the shares at cost and requested an option to buy them itself at cost. That offer was rejected and little happened for the next few months.

78. At the end of October and in early November 1998, Mr Wurzburg received letters from Madam Jamilah requesting the share certificate in the plaintiff's name. He called Mr Gould as he could not respond directly to Madam Jamilah since she was legally represented. Mr Wurzburg confirmed to Mr Gould that he still possessed the undated share certificate in the name of Just Gems Inc and said he would work on revising the Allardice draft indemnity. Mr Wurzburg testified that he believed that he had then revised the indemnity and faxed it to Mr Gould although he could find no record of having done so.

79. Instead of Mr Wurzburg hearing back from Mr Gould, Madam Ooi received a letter on 26 November 1998 from the plaintiff's Singapore lawyers asking for refund of US\$550,000. On 10 December 1998 Mr Wurzburg wrote to these lawyers offering, in exchange for the plaintiff's shares in both Agate and Pacific Rim, to refund US\$550,000 to the plaintiff. On 23 December 1998, the plaintiff's Singapore lawyers stated that the plaintiff could not accept the proposed terms of settlement and asked whether Mr Wurzburg had instructions to accept service on behalf of Madam Ooi. Mr Wurzburg replied on 6 January 1999 stating that his client would refund US\$595,002.50 (US\$500,000 for the Pacific Rim shares and US\$95,002.50 for the Agate shares). He also reiterated that the Pacific Rim share certificate would be released once the indemnity letter had been signed by Madam Jamilah and Mr Amin. Subsequently, the parties began settlement discussions through a mediator but these were not successful.

Findings

Issue (1)

What payments did Mr Amin make?

80. It is a part of the Plaintiff's case on the agreement that it was concluded in August 1996 or, at least, prior to the payment by Mr Amin of the sum of US\$200,000 to Madam Ooi in September 1996. The plaintiff says that this payment was the first instalment of its investment in Pacific Rim and that it was because of Madam Jamilah's anxiety over the lack of paperwork to support the spending of such a large amount that the memorandum of 25 September was produced. Madam Ooi's position on the other hand is that the payment had nothing to do with the plaintiff's investment in Pacific Rim. If Madam Ooi's case on this is accepted, the strength of the plaintiff's case overall would be much reduced. In addition the plaintiff would be unable to establish that it had paid US\$550,000 in total. It is therefore important to decide whether the plaintiff paid US\$200,000 to Madam Ooi in September 1996 on account of the investment before going on to consider what contract was arrived at and between whom.

81. Mr Amin's evidence was that he instructed Coutts on 16 September 1996 to transfer from the account of Parmoor the sum of US\$200,000 to Citibank Singapore for account of Madam Ooi. He produced a copy of his letter of that date to the bank indicating Madam Ooi as the payee and giving her account number as A/C 0116316005. He also produced a debit advice from Coutts dated 17

September 1996 showing that it had debited Parmoor's account with the sum of US\$200,036.70 in respect of US\$200,000 remitted to Madam Ooi and a further US\$36.70 as its charge for this remittance. The third supporting document that Mr Amin produced was a copy of Parmoor's bank statement from Coutts for the period July to September 1996 and this showed the debit of the sum of US\$200,036.70 on 17 September 1996.

82. The account number of Madam Ooi that Mr Amin specified in his letter of instruction was her 'Maxisave' account. This was an account denominated in Singapore dollars whereas the remittance was denominated in US dollars. Ms Catherine Tan, the Citibank officer, testified that if monies were sent by a third party to a specified account in Citibank and that account was denominated in Singapore dollars whereas the remittance was in US dollars, then if the amount was substantial the bank would ask its customer, the holder of the account, how the customer wanted the funds dealt with and would follow those instructions. If the remittance was a small amount, they would convert it into Singapore dollars and credit the specified account.

83. Madam Ooi produced some bank statements issued to her by Citibank. The statement covering the month of September 1996 does not show the receipt of the remittance of US\$200,000. Nor does it show the receipt of a Singapore dollar amount equivalent to US\$200,000. In fact there seems to have been only one deposit into the account in September and that was the sum of S\$5,004.09 deposited on 30 September. In her defence, Madam Ooi put the plaintiff to strict proof that payment of US\$200,000 was made into her Citibank account on or about 16 September 1996 or at all. The implication of that pleading was that she had not received the money. In court however, she did not maintain this stand. Instead she admitted that a sum of US\$200,000 had been received into Citibank in her name for the purpose of enabling Mr Amin to take out in cash Malaysian Ringgit of an amount equivalent to US\$190,000. She did not, however, produce any bank statement which showed either the receipt of that money on her behalf or the withdrawal of the US\$190,000. Nor was there any document showing what had happened to the remaining US\$10,000.

84. Madam Ooi's position in relation to the US\$200,000 changed more than once in the course of the action. Her first position, as stated in her defence, was the denial that she had received the sum of US\$550,000 and her requiring strict proof from the plaintiff on the remittance of US\$200,000 which formed part of that total sum. When it came to the application by the plaintiff for summary judgment, however, Madam Ooi filed an affidavit (her first affidavit) in which she admitted that at some time Mr Amin had remitted US\$200,000 to Citibank Singapore in her name. She explained that this money had been sent in her name because Mr Amin wanted to open an account with that bank. As the account opening formalities were not completed, he requested that this money be exchanged for Malaysian Ringgit which he physically carried with him. She went on to say that the officer who attended to this transaction on 19 September 1996 when Mr Amin and herself visited the bank was one Ms Nora Saini. This was not the end of the explanation as Madam Ooi continued:

'This payment, like the earlier one referred to in paragraph 10 hereinabove, related to a different transaction altogether and is separate and distinct from the transaction in question in these proceedings, which involve the purchase of shares of Pacific Rim. In this respect, I crave leave to refer to copies of the documents exhibited and collectively marked as "SOCL-3".'

In paragraph 10 of the first affidavit, Madam Ooi had been talking about the direct investment by the plaintiff in Agate. The documents marked 'SOCL-3' were documents relating to a direct investment in Agate by Parmoor. It therefore appeared from the first affidavit that Madam Ooi was connecting the remittance of US\$200,000 to Parmoor's investment in Agate.

85. In her affidavit of evidence-in-chief (her second affidavit), Madam Ooi modified her stand by deleting all references to Parmoor's investment in Agate and contented herself with repeating the assertion that the US\$200,000 was sent to her so that Mr Amin could open an account in Citibank. Naturally, she was cross-examined at length on the change in her position. Her initial response was that her stand at the Order 14 proceedings had been identical to the stand taken in her second affidavit. She admitted, in a roundabout fashion, that the September payment had been the only time when the US\$200,000 had been sent to her account. She conceded subsequently that it seemed from her first affidavit as if it had been her assertion that the US\$200,000 paid in September 1996 related to the Parmoor investment in Agate. She said next that the US\$200,000 was a transaction that was distinct and separate both from the subscription for Agate shares by Parmoor and the subscription for shares in Pacific Rim by the plaintiff. She then conceded that it did appear from the first affidavit that there had been some confusion in the documentation attached to that affidavit but asserted that she had clarified the position in her second affidavit. As far as the first affidavit was concerned, she said: "I don't know why the Parmoor shares were attached here. I may have been confused at that time. There is no doubt that when I did my second affidavit I was very clear how the transaction transpired."

86. The plaintiffs submitted that Madam Ooi had abandoned the stand in her first affidavit that the US\$200,000 was connected with Parmoor's investment in Agate because Madam Jamilah had, in a subsequent affidavit filed in the Order 14 proceedings, demolished that assertion by exhibiting the evidence of the payments for the Parmoor's investment which had all been made in 1997 and not in September 1996. There is some force in that submission since Madam Ooi was unable to give a rational explanation as to why she had brought up the Parmoor investment in connection with the US\$200,000 and could only state weakly that she had been confused. Madam Ooi herself was compelled to admit that the change in her stand between the filing of the first affidavit and that of the second had taken place because the original position was no longer tenable.

87. There are other ways in which Madam Ooi's evidence on the US\$200,000 was unsatisfactory. First, she was wrong on the date on which Mr Amin was in Singapore. She had stated categorically on two occasions that Mr Amin was here on 19 September 1996. This assertion was demonstrated to be wrong by the production of Mr Amin's passport which established that he was not in Singapore on 19 September but was here only on 20 September. Further, Ms Catherine Tan produced evidence showing that Mr Amin had opened an account with Citibank Singapore on 20 September 1996 and not on 19 September 1996. When Madam Ooi was confronted with this evidence while she was on the witness stand, she said that she stood by the assertion that: 'On or about 19/9 i.e. between 16/9 and 20/9 he was in Singapore.' She then said that it had been a long time ago and she could not remember the exact date. I also noted that the opening of the account was completed on 20 September and thus, contrary to Madam Ooi's assertion, Mr Amin would not have had to take away money in cash simply because the formalities were incomplete.

88. Secondly, Madam Ooi did not call Ms Nora Saini to testify on her behalf. This lady was handling Madam Ooi's account at Citibank Singapore at all material times and she was the one who was supposed to have attended to the transaction in which US\$190,000 was withdrawn by Madam Ooi, converted into Ringgit and handed to Mr Amin. Madam Ooi admitted on the stand that since the sum of US\$200,000 had been remitted to her account and she was the named beneficiary of the remittance, she was the only person who could direct Citibank as to what to do with the money. She agreed that if she had instructed Ms Nora Saini to take out US\$190,000 from that remittance and not deposit the same into the account, Ms Saini would have done so and that such an instruction would have been evidenced by a Citibank form filled up and signed by Madam Ooi. When asked where that written instruction was, Madam Ooi's reply was it was with the bank and that she had not kept a copy of it.

89. Madam Ooi did not mention in either of her affidavits what had happened to the remaining US\$10,000. On the stand, she filled in this lacuna by saying that part of the remittance had been credited to the new account which Mr Amin established with Citibank during their visit that day as the initial deposit on the new account. She agreed that there must have been a written confirmation from her addressed to the bank instructing it to transfer US\$10,000 to Mr Amin's new account. She asserted this document was with the bank as well. There was some confusion as to how much exactly Mr Amin had deposited in his new account (his statement showed an initial deposit of US\$5,000) and later in the cross-examination, Madam Ooi asserted that US\$5,000 had been deposited into the account and US\$5,000 must have been taken out in cash. She surmised that she must have given a written instruction to Citibank to allow that withdrawal as well though she could not remember what exactly had happened. All the gaps in Madam Ooi's evidence in relation to the US\$200,000 could have been filled if Ms Saini had been called. The omission to call her and the failure to produce other account documents that must have been generated in relation to the receipt and disposal of this US\$200,000 including instructions given to Citibank, are, in my view, telling.

90. I do not accept Madam Ooi's explanation in relation to the use of the US\$200,000. Having admitted receipt of the money (the remittance of which was more than adequately established by Mr Amin) the onus lay on her to show that it was received for a purpose that had nothing to do with the investment in Pacific Rim. Her explanations were inconsistent and not backed up by any documentation or any independent witness. At an early stage, she tried to fudge the issue by connecting this payment with the Parmoor investment. Having been forced to abandon that assertion, she was not able to bolster her alternative position with convincing evidence. I therefore find that Madam Ooi received US\$200,000 on or about 17 September 1996 as a part payment for the plaintiff's investment in Pacific Rim.

91. Madam Ooi did not dispute receipt of the sum of US\$250,000 on 6 November 1996 and the sum of US\$100,000 on 20 November 1996. Since I have found that she also received the US\$200,000, the result is that I find that in total she was paid the sum of US\$550,000 on account of the plaintiff's investment in shares of Pacific Rim.

92. In coming to the above findings, I am cognisant that in correspondence sent in December 1996, Mr Amin stated that he had only paid US\$450,000 up to the date of his letter. Mr Amin's explanation was that he was confused when he wrote that letter since he had made many payments to Madam Ooi for various investments and she was always asking him for more money. It was only when his wife went through the payments in 1998 that she discovered the overpayment. I accept Mr Amin's explanation. It is a reasonable one given the circumstances then existing.

93. I am also influenced by the fact that Madam Ooi was unable to establish her assertion that the full purchase price of US\$500,000 had been paid in four instalments in the amounts of, respectively US\$250,000, US\$100,000, US\$100,000 and US\$50,000. The last two payments were allegedly made in cash. Mr Amin denied having made the payment of US\$100,000. Since Madam Ooi alleged this payment had been made she had the onus of proof on this issue. She was not able to discharge it. The money was purportedly received by Ms Sim but Ms Sim was not called to testify on the matter. Further, Madam Ooi's bank statement did not show a deposit of US\$100,000 on the day in question and as I have stated in 51 above Madam Ooi's attempt to equate a deposit of US\$99,500 with the US\$100,000 purportedly received was not convincing. Madam Ooi's inability to substantiate the US\$100,000 payment put a substantial dent in the credibility of her version of how the purchase price was settled.

94. Mr Amin admitted making the payment of US\$50,000 in cash to Mr Khoo but said that he had not

included this amount in the calculations as he did not have proof of the payment. If I accept Madam Ooi's testimony that this money was received on account of the Pacific Rim share purchase by the plaintiff, I would have to find that the plaintiff had overpaid Madam Ooi by US\$100,000. Since, however, the plaintiff is not claiming reimbursement in the sum of US\$100,000, I need not deal further with this payment.

Issue (2) What agreement was arrived at and between whom?

95. As the plaintiff pointed out in its closing submissions, the parties do not agree on the nature of the agreement to purchase shares in Pacific Rim. In particular, they are at odds on when the agreement was made, who the parties to the contract were and the quantum of shares agreed to be purchased and sold. The plaintiff further submitted that for the purpose of succeeding in respect of its claim for monies had and received, the matters that are in dispute regarding the agreement are not relevant. What is relevant to the cause of action is not in dispute, namely that there was an agreement between the parties to purchase shares in Pacific Rim and that it was pursuant to this agreement that US\$500,000 was to be paid. With respect, I disagree. In order to determine what, if any, liability Madam Ooi has to the plaintiff, I do need to determine who the agreement was between, what the terms of the agreement were and what each party was expected to do thereunder.

96. It was submitted that Madam Ooi's position on this issue is straightforward. As the SPA clearly stated, the agreement for the sale and purchase of the shares was made between the plaintiff as purchaser and the shareholders of Pacific Rim as vendors. Madam Jamilah signed the SPA in her capacity as representative of the plaintiff. Likewise, Madam Ooi signed the SPA in her capacity as the representative of the shareholders of Pacific Rim.

97. The above submission did not deal adequately with the wording and implications of the SPA. First, it should be noted that Madam Ooi was not only a representative of shareholders of Pacific Rim but also a shareholder of that company in her own right. Secondly, as can be seen from 23 above, the SPA made no attempt to distinguish between and separate the sales made by each of the shareholders. The shareholders were not identified separately nor was the number of shares each individual shareholder was supposed to sell indicated. Instead, there was a joint agreement by the shareholders of Pacific Rim 'To sell and deliver to the Purchaser One Hundred Twenty Thousand and Five (124,005) of its US\$1 par value common stock'. This meant that each of the shareholders had an obligation to ensure that the plaintiff received those shares. Madam Ooi as one of the shareholders was equally obliged. Thus, even if the only agreement that existed in relation to the sale of the shares was the SPA, Madam Ooi's role under it was not simply to receive the purchase monies on behalf of the shareholders. She was obliged to ensure that the plaintiff received 124,005 shares in Pacific Rim.

98. I cannot find that the SPA was the sole contract existing in this case. As an entire agreement, it leaves a lot to be desired. There is no indication of any time limit either for payment or for delivery and such inadequacies would imply that these matters had been agreed separately as Madam Jamilah averred. The evidence points to the conclusion that the SPA was ancillary to the main contract which was a contract between the plaintiff and Madam Ooi.

99. It appeared clearly from the evidence that Madam Ooi was the person who instigated the chain of events leading to the purchase of the Pacific Rim shares. She was a prime mover of both Pacific Rim and Agate and in mid 1996, Agate was in urgent need of funds. She therefore contacted her old friend Madam Jamilah to persuade her to invest in Agate and Pacific Rim. She was successful in both attempts. The direct investment in Agate went through first and smoothly and, in the meantime, the

parties had many telephone discussions about an investment in Pacific Rim.

100. I find that the result of these discussions was that there was an agreement between Pacific Rim (a company incorporated at Madam Ooi's suggestion and with her help – it was even she who came up with the name 'Just Gems') and Madam Ooi in either late August or early September 1996. This agreement was evidenced by the payment of US\$200,000 made by Mr Amin on behalf of the plaintiff, the memorandum of 25 September (which even Madam Ooi, who professed at first to have no knowledge of it, later accepted as reflecting some of the terms of the agreement with the plaintiff), and the SPA itself. The agreement was that the plaintiff would invest US\$500,000 in Pacific Rim in order to obtain a 22% interest in that company and that this money would be paid in instalments to Madam Ooi who would do everything necessary to ensure that the plaintiff became a 22% shareholder of Pacific Rim. The intentions of the parties were reflected not only in the memorandum which was prepared by Madam Ooi subsequently but also in documents prepared by Agate in November and December 1996. In view of this finding on the contractual relationship between Madam Ooi and the plaintiff, it follows that all payments that were made to Madam Ooi or into her bank account were made for her account and in relation to that contract. Those payments were not made to the account of the shareholders of Pacific Rim in general. What Madam Ooi did with the money after she received it and in what proportions she distributed it amongst herself and the other shareholders was her business and had nothing to do, in contractual terms, with the contract between her and the plaintiff.

101. Madam Jamilah fixed the time of the discussions and agreement around August 1996. Madam Ooi was vague and evasive on timing. The closest she could come to an exact approximation was to say that the discussions took place in the second half of the year. Notwithstanding that the memorandum that she eventually admitted to have authored stated that the figure to be invested in Pacific Rim was US\$500,000, she refused to confirm that the figure had been agreed during the telephone discussions but asserted instead that it was finalised 'through the Stock Purchase Agreement'. That would mean that the purchase price was not agreed prior to 1 November 1996 when the SPA was sent to Madam Jamilah. That assertion was contrary to the contents of the memorandum. Mr Khoo's evidence also contradicted the position that the SPA was the document that finalised matters. He was clear in his own mind that the agreement was concluded prior to the SPA and the SPA's function was to evidence the concluded agreement.

102. I found Madam Ooi to be an unsatisfactory witness in many areas, some of which have already been noted. She was particularly unsatisfactory in relation to the preparation and meaning of the memorandum. As noted, at first she claimed that she could not remember even preparing it but on the stand she admitted that she had. Even then, she claimed that she could not remember what the contents of the memorandum meant. Madam Ooi could not remember either when or even where the meeting took place. On further questioning she claimed that the purpose of the memorandum was to discuss possible 'what if' scenarios and what Madam Jamilah's position would be based on such scenarios. She claimed that the figures stated therein were not accurate or true but simply estimations. However, when asked in cross-examination whether the memorandum reflected what Madam Jamilah's position would be in those 'what if' scenarios, she admitted that it had not. I note that Mr Khoo was equally evasive and unforthcoming on the question of the memorandum and the meeting until he was forced to admit during cross-examination that there had been a meeting between Madam Jamilah, Madam Ooi and himself and that he had done some scribbling at the back of the memorandum though of course he was quick to assert that that writing did not reflect any agreed terms.

103. It was clear from the evidence of Mr Khoo and Mr Soh that Madam Ooi had carte blanche from them to do whatever she wished with their shares in order to raise capital for Pacific Rim and Agate.

It no doubt helped that her actions also resulted in a quick profit for both of them. Mr Soh, for example, invested only US\$120,000 in Pacific Rim in 1996 but claimed that in 1997 he was paid US\$100,000 for 20% of his original investment. Since Madam Ooi had the ability to deal with Pacific Rim and its shares as she saw fit, it was entirely reasonable for her to agree with the plaintiff to give that company a 22% interest in Pacific Rim notwithstanding that she herself did not own all the shares necessary to transfer that interest to the plaintiff.

104. Madam Ooi asserted that the SPA was the only contract that existed and that it was an agreement by the shareholders of Pacific Rim to sell the plaintiff a 20% share in Pacific Rim. In my judgment, the SPA was not a separate contract between the shareholders of Pacific Rim and the plaintiff. It was simply a document generated by Madam Ooi who thought she needed it to give effect to the agreement which already existed between her and the plaintiff. The plaintiff had already agreed to acquire a 22% interest in Pacific Rim from or through Madam Ooi. It would have been incompatible with that contract for the plaintiff to enter into a separate agreement with the shareholders generally for the purchase of the same, or almost the same, interest. In my opinion, the SPA had no legal effect. At the most, it could have evidenced a variation in the agreement between the plaintiff and Madam Ooi whereby the plaintiff agreed to reduce the interest it was purchasing from 22% to 20%. Such a variation was, however, inconsistent with the statements made by Agate as to the 22% interest which the plaintiff had in Pacific Rim. Nor was it supported by fresh consideration. All I can conclude is that the paperwork was extremely shoddy and, since it was generated by Madam Ooi and/or her attorneys and employees, if there is any doubt as to what occurred, that doubt must be resolved in favour of the plaintiff. I therefore hold that the original contract whereby in return for an investment of US\$500,000 the plaintiff would acquire a 22% interest in Pacific Rim remained unmodified despite the signing of the SPA.

105. Madam Ooi, in trying to support her assertion that the SPA was the contract, produced what she said was a letter of authorisation from the shareholders giving her a mandate to deal with their shares on their behalf. The plaintiff submitted that this authorisation was clearly an after-thought and ought to be rejected. First, it was dated 1 November 1996 and by then the agreement had already been made. Secondly, only Mr Soh ever signed the authorisation. There was no evidence that the other shareholders had even seen it let alone signed it. Thirdly it was inconsistent with Mr Khoo's assertion that he was negotiating with the plaintiff on his own behalf when he spoke to Madam Jamilah. Yet Mr Khoo's name (though not his signature) appeared on the same document. Fourthly, Ms Sim's name was omitted from the document altogether for some unexplained reason. I accept the foregoing submissions. There was no evidence that the letter of authorisation actually existed let alone was signed by any of the shareholders on 1 November 1996.

106. Another piece of evidence which casts doubt on the legal effect of the SPA as a contract relates to the issued shareholding of Pacific Rim at that time. It would be recalled that under the SPA, the shareholders purportedly undertook to sell to the plaintiff 124,005 of the common stock of Pacific Rim and represented that this share purchase would represent a 20% ownership interest in Pacific Rim. In November 1996, however, 124,005 shares in Pacific Rim would not have given the plaintiff a 20% share in the company.

107. Up to 8 January 1997, Pacific Rim had a share capital of only 420,003 shares. Thus, in November 1996, 124,005 shares was equal to a 29.52% interest in the capital. For 124,005 shares to represent a 20% interest, the share capital would have had to consist of 620,003 shares. Both Madam Ooi and Mr Khoo admitted in court that in November 1996, Pacific Rim had not issued even 620,000 shares.

108. Madam Ooi attempted to get around this discrepancy by claiming that in their calculations she and Mr Khoo had taken into account outstanding shareholders' loans totalling US\$200,000.

Capitalisation of the loans would have increased the share capital to 620,003 shares. She did not, however, produce any evidence to show that such loans existed. Mr Soh was asked whether he had lent money to Pacific Rim and, although he remembered having made a loan of US\$25,000, he could not remember if that had been to Pacific Rim. Even if he had, on the basis of his evidence that he, Madam Ooi and Mr Khoo had invested roughly equal amounts in Pacific Rim (this was substantiated by the fact that each of them transferred an equal number of shares to Madam Jamilah) and the loan made by him was in the amount of US\$25,000, a total amount lent to the company by its three main shareholders would not have exceeded US\$100,000 and the minority shareholders, who between them held only 20% of the issued capital, could not have lent the company more than US\$20,000. This was because it was not contemplated that capitalisation of the loans would change the proportions of shares held by the existing shareholders. Since the number of shares to be transferred to the plaintiff pursuant to the SPA was not equivalent to a 20% interest of the company as at November 1996, the SPA cannot have been intended to have immediate legal effect. Otherwise the shareholders would have been obliged to give the plaintiff a 29% interest, something they did not intend to do.

109. There is no dispute that no share certificate for a number of shares which would give the plaintiff a 22% interest in Pacific Rim has ever been issued and delivered to the plaintiff. There is an undated share certificate in the name of 'Just Gems Inc' for a number of shares equivalent to a 20% interest in Pacific Rim but there is no evidence that this share certificate has legal effect. As stated, it is undated and nothing has been produced which would indicate that despite the failure to date the share certificate, the plaintiff whether called by its proper name or by the name of 'Just Gems Inc' appears in the register of Pacific Rim as the holder of the number of shares stated in the certificate. I must therefore hold that Madam Ooi has not fulfilled her obligation under the contract which was to procure that in return for the investment of US\$500,000, the plaintiff would acquire a 22% interest in Pacific Rim.

110. I should state here that I accept the evidence that Madam Jamilah signed the six instruments of transfer. Mr Soh's evidence on this point struck me as straightforward and truthful. Madam Jamilah was not as truthful on this point as she could have been. She did admit signing six documents but refused to accept that they could have been instruments of transfer. This denial was undermined by the contents of the memorandum she made in July 1997 at about the time of the signing of the six documents. The figures that she wrote down in the memorandum corresponded with the number of shares being transferred by each of the shareholders in the respective instruments of transfer. Although Madam Jamilah signed those instruments her action would not excuse Madam Ooi's breach of contract. Madam Ooi was instrumental in the way in which the transfers were drafted and she accepted responsibility for this, quite rightly, in March 1998. Having done so, if she had corrected the situation immediately, the present action would never have arisen.

Issue (3) Was the eventual non-transfer of the shares to the plaintiff due to any default or omission on the part of the plaintiff?

111. In the amended defence, Madam Ooi pleaded that the non-transfer of the shares was due to the default, omission and/or refusal on the part of the plaintiff and its representatives to do what was necessary to regularise the erroneous registration of the shares in Madam Jamilah's name. The crux of this was the failure and/or refusal of the plaintiff and Madam Jamilah and Mr Amin to sign the indemnity agreement drafted by Mr Allardice.

112. At trial, Madam Ooi admitted that the erroneous registration of Madam Jamilah as the holder of the shares which should have been in the plaintiff's name was her fault. She admitted that it was her mistake that resulted in the share certificate issued by Agate naming the shareholder as 'Just Gems

Inc' and it was also her mistake that the Pacific Rim share certificate was issued in Madam Jamilah's name. She further admitted that she had sought the indemnity agreement from the plaintiff to protect herself from the consequences of her mistake.

113. In these circumstances, it was not correct for Pacific Rim to insist on the indemnity agreement being signed by the plaintiff, Madam Jamilah and Mr Amin and Madam Ooi had the power to cause Pacific Rim to withdraw that insistence. It would be noted that under the indemnity agreement, the indemnifiers were to indemnify all officers of Pacific Rim, past, present and future and to see such officers indemnified against all claims, demands, liabilities, costs and expenses arising out of the company acting on their request to cancel the share certificate in the name of Madam Jamilah and reissue it in the name of the plaintiff. This was a highly unreasonable requirement since the necessity for the cancellation and reissue of the certificate was a mistake made by a director of Pacific Rim. In any case it was wrong to require Mr Amin to give an indemnity since he was a third party in relation to the mistake that had been made.

114. There was also a submission that the situation could have been resolved had Madam Jamilah herself executed, as transferee, an instrument of transfer, whereby she transferred the shares in question to the plaintiff, as transferee. Madam Jamilah refused to do this. I do not find this refusal to be unreasonable. Madam Jamilah's position was that she herself was not supposed to be a shareholder of Pacific Rim. By signing such an instrument as transferee she would have accepted that for some time and for whatever reason she had held shares in Pacific Rim. Such an acceptance may very well have had other consequences for her. I cannot fault her refusal to put herself in what would have been an incorrect position.

115. There were settlement negotiations between the parties. Mr Khoo in the course of his evidence agreed that Madam Jamilah was asked as part of the settlement negotiations to agree not to sue and that in 1998 and 1999 she and Mr Amin were asked a few times to indemnify the officers of Agate past, present and future against all claims, demands, liabilities, costs and expenses. In May 1999, one Mr Ong had been enlisted to assist in settling the dispute between the parties and in the course of settlement process, a settlement document was sent to Madam Jamilah. This document was signed by Mr Khoo and contained among other things an indemnity in relation to the shareholding in Pacific Rim. Madam Jamilah's position was that she was prepared to agree to part of the indemnity but would not accept that paragraph indemnifying all the officers of Pacific Rim against claims etc for which they or the company might become liable. Mr Khoo did not admit that Madam Jamilah had agreed to a modified form of indemnity but, on the evidence, it appears to me that she did and it was Madam Ooi and Mr Khoo who dug their heels in at this point.

116. In the light of the evidence, I find that the plaintiff did not act unreasonably in refusing to sign the indemnity. I further find that the failure to register the plaintiff as a shareholder of Pacific Rim is not due to the default of the plaintiff or of Madam Jamilah.

Issue (4) What remedy is the plaintiff entitled to?

117. The plaintiff no longer wants to be a shareholder in Pacific Rim. It wants its money back with interest. It also wants a declaration that neither it nor Madam Jamilah has ever been a shareholder in Pacific Rim. In any case, the plaintiff is entitled to the return of the US\$50,000 which it overpaid Madam Ooi. She has no basis to hold on to this money which was paid to her under a mistake of fact by the plaintiff, the mistake being due to a wrong calculation of the amounts paid to Madam Ooi prior to 20 November 1996. On that date, the plaintiff should have paid Madam Ooi US\$50,000 instead of the US\$100,000 remitted.

118. As regards the US\$500,000 which was paid for the shares, the plaintiff's contention is that it is entitled to get this money back from Madam Ooi either on the basis of money had and received for a particular purpose or due to a total failure of consideration. Madam Ooi's basic position was that she had received the money for the account of the shareholders of the second defendant and in her capacity as agent for these shareholders. As such, any liability to repay the money would rest on the principals and not on Madam Ooi, the agent.

119. I have found that Madam Ooi was a party to a contract with the plaintiff. She received this money under the contract and she received this money as principal and not as agent. Madam Ooi's first line of defence therefore fails.

120. As regards the claim for money had and received, Madam Ooi's stand is that she did not receive the money for the use of the plaintiff or under any circumstances as would entitle the plaintiff to recover it from her. The classic case of an action for money had and received arises, as stated in *Halsbury's Laws of England* (4th Ed) Vol 9(1), para 1138 when D has received money from X for the purposes of paying it over to P or where D has in his hands money belonging to X and is subsequently instructed by X to pay it over to P. In these circumstances P can maintain an action against D for money had and received. It can be seen that in this situation the plaintiff and the defendant are not in a direct contractual relationship but that the defendant has to account to the plaintiff for money received from a third party. This situation does not apply in this case as Madam Ooi and the plaintiff had a contractual relationship under which the plaintiff paid money, albeit through a third party, to Madam Ooi in consideration of her procuring the plaintiff shares in Pacific Rim. The plaintiff was not really concerned whether the money was paid to the shareholders or to the company as long as it received its shares.

121. In my view, the plaintiff can only recover the monies paid if it can establish that there has been a total failure of consideration. As stated in *Chitty on Contracts* (28th Ed) Vol 1 para 30-048, where money has been paid under a transaction that is or becomes ineffective, the payer may recover the money provided the consideration for the payment has totally failed. A failure of consideration occurs where the payer has not enjoyed the benefit of any part of what he bargained for.

122. The question here is whether the plaintiff has enjoyed any benefit from its bargain to invest in Pacific Rim shares. It should be noted that it has not received any dividends nor has it taken part in the operations, such as they are, of Pacific Rim. At one stage, Mr Amin made a suggestion that Madam Jamilah as the representative of the plaintiff should be appointed to the board of Pacific Rim. This suggestion was not taken up by Madam Ooi or Mr Khoo. Mr Khoo said it was not part of the agreement. If the plaintiff had been a shareholder, however, it could have called for a shareholders' meeting and proposed Madam Jamilah's appointment although it might not have been able to have its proposal passed. As a shareholder the plaintiff could have attended general meetings of Pacific Rim and asked for the convening of extraordinary general meetings. It would also be entitled to participate in a distribution of the company's assets on a winding-up.

123. It is no doubt true that after the plaintiff's investment was made, it was declared to be a shareholder of Pacific Rim in several documents issued by Agate. Such advertisement would not, however, constitute in my view the benefit bargained for. Nor would the role that Madam Jamilah played in Agate's Malaysian subsidiary's operations nor her appointment to the board of Agate. The plaintiff had a direct investment in Agate which could justify Madam Jamilah's participation.

124. I am satisfied that the plaintiff has not received the benefit it paid US\$500,000 for and that the consideration for the contract has totally failed. Accordingly, it is entitled to the return of

US\$500,000.

125. As regards the declarations asked for, I think it proper to make a declaration in respect of the plaintiff's status (actually non-status) vis--vis Pacific Rim. I will not make such a declaration as regards Madam Jamilah's status as there is a share certificate issued in her favour and this may have been recorded in the share register book of Pacific Rim. In any case, Madam Jamilah is not a party to this action.

126. The plaintiff has also asked for a declaration that Madam Ooi give an indemnity to the plaintiff and/or Madam Jamilah and/or Mr Amin if they are made parties to an action by reason of the fact that they are or were shareholders or officers of Pacific Rim. I do not understand the legal basis of this claim. I will not make such a declaration at this stage but the plaintiff is at liberty to make further arguments on this issue if it so desires.

Conclusion

127. In the result there will be judgment for the plaintiff against the first defendant in the sum of US\$550,000. The first defendant shall pay interest on the total sum of US\$550,000 at 6% p.a. from the date of the writ. This return of this money was first demanded by the plaintiff's lawyers' letter of 26 November 1998 but because of negotiations between the parties, the writ was not issued until October 1999. That being the case, I think the fairest date for the commencement of interest is the date of the writ. The plaintiff is also awarded its costs of the action. I would like to hear the parties on costs as there was an amendment part way through the trial without which the plaintiff would not have succeeded. This may affect the costs to be awarded.

128. There will also be a declaration that Just Gems Limited is not and has never been a shareholder of Pacific Rim Limited.

Sgd:

JUDITH PRAKASH
JUDGE

This does not merit reporting.

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