IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 55

Suit No 553 of 2012

Between

VERONA CAPITAL PTY LTD

… *Plaintiff*

And

RAMBA ENERGY WEST JAMBI LIMITED

… *Defendant*

GROUNDS OF DECISION

Contract - Interpretation

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Verona Capital Pty Ltd
v
Ramba Energy West Jambi Ltd

[2016] SGHC 55

High Court — Suit No 553 of 2012
Aedit Abdullah JC
21, 22, 23, 24, 28, 29, 30 April 2015; 5, 6, 7 May 2015; 12 August 2015.

4 April 2016

Aedit Abdullah JC:

Introduction

1 The crux of this case is what meaning should be given to a fairly common word, "information", as used in a contract between the parties. When dealing with words, one is often tempted to emulate Humpty Dumpty in retorting to Alice,

> "When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean – neither more nor less".

But that egg probably never had to sign or honour a contract. In contracts, at least the ones that are brought to court, one is often faced with words that may have to be clothed with different varieties of meaning. Plainly unambiguous words rarely make it into case law. Instead, in contractual interpretation, rather

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than being able to emulate either Humpty or, for that matter, Alice, one is often left with Schrödinger's cat, with ambiguity, till the box is opened by the court and clarity imposed.

2 In the present case, the situation was even more fraught as what was at issue as constituting "information" was conveyed in a business presentation. Presentations are a ubiquitous part of organisational and commercial life. They allow parties to attract interest for their product, service or project. Prospective buyers, investors or project partners can obtain some preliminary information that will allow them to gauge risks and rewards. If everything is accurately presented, no problem usually arises. However, when presentations contain statements which turn out to be exaggerated or incorrect, lawsuits often follow.

3 So it was with this case. The Plaintiff, Verona Capital Pty Ltd, sued the Defendant, Ramba Energy West Jambi Limited, claiming damages for breach of the contract entered between them. Specifically, the Plaintiff alleged breach of a clause in the contract warranting that certain "information" provided by the Defendant was true. The Plaintiff claimed from the Defendant damages for breach of contract. The Plaintiff also claimed on the basis of unjust enrichment and a *Quistclose* purpose trust. No claim was made on the basis of misrepresentation. The Defendant for its part counterclaimed for a declaration that it was entitled to treat the contract as terminated.

4 I found for the Defendant, ruling that the Plaintiff had not made out a breach of the contractual clause in question. It had not also made out other claims in restitution and for a resulting trust. The Plaintiff has now appealed.

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Background

5 The Defendant was a subsidiary of Ramba Energy Limited, a company listed on the Singapore Exchange. The Defendant had entered into an operations cooperation agreement (in Indonesian, a Kerja Sama Operasi, or "KSO") with PT Pertamina EP ("Pertamina"), a state-owned entity in Indonesia, for the exploration, development, and production of oil and gas in the West Jambi area of South Sumatra, Indonesia.

6 The Plaintiff, an Australian corporation, came to learn of the Defendant's activities in Indonesia through the Plaintiff's fourth witness, one David Robert Whitney. The parties thereafter explored entering into a commercial relationship. A presentation was made in Perth, Australia, on 13 April 2011 ("the Presentation"), by the Defendant's officers to various persons associated with the Plaintiff. While slides were used in hardcopy form, the Presentation did not involve an actual slideshow. What exactly was conveyed at the Presentation was in dispute. What was not controversial was that the Defendant's officer in the Presentation covered the drilling at a particular well, Tuba Obi-8 (also, and hereinafter, referred to as "Lead 1"), in the West Jambi area. This well was apparently first drilled during Dutch colonial occupation of the area, and was thus referred to as a Dutch well.

7 The slide deck used at the Presentation contained two crucial statements regarding Lead 1, which were referred to in these proceedings by the relevant paragraph in the Statement of Claim. Statement 10A was a claim that Lead 1 "penetrated fracture[d] basement and encountered gas". Statement 10B further claimed that Lead 1 "penetrated untested Gas section within upper part of basement Level".

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8 Another slide (referred to in this judgment as slide 27) contained a statement that Lead 1 comprised or represented 54% of the total estimated resource volume of all the leads covered in the presentation, and that the basement section of Lead 1 was estimated to contain 57% of Lead 1's gas resources.

9 Following this presentation, on 25 July 2011, the Plaintiff entered into an agreement with the Defendant ("the Investment Agreement") under which the Plaintiff paid US$1 million to the Defendant, with an obligation for at least one further payment (referred to as the Tranche 2 drawdown).

10 Clause 9.4.16 stipulated that:

> All information given to the Investor and its advisors by the Company, its officers, employees and advisers was when given and is at the date hereof true and accurate.

Subsequently, the Plaintiff carried out some work relating to the wells, including efforts through another company, Red Carpet Energy Pte Ltd. Of particular interest were the well data files for Tuba Obi-8. It was disputed between the parties whether the Defendant had in fact indicated that it had these files. In any event, the file was eventually obtained in October 2011 by the Plaintiff from a company associated with the relevant Indonesian agency. When the well-logs for Tuba Obi-8 were finally obtained, it was apparent that there was no likelihood of commercially viable gas extraction at that site. Subsequently, on 24 October 2011, the Defendant issued a drawdown notice as required by the agreement for the Tranche 2 drawdown. This notice was disputed by the Plaintiff and on 3 November 2011, the Plaintiff acted to cancel the Investment Agreement and sought repayment of the US$1 million already paid and expenses incurred by the Plaintiff. On 7 November 2011, the

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Defendant issued a termination notice under the Investment Agreement, stating that the Investment Agreement was terminated as of 4 November 2011.

11 A dispute arose as to whether the slide deck provided at the Presentation contained a disclaimer to the effect that, *inter alia*, statements made at the Presentation were not to be relied on and were subject to updating and correction. The Plaintiff did have a slide deck in its possession that contained such a disclaimer ("the 56-slide version"). However, the Plaintiff claimed that this was obtained not at or around the time of the Presentation, but later, from the Defendant's or Defendant's group's website. What was provided at the Presentation, according to the Plaintiff, was a shorter version which did not contain the disclaimer ("the 51-slide version"). The Defendant asserted that the 56-slide version was provided at the Presentation and denied that either the 51-slide version or the 56-slide version was ever made available on the website.

12 Following submissions, additional questions were asked by the court as focussing on the use of the term "information" in clause 9.4.16, the nature of statements 10A and 10B, and the effect of the disclaimer that the Defendant alleged was part of the slides.

The Plaintiff's case

13 The Plaintiff's basic position was that there was breach of contract. It disavowed any claim for misrepresentation. Clause 9.4.16 stated that all information given to the Plaintiff was true and accurate. While the term "all information" was not defined in the contract, it clearly covered what was provided in respect of Tuba Obi-8, and as testified to by the Plaintiff's expert,

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was material. There was no ambiguity requiring contextual interpretation. Furthermore, no limit was placed on the ambit of the term "all information".

14 It was not disclosed that the Defendant did not actually have the well files at the time of the presentation. Although the parties did agree to a pre-contractual term sheet ("the Term Sheet") which stated that the parties would perform their own due diligence checks, the Term Sheet did not affect the operation of the Investment Agreement, as clause 20 specified that the entire agreement between the parties was contained within the four corners of the Investment Agreement.

15 All the warranties were, by virtue of clause 9.7, given without any condition or qualification, and were stated to be correct at the material times (*ie*, as at the date of entry into the agreement and the dates of the drawdowns). There being a breach, an event of default occurred under clause 10(b). Additionally, clause 5.2 specified that before each drawdown no material adverse change had occurred and all representations and warranties were complied with and remained true, accurate and correct. The drawdown form itself also contained a confirmation of the truth and accuracy of the representations and warranties.

16 The 51-slide version contained material information which was false or inaccurate. The two statements at slides 5 and 7, *ie*, statement 10A, that Lead 1 penetrated a fractured basement and encountered gas, and statement 10B, that the well penetrated an untested gas section within upper part of the basement level, contained material information. Other slides represented that Lead 1 represented about 54% of the estimated volume of all the leads together, and that the basement of Lead 1 would have 57% of the gas resources of that Lead. The information provided was false as it transpired through the well files that

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the lead did not encounter any gas within the basement level. Breach was thus made out, and the Defendant was liable to repay the US$1 million paid as well as to pay damages of US$498,598.

17 The Defendant's attempt to show that the statements were to be interpreted to mean that the gas was above the basement level, could not, as the Plaintiff's expert testified, be accepted. The effect of the statements that there was gas found was not a matter of interpretation.

18 As testified by various witnesses, the 56-slide version relied upon by the Defendant, containing the disclaimer, was not used at the presentation. While it was testified at trial by Daniel Jol, the Defendant's CEO, that it was possible that the 56-slide version was given to the Plaintiff through a thumb drive, this was clearly an afterthought. The Plaintiff could not explain how the 51-slide version came into being, and its relationship to the 56-slide version.

19 While the Defendant, through its Information Technology officer, tried to show that the slides could not have been hosted on the Defendant's website, the Plaintiff brought in its own expert whose evidence showed that the Defendant's expert could not be relied upon. Therefore, the fact that the Plaintiff happened to have a copy of the slides with the disclaimer did not mean that that version was the one used at the presentation. The Plaintiff's witnesses also all testified that what they saw at the session was a version without any such disclaimer.

20 As an alternative to the breach of contract claim, the Plaintiff claimed restitution of the US$1 million paid as it was paid under a mistake, or that there was a failed *Quistclose* trust: the money was paid for a specific purpose,

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ie, for operations and exploration, which had failed, and the money should therefore be returned.

21 The Defendant's counterclaim would fail in the circumstances, particularly as the notice of drawdown invoked by the Defendant was invalid.

22 Objections were taken to the authenticity of various matters, including documents and audit recordings. The Defendant also sought to adduce hearsay evidence.

The Defendant's case

23 The Defendant put forward a number of arguments that were not directed to the pleaded case or the Plaintiff's actual position. The Defendant argued that the statements in question were not actionable – statements 10A and 10B should be interpreted to mean only that the Plaintiff's officers held the opinion that there were only potential gas resources in place, justifying exploration. There were also risks and uncertainties inherent in the exploration of gas and oil. The Presentation also contained disclaimers. The Plaintiff's version of the slides, which did not contain the disclaimers, was not what was used at the presentation.

24 The Defendant also had an honest belief in its opinion: it did not have the actual well files till late in the day. In any event, there was no reliance by the Plaintiff as they were supposed to carry out their own due diligence, and would have been able to obtain the necessary information.

25 The effect of the contractual provisions was that they did not extend to cover the Presentation. Clause 9.4.16 was not intended to cover the presentation or the statements. Such an exemption would be inconsistent with

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other express terms such as clauses 9.6.4, 9.6.5, 9.6.7 and 20, and the circumstances arising in the negotiations. Clause 9.6.4 stipulated that the Plaintiff would be responsible for its own assessment on the investment. Clause 9.6.5 provided that the Plaintiff represented and warranted that it had not relied upon any representation or warranty other than those expressly set out in the agreement. Clause 9.6.7 provided that the Plaintiff acknowledged that oil and gas exploration is a high risk business. Clause 20 was an entire agreement clause, stipulating that the Investment Agreement was the entire agreement of the parties and superseded all prior communications.

26 "Information" in clause 9.4.16 was limited to representations in clause 9.4. This was underlined by clause 9.4.17, which stated that the recitals were true and accurate. Following *Sandar Aung v Parkway Hospitals Pte Ltd (trading as Mount Elizabeth Hospital) and anor* [2007] 2 SLR(R) 891 and *Singapore Telecommunications Ltd v Starhub Cable Vision Ltd* [2006] 2 SLR(R) 195, the phrase "All information" should be read to include the words "in the course of and pursuant to the [Plaintiff's] due diligence inquiries" or alternatively to include the words "as set forth in the Investment Agreement". The term would not cover statements 10A and 10B as these were not statements of fact.

27 The Plaintiff was conducting due diligence through Red Carpet Energy. The Plaintiff had the benefit of Dixie Bastian's expertise when he was engaged as part of the Plaintiff's due diligence team. All this went to show that clause 9.4.16 was not to be interpreted to capture the contents of the presentation. In this context, therefore, the Presentation was just a sales pitch.

28 A number of other points went against the Plaintiff. The Plaintiff was thus not entitled to terminate the agreement and was not entitled to the refund

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of the US$1 million payment and expenses. The Defendant was also entitled to a declaration that the Investment Agreement was terminated by the Plaintiff's repudiation. The Term Sheet also provided for the plaintiff's conducting of due diligence.

29 The Defendant also argued at some length that there was no actionable misrepresentation on the facts.

The Decision

30 I concluded that there was no breach of contract that would have given rise to a right by the Plaintiff to terminate the contract. The specific clause relied on by the Plaintiff, clause 9.4.16, was, on its proper interpretation, a warranty that the information as given in the contract to the Plaintiff was and remained true and accurate. The contents of the slide presentation were not "information" within the meaning of that clause.

31 Neither did I find that the claims in unjust enrichment and on the basis of a *Quistclose* trust were made out.

32 I should note that the Plaintiff did not plead actionable misrepresentation. A number of obstacles to such a claim may be apparent. The Defendant, however, perhaps out of an abundance of caution, put forward a number of arguments designed to defeat such a claim.

33 Given my findings, a number of issues that were the focus of both evidence and submissions were not, in the end, material to the result. These included whether the slides contained disclaimers, which would have disentitled the Plaintiff from relying upon them at all, the consequence of the absence of an officer of the Defendant, Dixie Bastian, who was involved in the

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presentation in Sydney, and the due diligence efforts of the Plaintiff after the contract was entered into. These matters will be dealt with briefly, after the main line of reasoning has been covered in the Analysis section.

Analysis

Breach of the contract

34 I found that the Defendant was not in breach of clause 9.4.16, under which the Defendant had warranted that all information conveyed to the Plaintiff was true when given and at the time of the contract. That clause only covered information conveyed by matters expressly mentioned in the contract, and did not extend to statements 10A and 10B, which were communicated at the Presentation only.

Interpretation of the contractual terms

35 The claim for breach by the Plaintiff was founded on clause 9.4.16, which read:

> All information given to the Investor [*ie*, the Plaintiff] and its advisors by the Company [*ie*, the Defendant], its officers, employees and advisers was when given and is at the date hereof true and accurate.

36 The Plaintiff had to show therefore that the contents of the slide were “information” within the meaning used in clause 9.4.16. The Plaintiff in its arguments also focused on the phrase “all information”, rather than “information” alone, arguing that the use of “all” showed that the clause was meant to be a catchall provision, sweeping up all possible information conveyed to the Plaintiff. The adjective “all” can on occasion clothe a noun with a wider meaning than usual. On occasion, it can mean that it covers everything, or the whole of the set of members defined by the noun. However,

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it could also have a scope that falls short of that, as when it refers to items in a list, as could be the case here. What mattered was what "information" meant, rather than whether it was all information.

37 The term was "information" was not defined by the contract. It was thus necessary to consider the proper interpretation or construction of the term.

38 The approach built upon that laid down in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at. In essence, in interpreting a contractual term, the court takes into account the context of the contract, without falling into a subjective rewriting of the contract.

39 Guidance on the approach to interpretation was further laid down in *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd)* [2015] 5 SLR 1187 ("*Yes*") and in *Lucky Realty Co Pte Ltd v HSBC Trustee (Singapore) Ltd* [2016] 1 SLR 1069 ("*Lucky Realty*").

40 These decisions were handed down after the conclusion of the case, but neither represented a departure from the cases cited by the parties before me. What was emphasised was what the text read should be the first consideration, as the contract cannot be created from context alone. As the Court of Appeal stated in *Lucky Realty*, at [2]:

> As this court has already observed in *Yes* (at [41]), this court's decisions in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR (R) 1029 … and *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and anor and anor appeal* [2013] 4 SLR 193 … "represent the lodestars in the Singapore legal landscape in so far as contractual interpretation is concerned". Whilst the courts ought to be so concerned with both the text and the context, it is important

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> to emphasise that the text of the contractual document ought always to be the first port of call (see also YES at [32]). As we observed in our brief grounds which were delivered in relation to the present appeal, absent the text, the contract cannot be constructed out of context alone.

The court further considered how absurdity in result is to be dealt with, as well as the need to have recourse, wherever possible, to relevant documentary evidence.

41 In *Yes*, the Court of Appeal emphasised that there must be balance between the text and context; the court could not rewrite a contract to give effect to what it considered to be the right result. What the court needed to do was to determine on objective evidence, the intention of the parties at the time the contract was made (at [32]). The court does not adopt the parties' subjective intention (at [33]).

42 Whether a purely objective use of words can always be differentiated from the subjective intention of the parties is an issue that is better addressed on another occasion. In my view, a trial court faced with the task of interpreting a contractual term needs to give a meaning that reflects the meaning most likely to have been ascribed to the term by the parties in the circumstances, looking at their negotiations, their prior relationship, the practices of the industry or trade, and the parties' commercial objectives (including the overall allocation of risk and liability in the contract as a whole). In many instances, this will be close to the dictionary meaning, which would generally thus be a useful starting point. All will depend on the facts of the case, but the court will need to be mindful of ensuring certainty and predictability in commercial transactions and should lean toward a meaning that best meets these considerations.

43 I do not understand the Court of Appeal's guidance to require that ambiguity be established to some specific degree before context is considered. The line between plainness and ambiguity is not always plain or unambiguous. What may be plain in one setting may be ambiguous in another. But that is, again, perhaps an issue for another day.

The plain meaning of the word

44 The word "information" is on its own sufficiently broad to cover the contents of the slides. The Shorter Oxford Dictionary defines "information" in various senses, the relevant one being the third:

> Knowledge or facts communicated about a particular subject, event, *etc*; intelligence, news.

The ordinary meaning thus excludes opinion generally, except, perhaps, where the matters relate to the holding of an opinion, which is itself a fact.

45 The Defendant argued that what was expressed was opinion, and thus did not fall within the meaning of "information" as properly understood. However, I accepted and preferred the position of the Plaintiff that statements 10A and 10B contained information in the normal sense. The statements were made in a definitive way and carried no qualifiers at all. I agreed with the Plaintiff's expert that there was nothing that showed that the statements were made as a matter of opinion only. This issue is examined further below; whether or not the statements were of opinion or were factual did not affect the outcome as to interpretation.

46 The question that was material was what "information" in clause 9.4.16 referred to. There was an ambiguity, namely whether "information" referred to information generally or information within the

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confines of the written contract. If the former, it was conceivable that statements 10A and 10B, and the other contents of the slides, were information captured by clause 9.4.16. If the statements were false, then the Defendant would have been in breach. On the other hand, if information was limited to what was listed in the contract, it would not encompass statements 10A and 10B, and thus, whether or not those were false, there would not be any breach.

47 On the proper construction of the contract, I was satisfied that the term "information" was limited to matters specified by the contract, and did not cover information generally.

The context within the contract

48 The plain meaning of a term used in isolation would be affected by its context of the surrounding circumstances, including the other obligations entered into the parties, which is recorded in the contract. Looking at the obligations made, what one concludes was that "information" had a restricted meaning.

49 Firstly, "information" would primarily be limited to the matters raised within the same series of the clauses and sub-clauses relating to facts and representations. Clause 9.4.16 came at the tail end of the clause 9.4 series. Clause 9.4 itself stated that "the [Defendant] Company's representations and warranties consist of the following" ("the following" referring to sub-clauses 9.4.1–9.4.17). The language of clause 9.4 would tend to indicate that the list that followed was exhaustive. In addition, the listing of various representations and warranties would also seem to indicate that the elements of that list would be self-contained.

50 Those sub-clauses captured the following:

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(a) That the company was properly incorporated and validly existing under the law of the British Virgin Islands (clause 9.4.1);

(b) That the Memorandum and Articles were accurate, and that the company had power to carry on its activities;

(c) The company's issued and paid up capital;

(d) That the conversion shares to be issued under the Investment Agreement would be authorised and free from encumbrances;

(e) That the conversion shares would rank *pari passu*;

(f) That no other options or other agreements would require the company to issue shares;

(g) That the execution, delivery and performance of the Investment Agreement were within the company's powers and had been authorised;

(h) That the company's obligations under the Investment Agreement were valid and binding;

(i) That the company was not insolvent and, *inter alia*, no winding up petition had been presented,

(j) That the unaudited management accounts were prepared in compliance with generally accepted accounting principles (GAAP) and gave a fair view;

(k) That any tax returns due had been filed and paid;

(l) That the obligations under the West Jambi KSO had been complied with and there was no breach or default;

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(m) That the company, in its performance of obligations under the West Gambi KSO, was in compliance with laws, and regulations;

(n) That the company was adequately covered under insurance;

(o) That there was no pending litigation, arbitration or investigation;

(p) That all information given to the Plaintiff by the Defendant was, when given, true and accurate and remained so; and

(q) That the contents of the recitals were true and accurate.

51 It is evident that the various matters covered in clause 9.4 are extensive, and are largely factual in nature, though some matters, such as (h), the binding nature of the obligations, and (f), that no other agreements required the issuing of shares, would necessarily contain an element of assessment or opinion, although based on some factual element.

52 Given the breadth and scope of the various warranties and representations under clause 9.4, the scope of clause 9.4.16 would seem to be information relating to the representations and warranties listed at clauses 9.4.1 to 9.4.15.

53 It is true that clause 9.2 stated that each representation and warranty was separate and not limited by reference to any other representation, but this appears to have been intended to ensure that whether or not a representation was fulfilled was to be considered separately for each representation: *ie*, the failure to fulfil one representation did not necessarily lead to failure to comply with others.

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54 Furthermore, clause 9.6.5, which stipulated that the Plaintiff represented that it had not relied upon or been induced to enter the contract on any representation or warranty not expressly set forth in the Investment Agreement, would seem to militate against the idea that "information" could capture the presentation or other information or data conveyed outside the contract. The effect of clause 9.6.5 would be to require that the Plaintiff invoke a specific warranty or representation that was laid out in the agreement. It is hard to see what the objective of clause 9.6.5 would have been if indeed it was possible for the Plaintiff to include the contents of the presentation. What clause 9.6.5 required was that anything to be relied upon by the plaintiff as a representation or warranty had to be expressly set out.

55 While it may be argued that the Plaintiff was not in fact relying on anything outside the representations and warranties expressly provided for by the Investment Agreement, since the Plaintiff invoked the term "information" in clause 9.4.16, this argument is not sound. Relying on a broad term such as "information" in clause 9.4.16 would not be sufficient – it would have been expected that the contents of the Presentation, or at least an express and overt reference to the Presentation, should have been stated clearly in the Investment Agreement.

56 Clause 9.6.7 also stipulated expressly that the oil and gas business was high risk and that there would be no guarantee of any hydrocarbon discovery, whether commercial or not. The inclusion of a clause of this nature tended to support the conclusion that the parties were to largely look after their own interests through their own efforts, with little to be placed on other matters, including what was contained in the Presentation.

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57 The intention of the document appears to be to list expressly the representation and warranties that were operative – clause 9.6.4 states that the Plaintiff was solely responsible for making its own assessment and decision.

Clause 9.7

58 The Plaintiff relied on clause 9.7 to argue that "information" could not be read narrowly. That clause read:

> Each of the representation[s] is made and each of the warranties is given without any condition or qualification and shall be correct and complied with as at the date of this Agreement, the Tranche 1 Drawdown Date to Tranche 5 Drawdown Date and for so long as the Conversion shall not have taken place.

59 However, that clause could not, in the context of the Investment Agreement as a whole, be taken just to specifically reinforce the point that the representations in the contract were true and correct and remained so. In addition, clause 9.7 did not specifically address "information", which was what clause 9.4.16 was concerned with.

60 Any wider reading of clause 9.7 that brought in matters outside the contract would also run up against the entire agreement clause, *ie*, clause 20.

61 I noted that the Plaintiff put forward a point in its submissions that the Defendant did not plead that the term "information" had to be interpreted contextually. The Defendant did, however, plead that clause 9.4.16 had to be interpreted against the backdrop of the other contractual provisions, as well as the Plaintiff's obligation to perform due diligence. That was sufficient, to my mind, to bring the context of the contract as a whole into play. In any event, on the current approach to interpretation, since context is the basis of the

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interpretative exercise, once interpretation is in issue, context automatically comes in as well.

The context of the negotiation and dealings

62 Aside from the entire agreement clause, the discussions and negotiation between the parties did not show that the term "information" should be interpreted to encompass the statements in the slide presentation. The court needs to be careful not to impute a subjective meaning to the term.

63 Nothing in the context required a reading that would expand the term "information" sufficiently to capture the contents of the presentation.

64 The importance of the information to the calculation and determination of the Plaintiff in deciding whether to put down its money could potentially have been an important consideration. However, the importance of certain facts or representations or statements to one party does not invariably lead to the conclusion that a contractual term should be construed to capture that importance. Such importance would have to be weighed against other factors, including the nature of the relationship of the parties and their respective capacities. Where, as is the case here, the parties are commercial entities, who are to be taken to be capable of looking after themselves, and where both have experience in a particular industry, it is not likely that an interpretation can be adopted that would capture subjective importance alone.

65 While it may be that the contents of the presentation enticed or attracted the interest of the Plaintiff, this would not determine the interpretation to be given to "information". Subjective weight or perception of the meaning of a term is not enough to cloak a term with a specific meaning. What must be shown is that in the discussions or negotiations a term was used

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with a specific meaning in mind – that is the lesson to be drawn from cases such as *Lucky Realty*. In that case, the term in question, "existing development", was an integral part of the discussions between the parties as it clearly influenced how certain computations were made. In contrast, there was nothing in the present case of that nature.

66 What the Plaintiff did have that was material was the following:

(a) There was a presentation in which factual information was conveyed;

(b) That presentation painted a positive view in the minds of Plaintiff's officers, agents or associates;

(c) The Defendant's officers probably intended to thereby create a positive image; and

(d) There was no contractual requirement in the Investment Agreement that the Plaintiff carry out its own due diligence.

67 Be that as it may, what was conveyed in the presentation did not colour or influence the meaning of the term "information". Anything that arose in discussion or negotiations would have to be examined against the context of the rest of the contractual document; as examined above, that context strongly pointed to a limited meaning. Even aside from that, any expanded meaning was unlikely to have been ascribed by the parties as the term "information" was not used substantively in the presentation statements or the rest of the slides. Nor was there any discussion between the parties about the term. This distinguishes the present case from those such as *Lucky Realty*, in which the term in question was used in discussion between the parties.

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68 There was also no evidence of any discussion about the effect or importance of the slide presentation. The Defendant may have known or suspected that the contents of the presentation would have been on the mind of the Plaintiff, but such subjectivity is not sufficient to expand the meaning of the term "information" beyond what was conveyed in the Investment Agreement. The question of due diligence may be somewhat relevant to the likely impact of the presentation, but whether or not an obligation of due diligence was required did not mean that "information" encompassed the statements in the slides.

69 The Plaintiff argued that although the requirement of due diligence was covered separately in the Term Sheet, this was not carried over into the investment agreement. Neither was an obligation by the Plaintiff to pay US$500,000 in advance. The background given in evidence by the Plaintiff's third witness, Brett Mitchell was that this was the result of the plaintiff asking for materials, including the well file. The Plaintiff also pointed to the need for haste as the Defendant was finalising the West Jambi KSO at the time. The Plaintiff argued that that context, taken together with clauses 9.4.16, 9.7 and 20, showed that no limitation was to be placed on the phrase "all information" as used in clause 9.4.16.

70 I did not think that anything in the course of negotiations would influence the interpretation of the term "information" or even as the Plaintiff preferred it, "all information". Nothing invoked by the Plaintiff would outweigh the other contextual pointers that limited information to the contents of clause 9. What the Plaintiff pointed to was that due diligence was not included in the Investment agreement ultimately. This could be seen as excusing the Plaintiff from embarking on its own investigations, but its absence was not a conclusive indication that the contents of the presentation

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constituted information under clause 9.4.16. The absence of any obligation to conduct due diligence could be due to many factors and nothing showed a link to information being construed as including statements 10A and 10B.

71 The Plaintiff argued that the warranties and representations in clause 9.4 were not self-contained. There needed to be reference to matters outside the express provisions of that clause. However, an examination of clause 9.6.4 did not support the Plaintiff's contentions. Any obligation to update on material breaches, or matters becoming untrue, for instance, could not affect the meaning of "all information", as this could apply to other matters listed in clause 9.4.

72 The Plaintiff argued that it was not necessary for statements 10A and 10B to be reproduced or referred to expressly, given the existence of clause 9.4.16. That argument was unsustainable: the absence of mention could be for other reasons, such as that it was not intended for clause 9.4.16 to cover statements 10A and 10B.

73 While the Plaintiff argued, in essence, that against the backdrop of the slide presentation, the term "information" had to encompass what was conveyed to the Plaintiff by the Defendant and its agents, the Defendant for its part argued that the slide presentation was merely a sales pitch; what was conveyed could not have been intended to be part of the contract, and was not information for the purposes of clause 9.4.16. The Defendant's argument had to be rejected. Even if the presentation was a sales pitch, that would not have given the Defendant a free hand in saying whatever they wanted: aside from any actionable misrepresentation, it was possible for what was conveyed to be included as a term of the contract.

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74 As noted by the Defendant, Brett Mitchell accepted that there was nothing in writing between the parties showing that clause 9.4.16 was put in because the well-files were not available.

No commercial absurdity arises

75 The result of the contractual interpretation may appear to be hard on the Plaintiff, who were, after all, given a presentation by the Defendant. Leaving aside for the moment whether that presentation contained a disclaimer, if indeed the Presentation contained false or at least erroneous statements, reading "information" narrowly in clause 9.4.16 left the Plaintiff with seemingly no remedy. On the other hand, the Defendant would seem to have escaped the consequences of making a false or erroneous presentation, while reaping the benefits of that presentation by attracting the Plaintiff's investment.

76 However, it had to be underlined that the parties, being commercial entities, should have been expected to look after their respective interests themselves. The Plaintiff was not an elderly grandmother who sought to invest her life savings and was hoodwinked by smooth suits from a big bad bank. The parties here were free to negotiate the terms of the contract as they saw fit, and if indeed the Presentation was important in the mind of the Plaintiff, the Plaintiff should have bargained for the incorporation of the Presentation's contents into the agreement. This the Plaintiff did not do, so it must live with the consequences.

77 It is arguable as well that there was indeed a possible cause of action that would cover any misstatement by the Defendant, which would allow the Plaintiff to hold the Defendant responsible for losses it suffered. It was the

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Plaintiff's choice not to pursue an action for misrepresentation, whether negligent or otherwise. Admittedly, it could be that had such a claim been pursued, contractual provisions would still have protected the Defendant; the same issues above would have to be considered even on this alternative approach. In any event, the matter was not before this court.

The entire agreement clause

78 The presence of an entire agreement clause in the contract did not weigh in favour of either side. The entire agreement clause, clause 20, read:

> This Agreement shall constitute the entire agreement of the Parties and supersedes all prior or contemporaneous oral or written communications, proposals and representations with respect to the subject matter of this Agreement.

79 It is possible for an entire agreement clause to co-exist with an expansive warranty clause that, through the appropriate use of language, brings in matters outside the four corners of the contract. But whether the language used does in fact do so depends on the contextual cues discussed above.

80 While the clause excluded "communications, proposals and representations" with respect to the subject matter of the contract, the issue in the present case was whether "information" as contained in a clause of the contract would have a broad meaning. The matters excluded were phrased very broadly and would, on their plain meaning, encompass what was conveyed during the presentation. At the very least, the statements in the slides were representations – the statements were about facts in respect of what was found in the wells. And what was conveyed would also be covered by "communications", *ie*, matters communicated or told to the Plaintiff.

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81 Such an entire agreement clause has been interpreted in various cases. In a passage that has been cited in leading textbooks such as K Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 6th Ed, 2015), Gavin Lightman J stated, in *Inntrepreneur Pub Co v East Crown* [2000] 2 Lloyd's Rep 611 ("*Inntrepreneur*") (at 614), that:

> … such a clause constitutes a binding agreement between parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that, accordingly, nay promises or assurances made in the course of negotiations (which, in the absence of such a clause, might have effect as a collateral warranty) shall have no contractual force, save in so far as they are reflected and given effect in that document.

In *Lee Chee Wei v Tan Hor Peow Victor and ors and anor* [2007] 3 SLR(R) 537 ("*Lee Chee Wei*"), the Court of Appeal noted (at [25]) that entire agreement clauses are conducive to certainty and confine the rights and obligations within the document in question. The court cited with approval (at [26]) *Inntrepreneur* as to the effect of such a clause, and preferred it to the approach taken by the High Court in *Exklusiv Auto Services Pte Ltd v Chan Yong Chuan Eric* [1995] 3 SLR(R) 728, which had limited the operation of such clauses. The Court of Appeal further noted that such a clause would not normally affect interpretation by precluding reference to contextual matters outside the contract.

82 In the present case, the entire agreement clause is not being used to exclude reference to context, but rather to consider whether the representations or statements put forward by the Plaintiff could be taken as part of the agreed terms. This approach is not against the guidance given in *Lee Chee Wei*.

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Unjust enrichment and Quistclose trust

83 The Defendant put forward alternative arguments based either on unjust enrichment because of a mistake or the existence of a *Quistclose* trust. Neither could be found on the facts.

Unjust enrichment

84 Unjust enrichment would not arise where the enrichment occurs as a result of a valid contract: there is no unjust element. In the present case, there was no attempt to set aside the contract; indeed, the Plaintiff's primary claim was premised on the existence and continuing validity of the contract. As it was not disputed that the contract existed and governed the relations between the parties, there was no room for the operation of an unjust factor that would have justified restitution or reversal of any enrichment.

85 The Plaintiff's claim in restitution did not identify a recognised unjust factor. As the payment of money which the Plaintiff wanted to reverse was made under a contract, the Plaintiff had to show that the contract ceased to operate or be effective, as held in *Guinness plc v Saunders* [1990] 2 AC 663, at 698–699. There, Lord Goff, in dealing with the argument that a person receiving money as constructive trustee (which would be described as a restitutionary claim in current terminology), addressed the issue of the existence of a valid contract:

> … It was first suggested … simply that [the recipient of funds], having received the money as constructive trustee, must pay it back. This appears to have formed, in part at least, the basis of the decision of the Court of Appeal. But the insuperable difficulty in the way of this proposition is again that the money was on this approach paid not under a void, but under a voidable, contract. Under such a contract, the property in the money would have vested in [the recipient] (who, I repeat, was *ex hypothesi* acting in good faith); and Guinness cannot short

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> circuit an unrescinded contract simply by alleging a constructive trust.

86 The same position would apply in an unjust enrichment claim. In the words of Professor Graham Virgo in *Principles of the Law of Restitution* (OUP, 3rd Ed, 2015), at 133–134:

> … If the parties have entered into a valid agreement which is to regulate their relationship, it is vital that the law of unjust enrichment does not undermine what they have decided. …

As the Plaintiff did not seek to have the contract set aside, even as an alternative pleading, the contract continued to govern the relationship and any remedy would have to be based on the contractual relationship.

Quistclose trust

87 As regards the purported *Quistclose* trust, what the Plaintiff needed to show was that the funds were transferred to the Defendant on trust for a specific purpose and there was failure of that purpose.

88 In *Raymond Bieber and others v Teathers Ltd (in liquidation)* [2012] EWCA Civ 1466 ("*Bieber*"), the English Court of Appeal endorsed, at [14], the summary of the law provided by Norris J at first instance. If I may restate the position briefly, when determining whether a *Quistclose* trust exists, the court will consider whether:

(a) It was intended that the money was at the free disposal of the recipient;

(b) A representation by the recipient that it intends to use the money for a particular purpose is insufficient; and

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(c) The express terms are, or the objective position is, that it was the mutual intention of the parties, and the essence of their bargain, that the funds should not be part of the general assets of the recipient but used exclusively for identified payments, so that if the money cannot be so used, it is to be returned.

If these criteria are fulfilled, equity imposes a resulting trust. The recipient has no beneficial interest in the money.

89 As noted in *Bieber*, as well as in *Twinsectra Ltd v Yardley and ors* [2002] 2 AC 164, it is common for money to be transferred or paid in advance. For this reason, Patten LJ, with whom Sullivan and Arden LJJ agreed, observed in *Bieber*, at [15], that:

> … It is therefore necessary to be satisfied not merely that the money when paid was not at the free disposal of the payee but that, objectively examined, the contractual or other arrangements properly construed were intended to provide for the preservation of the payor's rights and the control of the use of the money through the medium of a trust. Critically this involves the court being satisfied that the intention of the parties was that the monies transferred by the investors should not become the absolute property … [of the recipient] but should continue to belong beneficially to the [payors] unless and until the conditions attached to their release were complied with. …

90 In the present case, there was nothing on the evidence to show that the funds disbursed to the Defendant were for a specific purpose, and not a part of the Defendant's general assets, or even that the funds remained the property of the Plaintiff. It may have been intended that the funds would help fuel the Defendant's activities in relation to the exploration and exploitation of resources in that part of Sumatra, but the money was clearly meant to form part of the general funds of the Defendant: *ie*, once paid over there was no restriction on the use of the money and the Defendant could choose to do what

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it liked with it. Whether there was any subsequent obligation to refund the moneys on the occurrence or non-occurrence of specific events was a different matter.

The Defendant's counterclaim for a declaration

91 In a departure from the normal run of things, the Defendant counterclaimed not for damages, but only a declaration that the Investment Agreement had been validly terminated following the Plaintiff's repudiation. The reason given was that this would put beyond doubt the fact that the Defendant was not in any breach.

Requirements for granting a declaration

92 A declaration may be made where there is an actual controversy, which would be addressed by a determination by the Court: *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd and anor* [2006] 1 SLR(R) 112 (at [14]). As declaratory relief is a discretionary remedy, the court considers the whole of the surrounding circumstances. While the locus of the applicant and the presence of any person affected are also requirements, these were not in play in the present proceedings. The Plaintiff did not take significant issue with the requirements; the focus of the arguments was on whether the basis for the declaration sought was in fact made out.

93 In any event, there was actual controversy here as the position of the two parties was at odds: the Plaintiff alleged breach by the Defendant, while the Defendant argued that it was the Plaintiff that was in breach. A declaration by the court would address the controversy between them. There was nothing that showed any reason why the declaration could not be granted provided there was a sufficient basis.

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94 The Defendant argued that the Plaintiff's refusal to pay after notice of drawdown of funds was given on 24 October 2011 gave rise to a right to terminate. There was no breach of warranty, and the necessary documentation required by clause 5.3, namely the Approval for Expenditure ("AFE"), had been given. Following the Plaintiff's failure to make the necessary payment as required by clause 5.7, an event of default arose, entitling the Defendant to terminate under clause 10.3. The required notice of termination was given by the Defendant. On the other side, the Plaintiff argued that the drawdown dated 24 October 2011 purportedly exercised was invalid. The primary argument was that the Defendant was already in breach. In addition, an AFE, as required by the Investment Agreement, had not been approved.

95 As I found that the Defendant was not in breach of the warranty and representations clause, the only issue was whether the Defendant was otherwise deprived of the right to issue the drawdown notice.

96 I accepted that contrary to the arguments of the Plaintiff, that the drawdown was properly based on an AFE. The Plaintiff argued that no applicable AFE was approved by Pertamina as there were proposed changes that had to be approved by Pertamina and that the new AFE that was thus required superseded the original. This position was, the Plaintiff argued, conceded by the Defendant's witness, Daniel Jol.

97 I accepted that any change of the firm commitment did not affect the validity of the drawdown notice. What mattered at the point of the drawdown notice was that there was a valid AFE then; even if changes were made to that AFE subsequently, and a new AFE was put in place, the basis of the drawdown was not affected. I did not see that the drawdown notice could only be valid if there were no subsequent changes; I suspect such an interpretation

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would cause difficulties and uncertainty since any subsequent change made at any time could vitiate the drawdown.

Other issues

98 To recapitulate, the issues and findings that disposed of the trial were primarily whether there was breach of the contract, based on what counted as "information" under clause 9.4.16. If "information" had not been so construed, a number of other issues would have been in play. These took up a substantial portion of the trial.

99 Firstly, there was considerable dispute in the parties' submissions about whether the statements in the Presentation were indeed "information". This was moot in view of my conclusion on clause 9.4.16 (*ie*, that it did not even apply to the Presentation), but, for the sake of completeness, will be considered at greater length below. To my mind, the statements would have qualified under the broader meaning of information.

100 Secondly, had "information" included the statements in the Presentation, it would have mattered whether there was a disclaimer as claimed by the Defendant. That depended on which set of slides was used: two sub issues of fact were in contention. There was testimony given about whether the Plaintiff could have obtained a copy of one of the versions online. There was also the testimony of the Plaintiff's witnesses about what was shown to them at the session.

101 A significant amount of time was spent on the use of terms in the Presentation, as well as the possession of well log files, which would have recorded what had previously been encountered in the wells.

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102 Finally, there were some matters in respect of the quality and state of evidence relied upon by the parties.

The effect of the information in the slides

103 The statements in the presentation were statements that could have constituted information. Statement 10A read: "1 Dutch Well (Tuba Obi-8) penetrated fracture[d] basement and encountered gas." Statement 10B read: "Tuba Obi-8 penetrated untested gas section within upper part of Basement Level." There were also other statements in the slides that concerned the viability and desirability of the well. Slide 27 in particular presented, as the Plaintiff submitted, an estimate of gas resources that could be extracted and commercially exploited out of that well.

104 Information in the broad context could encompass not just factual statements but also opinion, at least in so far as the opinion is held or is represented as being held by a person. Here, then, the fact that the Defendant held the opinion that Lead 1 (the Tuba Obi-8 well) was promising would ordinarily constitute information. I accepted the Plaintiff's expert evidence as to the interpretation that would be given within the industry of the contents of the slide presentation, in particular, statements 10A and 10B, and the contents of slide 27. The Plaintiff's expert, Douglas Peacock, gave his opinion that these statements were to be interpreted as follows:

(a) Slide 5: That the well had encountered gas in a fractured basement reservoir;

(b) Slide 7: That the well penetrated the upper part of the basement section, which was fractured, and encountered gas, but it was not tested if the gas would flow to the surface.

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(c) Slide 27: That a large volume of gas could be present there.

(d) The well was the best lead among the various leads identified by the Defendant.

Douglas Peacock was of the view that taken together, slides 5, 7 and 27 made Lead 1 appear to be an attractive investment.

105 In his view, in light of the well reports that were subsequently obtained, there was no evidence that the basement was fractured. To the contrary, the basement was comprised of stone that would be less likely to have fracturing, and thus would not constitute a good reserve. The well files also showed there was no gas present in the basement. As for statement 10B, it was not true as gas was not actually found in the basement; the well records showed gas only in a rock formation close to the surface.

106 I note that the Defendant argued that there was no breach of clause 9.41.6 simply because Lead 1 did not materialise. This was not the point of the Plaintiff's claim; the focus was not on the lead as such and whether it would eventuate.

107 At the end of the day, looking at the contents of the slides, I was convinced that the Plaintiff's characterisation of these statements should prevail.

The disclaimer issue

108 Much time was taken up at trial on the issue whether the slide deck used at the Presentation contained disclaimer clauses. This in turn raised other issues, such as which of two versions of the slide deck was used at the presentation, how the Plaintiff came to be in possession of the slide deck it

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relied upon and who was actually present at the presentation. Which slide deck was used was important as one version, the 51-slide version, did not contain disclaimer clauses, while the other, the 56-slide version, did. The Plaintiff relied on the 51-slide version without while the Defendant relied on the 56-slide version.

109 One of the issues that underlay this contest between the two versions was whether it was at all credible that the Plaintiff came into possession of the version with the disclaimer. The Plaintiff had this version in its possession – the Defendant argued that this meant that the Plaintiff must have obtained that version with the disclaimer at the presentation. It followed then that the disclaimer version was what was used at the presentation. The Plaintiff claimed though that it had obtained the disclaimer version from the Defendant's website. The Defendant denied that this was possible, arguing that this was not possible as it had never put up any version of the slide deck on its website. That led to the calling of evidence relating to Information Technology ("IT") issues on both sides.

110 The other point that arose was what other explanation could be given as to how the Plaintiff came into possession of the 56-slide version slide presentation, except through the Defendant.

111 I concluded that what was shown at the presentation was the 51-slide version, without the disclaimer. In reaching this conclusion, I preferred the evidence of the Plaintiff's witnesses, who testified as to what they saw.

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Whether the 56-slide version was obtained by the Plaintiff from the Defendant's website

112 What was in issue was whether it was possible for the Plaintiff to have obtained the 56-slide version from the Defendant's website. This turned on the evidence of the Plaintiff and Defendant's IT witnesses.

113 I accepted the evidence of the Defendant's IT witness who testified, essentially, that it was not possible for the Plaintiff to have downloaded the slide deck with the disclaimers from the Defendant's parent's website. DW4 was in charge of maintaining the website of the parent company of the Defendant, from which the 56-slide version was supposed to have been taken – it was his evidence that this slide version was never available on that website. The web server logs, *ie*, the record of what was uploaded, did not show this.

114 The Plaintiff's IT witness took issue with the evidence proffered by the Defendant. He took issue with the use of an internal Internet protocol ("IP") address to access the web server logs. In the end I was satisfied on the evidence before me that the software used, which is known as a GIT program, would use the internal IP address as that was how it archived the files that were accessible in the past, and that it did not mean that it was not an accurate reflection of what was publicly accessible.

115 The Plaintiff also attacked the domain name used by the Defendant's witness, rambaenergy.com.sg. While this did raise the question of whether the DW's analysis was correct, I was satisfied at the end of the day that this was not material. I accepted that, on the evidence before me, there was only one webserver which would have contained the webpages that could have been accessed by the public and the plaintiff. In the face of the Defendant's

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evidence, the Plaintiff did not bring in any evidence to challenge that part of the Defendant's evidence. I thus needed to assess the Defendant's evidence on its own, and I saw no reason not to accept it.

116 I also had concerns about the relevance of the Plaintiff's witness's background. His expertise was primarily in forensics rather than web server and content management. As noted by the Defendant, the Plaintiff's witness's only experience in web management was maintaining his own website. He had also had no experience with the GIT software which had been used.

117 I also accepted that it was not necessary in this case for forensic techniques to be applied. What was required here was evidence of what was on the website. Forensic standards would be applied if there were any allegation of deletion or anything similar, but in the absence of at least some evidence that there was some sort of manipulation of data, the fact that the Defendant's witness did not use forensic techniques did not undermine his evidence in any way.

118 On the other hand, I could not accept the argument by the Defendant that it was unlikely that the information would be put online as it contained proprietary licenced data, the wrongful disclosure of which would attract a significant penalty. That may militate against the Defendant doing so intentionally; it may yet have been put there inadvertently, and such possibility could not be ruled out.

What was presented at the Presentation

119 The Plaintiff's witnesses all testified that what they saw was the 51-slide version, without the disclaimer. David Whitby testified as well that he

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had the 51-slide version, and had given his copy for the use by the Plaintiff and its officers.

120 The Defendant tried to attack the Plaintiff's version by arguing that one of the Plaintiff's witnesses, Brett Mitchell, could not have been at the presentation, and thus should have his evidence of what he saw disregarded. However, I was satisfied that that witness was indeed present. It was argued by the Defendant that he was absent as, by his own admission, he had to be present at a conference. However, I accepted the witness's evidence that he was only a few minutes away from the conference venue and that he left part way through the Presentation. His presence was supported by the evidence of other witnesses. While the Defendant's witnesses denied he was present, I was doubtful about their evidence in light of the inherent probabilities – I did not think that they would be particularly focussed on his presence given that he was not the principal person on the Plaintiff's side, and they had also just met him. There was nothing to show that their attention would have been drawn to his presence or absence. More likely than not, their attention was elsewhere, and thus their evidence on whether he was present or not was of doubtful weight. The witness's own evidence remained unshaken by questioning. I also did not find anything to doubt the evidence of the Plaintiff's other witnesses, which was consistent as regards what was seen at the Presentation.

121 However, determining which version of the slide deck was used at the Presentation does not necessarily answer the question of whether the 56-slide version was downloaded from the Defendant's website. While I found that the Plaintiff had the 51-slide version, and that it was this that was used at the Presentation, I could not come to any conclusion about how the Plaintiff came to be in possession of the version with the disclaimer. Despite the evidence of the Defendant that Plaintiff could not have obtained the slide deck with the

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disclaimer from the website, it did not follow that because the Plaintiff was in possession of that slide deck that it must have obtained it only at the presentation. I had to weigh the proposition that the Plaintiff must have obtained that slide deck at the presentation against the other evidence adduced about what happened at that time.

The legal effect of the disclaimer

122 While the parties devoted quite a bit of energy to the issue whether the disclaimer was present in the slide presentation, I found it doubtful that, in a contractual claim for breach of a term, the presence of any disclaimer would automatically exclude the term in question from operating. Thus, if "information" had included statements 10A and 10B, the presence of the disclaimer would not have affected that result. On the other hand, the presence of a disclaimer could perhaps show that the objective conclusion would be that "information" could not include such statements. However, it was not necessary for me to adopt that reasoning in the present case. Alternatively, a disclaimer would be material in considering whether misrepresentation was made out.

The significance of the well log files

123 There was a considerable amount of argument about whose responsibility it was to get the well log files and, indeed, whether the Defendant had indicated that it had these files in its possession at the time of the presentation. As a matter of legal analysis on the basis of the pleaded case, I did not think that this issue was material save, perhaps, to show that the statements made at the presentation had an effect on the Plaintiff (and possibly, peripherally, to the credit of either side). The Plaintiff's claim was on the basis of breach of a term of the contract that the information provided was

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correct. What the basis was for such information was not in issue – it would not have helped the Defendant for it to show that the well log files supported a (mistaken) belief that the erroneous contractual information was correct, just as it would not have helped the Plaintiff if the contractual information had been correct but not supported by the well log files at the relevant time. The basis for the contractual information would have been relevant as a matter of law only if the case was, for instance, one of negligent misrepresentation.

124 In the present case, the well log files were invoked to support other evidence. The Plaintiff argued that the well log file showed the materiality of the presentation statements. The argument was that the testimony of the Plaintiff's witnesses, especially Charles Waite Morgan, was that the descriptions in respect of the well and its prospects had captivated the Plaintiff's interest. In this context, that interest and materiality to the Plaintiff's thinking (and presumably assessment of the commercial value of the contract), continued until the well log files were obtained. The Plaintiff was under the impression, it contended, that the Defendant did have the well log files in its possession, and thus did not seek to obtain them directly for some time. The Plaintiff's employee was told by Dixie Bastian in July 2011 that he did not have the well log files at the time, and that they would be sent over.

125 The Defendant's Daniel Jol denied promising delivery of the well log files; he also alleged that the Plaintiff knew that the Defendant did not have the well log files. In this regard, I accepted the evidence of the Plaintiff that Daniel Jol was wrong in his testimony. I would thus have accepted that the presentation statements operated on the mind of the Plaintiff's officers and associates. But I did not think that had I interpreted "information" in favour of the Plaintiff, this would have had any impact on the result.

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The use of definitions specified by the Petroleum Reserves and Resources criteria

126 There was also controversy about the use of definitions specified by the Petroleum Reserves and Resources ("PRMS") criteria, which is an industry standard setting out how certain terms are commonly used. In particular, the Defendant put forward the position that "lead" had a limited meaning, namely that it was "a project associated with a potential accumulation that is currently poorly defined and requires more data acquisition and /or evaluation in order to be classified as a prospect". A "prospect" carries greater potentiality, being defined as "a project associated with a potential accumulation that is sufficiently well defined to represent a viable drilling target". The Defendant thus effectively contended that what was put forward in the slides was not a promise of anything definite or even probable.

127 While it is true that there was nothing in the Investment Agreement incorporating PRMS meanings, given the context of the agreement, and had the matter been pleaded and argued, there would have been a strong inclination to find that PRMS meanings should have applied. However, I do accept the opinion of Douglas Peacock that ultimately this had no impact on the effect of 10A and 10 B statements. Neither used the term "lead" or any of the PRMS definitions. Slide 27 did refer to "Lead 1", but I did not interpret that use of "lead" as necessarily importing the PRMS definition in that context.

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The non-availability of witnesses

128 One of the key officers, Dixie Bastian, involved from the Defendant's side was not a witness in the proceedings. The Defendant sought to bring in a recording of a conversation between Dixie Bastian and Daniel Jol.

129 Dixie Bastian's involvement with Red Carpet raised some concerns at the trial. It may be that if the matter was probed further there would be some issues about his credibility as well as the legal effect of his involvement in Red Carpet. However, as Dixie Bastian's evidence was not part of the proceedings, these matters were largely moot. Another hearsay issue concerned the absence of Dixie Bastian from the hearing. I did not think that the requirements of s 32(1)(j) of the Evidence Act (Cap 97, 1997 Rev Ed) were met, *ie*, that he was outside Singapore and that it was impracticable to secure his attendance. The Defendant did not bring in sufficient evidence to make out impracticability in this case. As submitted by the Plaintiff, citing *Gimpex Ltd v Unity Holdings Business Ltd and ors and anor appeal* [2015] 2 SLR 686, the burden lay on the Defendant to make out a case for reliance on such hearsay. The Defendant failed to do so, and I thus did not take Dixie Bastian's evidence into account in my decision.

Other evidential issues

130 Another evidential matter concerned the credit and credibility of Daniel Jol. I found his evidence unconvincing on the issue of which version of the slides was used at the session. I preferred the Plaintiff's witnesses on this point. That conclusion, however, did not mean that I should reject all of Daniel Jol's evidence and I did not do so.

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131 I would not take issue with the reliability of the documentary evidence put forward by the Defendant to support its use of funds. The Plaintiff took issue with these on the basis that authenticity was questioned, and required inspection of the originals. While the Defendant argued that secondary copies may be used, I understood the plaintiff's position here to be that it could not agree to the admission of these documents because it did not have sight of the originals, which was a different matter from what the Defendant was addressing.

132 Nonetheless, hearsay evidence may be relied upon if it falls within the circumstances enumerated in s 32(1)(b) of the Evidence Act, that is where a statement is made by a person in the ordinary course of business, and covers documents constituting or forming part of a record kept by any person, body or organisation carrying out the trade. If I had needed to determine the extent of use of funds, that provision would have allowed the court to take into account the use as substantiated by the documents relied upon by the Defendant.

133 There was the issue of how the Plaintiff came to have the 56-slide version of the slide deck in its possession. It could not have obtained that version from the Defendant's website. A suggestion was put forward that this version was provided by the Defendant at the Presentation, either pre-loaded on a thumb drive given by the Defendant or by transfer to a thumb drive brought by the Plaintiff. This suggestion came very late in the day. I agreed with the Plaintiff that there was nothing to support this contention. There is, therefore, simply insufficient evidence to form a firm conclusion as to how the 56-slide version came into the Plaintiff's possession.

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Damages

134 In respect of the damages claimed, if I was wrong on the issue of breach, some damages would of course be recoverable. The scope of damages sought by the Plaintiff encompassed return of the amounts paid under the tranches as well as compensation for wasted expenditure. The basis of this was presumably the reliance interest.

135 Of the components claimed by the Plaintiff, the most contentious was the expenditure on preparations for the operationalisation of the contract, which were primarily done through another entity, Red Carpet Energy Pte Ltd. I would have accepted those documents as being admissible evidence as to the expenditure incurred.

136 If I was wrong on the question of interpretation, and damages were indeed due to the Plaintiff for breach of contract, the expenses and costs incurred in carrying out due diligence would not be claimable as clause 12 of the Investment Agreement provided that each party would bear its own costs in the preparation, negotiation, entry and performance of the agreement and transactions contemplated by the agreement.

137 I also accepted the Defendant's argument that the various claims were not substantiated as there was little evidence supporting the expenditure purportedly proven by each document as linked to the subject matter of the present case.

Conclusion

138 For the reasons captured in the foregoing analysis, the Plaintiff's claim was disallowed and the Defendant's counterclaim was allowed. Costs were

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awarded to the Defendant largely following a previously submitted costs schedule. An application by the Plaintiff to stay payment of costs was refused.

Aedit Abdullah
Judicial Commissioner

Suresh s/o Damodara and Clement Ong (Damodara Hazra LLP) for the Plaintiff;
Conrad Melville Campos and Lee Wei Qi (RHTLaw Taylor Wessing LLP) for the Defendant

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