S I2I Limited
v
Globalroam Group Ltd

[2017] SGHC 181

High Court — Originating Summons No 81 of 2017
Lai Siu Chiu SJ
22 March 2017

Contract — Breach — Convertible loan agreement

Contract — Waiver — Exclusive benefit

Contract — Contractual terms — Condition precedent

28 July 2017

Lai Siu Chiu SJ:

Introduction

1 S I2I Limited and Globalroam Group Ltd are the Plaintiff and the Defendant respectively in this action. They are both Singapore-incorporated public companies, but only the Plaintiff is listed on the mainboard of the Singapore Exchange Limited ("SGX"). The Plaintiff was formerly known as Mediaring Ltd.

2 The parties' dispute arose out of a convertible loan agreement between them, contained in a Deed of Addendum dated 24 September 2014, under which

the Defendant purported to convert the Plaintiff's loan into equity in the Defendant on the date the loan matured. The Plaintiff's case was essentially that the Defendant did not carry out the conversion in accordance with the agreement, and therefore the Defendant's issuance of shares to the Plaintiff pursuant to the conversion of Plaintiff's loan to equity should be set aside. Accordingly, the Plaintiff brought this application against the Defendant and sought the following heads of relief:

(a) a declaration that the conditions for loan-to-share conversion under clause 2.5 of a Deed of Addendum have not been fulfilled, and that in the circumstances the 6,695,133 ordinary shares in the Defendant issued to the Plaintiff under Share Certificate No. 222 (the "Conversion Shares") were not validly issued by the Defendant on 23 September 2016;

(b) an order that, pursuant to the declaration granted above, the issuance of the Conversion Shares to the Plaintiff be voided and/or set aside;

(c) further and/or in the alternative, a declaration that Events of Default under clause 9.1.3 and/or 9.1.12 of a Loan Agreement dated 5 March 2008 (the "Loan Agreement") have occurred without being remedied in accordance with clause 2.7 of the Deed of Addendum;

(d) further and/or in the alternative, a declaration that the Loan Agreement, as read with the Deed of Amendment dated 28 September 2009 ("Deed of Amendment") and the Deed of Addendum, has been terminated by reason of the Defendant's breach of the terms of the Deed of Addendum;

(e) a declaration that the Defendant shall immediately repay the Plaintiff the outstanding amount of $3,884,246.53, being the outstanding portion of the loan extended by the Plaintiff to the Defendant pursuant to the terms of the Loan Agreement, as read with the Deed of Amendment and the Deed of Addendum (the "Convertible Loan");

(f) an order that the Defendant pays the Plaintiff interest on the Convertible Loan, to be assessed;

(g) an order that the Defendant bears the Plaintiff's costs of the application.

3 After hearing the parties' arguments, I dismissed the Plaintiff's application with costs. I found that the Defendant had complied with the terms of the Deed of Addendum in converting the Plaintiff's loan into shares in the Defendant on the date the loan matured. The principal reason for this is that, contrary to the Plaintiff's case, there was no requirement that the conversion takes place only upon the approval of the Plaintiff's shareholders. If there was to be such a requirement, it was the Plaintiff who bore the responsibility for ascertaining the existence of that requirement with the SGX, which the Plaintiff had failed to do before the date on which the loan matured. As the Defendant complied with all applicable terms of the Deed of Addendum in carrying out the conversion, there was no reason for me either to declare that it had done otherwise or to set aside its issuance of shares to the Plaintiff pursuant to its conversion of the Plaintiff's loan.

4 The Plaintiff has appealed against my decision. I therefore now set out my reasons in full.

The facts

The Plaintiff's case

5 The facts set out below are extracted from the parties' affidavits. These affidavits comprise the first affidavit of the Plaintiff's director, Chada Anitha Reddy ("Chada") dated 23 January 2017, ("Chada's first affidavit"), Chada's reply affidavit dated 7 March 2017 (Chada's second affidavit"), and the affidavit of the Defendant's director, Clarence Tan Kum Wah ("Tan") dated 17 February 2017 ("the Defendant's affidavit"). I will refer to these affidavits specifically where appropriate.

6 According to Chada's first affidavit, the parties' relationship began with an agreement dated 2 January 2008 ("the Advance Agreement") pursuant to which the Plaintiff agreed to advance to the Defendant an interest-free loan of $500,000 ("the first loan"). The Advance Agreement provided under clause 5.1 that the first loan would be repayable in full to the Plaintiff upon demand.

7 Subsequently, on 5 March 2008, the Plaintiff agreed to advance a further loan of $5.5m ("the second loan") to the Defendant under the Loan Agreement. The second loan was repayable after five years. As the first loan was still outstanding, only $5m was disbursed under the second loan. In consideration of the grant of the second loan, the Defendant executed a Deed Poll dated 30 April 2008 ("the Deed Poll") by which it issued 13,414,634 warrants to the Plaintiff which conferred on the Plaintiff the right to subscribe for one preferred share for each warrant issued.

8 On 28 September 2009, the parties entered into the Deed of Amendment to make certain amendments to the Loan Agreement and the Deed Poll; this included extending the time for repayment of the second loan. In consideration

of the amendments, the Defendant issued to the Plaintiff 619,440 warrants which, like the warrants under the Deed Poll, gave the Plaintiff the right to subscribe for one share in the Defendant for each warrant issued. The loan repayment period was extended to seven years from the disbursement date of the second loan.

9 In the event, the Plaintiff decided not to exercise any of the warrants issued by the Defendant. So it gave the Defendant a written notice of that decision on 26 April 2013 pursuant to clause 5.12 of the Loan Agreement. Upon the giving of the notice, the warrants lapsed and ceased to be valid after 30 April 2013 while interest continued to accrue on the then outstanding loan amount at 5% per annum.

10 On 24 September 2014, the parties entered into the Deed of Addendum to amend the repayment terms of the outstanding principal sum of $5.5m under the second loan and the accrued interest of $384,246.53 for the period of 30 April 2013 to 22 September 2014. The main effect of the Deed of Addendum was as follows:

(a) $2m would be repaid by way of cheques in three separate tranches.

(b) $3.5m and the accrued interest would constitute a convertible loan facility of two years extended by the plaintiff to the defendant. This was the Convertible Loan referred to at [2(e)] above.

(c) The term of the Convertible Loan would mature on 23 September 2016 (“the Maturity Date”). On that date, the Loan would be converted into new ordinary shares in the Defendant, referred to in the Deed of Addendum as Conversion Shares. The Loan would then be

deemed to be fully repaid and no longer outstanding, based on an agreed formula. I will refer to this below as the Conversion exercise.

(d) The agreed formula (under clause 2.4) required the equity value of the Defendant to be determined by an "Approved Accounting Firm" (as defined in the Deed of Addendum) appointed by mutual agreement of the parties no later than six months prior to the Maturity Date.

11 Computation of the number of new shares to be issued to the Plaintiff under the Conversion exercise would be based on the following formula set out at clause 2.3.2 of the Deed of Addendum:

$$Number\ of\ Conversion\ Shares = \frac{Convertible\ Loan}{X\ /\ Total\ number\ of\ Ordinary\ Shares}$$

Where X = the higher of (i) the Equity Value of the [Defendant], or (ii) the post-money valuation of the [Defendant], based on the most recently completed investment of the [Defendant].

12 Clause 2.5 of the Deed of Addendum provided the conditions for the Conversion exercise. It is central to the dispute between the parties. It states:

> **Conditions to Conversion**
>
> If the conversion of the Convertible Loan and the issue and allotment of Conversion Shares are subject to the [Plaintiff] obtaining shareholders' approval as required by applicable laws or the Singapore Exchange Securities Trading Limited, the [Plaintiff] agrees to:
>
> (i) convert such portion of the Convertible Loan to the maximum extent as may be possible without triggering the requirement to obtain shareholders' approval; and
>
> (ii) discuss in good faith with the [Defendant] on a revised repayment schedule in relation to the balance of the Convertible Loan, provided that in the event the Parties fail to reach an agreement within one (1) month of the Maturity Date, such balance of the Convertible Loan shall without demand become immediately due and payable.

13 In anticipation of the issuance of new shares by the Defendant, the Plaintiff's Rakesh Khera ("Khera") sent an email to Tan on 8 June 2016, proposing a meeting to discuss, among other things, the appointment of the Approved Accounting Firm for the purposes of determining the equity value of the Defendant.

14 The meeting between the parties took place on 24 June 2016. Khera followed up with an email on 10 July 2016 seeking an update on the appointment of the accounting firm. Chada alleged that after multiple reminders from the Plaintiff, the Defendant decided not to appoint any accounting firm to value its shares although Tan had earlier indicated that the Defendant would appoint Duff & Phelps.

15 By an email dated 5 September 2016, Tan told the Plaintiff that the Defendant had decided to proceed with the Conversion exercise without appointing an accounting firm to determine the Defendant's value. Tan said this to the Plaintiff's Maneesh Tripathi in his email:

> … Further to discussion with the Globalroam board, the board has decided to waive our right to get a valuation done pursuant to the Deed of Addendum dated 24 September 2014 due to the costs involved. We will proceed with the conversion of the outstanding amount of S$3,884,247.53 on the following basis in accordance with the Deed:-
>
> - The valuation of Globalroam will be based on the latest post-money valuation of the [Defendant] pursuant to the investment in September 2015, being ~S$113m.
> - The amount to be converted will be up to 20% of the market cap of S i2i on 23 September 2016.
>
> Will inform you after 23 September 2016 on the amount to be converted and the number of shares S i2i is entitled to. Look forward to your support as a future shareholder of Globalroam! Have attached Globalroam's latest financials for your reference and we can arrange for Thomas (the new CEO) to share the exciting plans for the [Defendant] with you.

16 The Plaintiff expressed its disagreement with Tan's proposal through an email from one Mukesh Khetan ("Khetan") dated 13 September 2016. The Plaintiff maintained that the Defendant should be valued in accordance with the procedure set out at clause 2.4 of the Deed of Addendum and the number of new shares to be issued should comply with clause 2.5 (see [12] above). The Plaintiff's email also highlighted to the Defendant that the Plaintiff needed to consult the SGX on the proposed Conversion exercise:

> It is also highlighted for your attention that under Clause 2.5 of the Deed, the conversion is only to be made up to the maximum extent as may be possible without triggering SGX's requirement to obtain shareholders' approval. Besides the relative figure based on the market capitalization of Si2i which you've calculated, there is also the relative figure under Rule 1006(b) of the Listing Manual which is computed on the net profits attributable to the shares in Globalroam compared with the net profits of the Si2i Group. In these circumstances, the relative figure will be a negative one, and accordingly Rule 1007 of the Listing Manual requires us to consult SGX if the shareholders' approval is required.

In the same email, the Plaintiff expressly reserved its right to bring an action against the Defendant in the event that the Defendant's failed to comply with the agreed terms of the Conversion exercise by unilaterally converting the Convertible Loan into shares without waiting for the required approval from the regulators and shareholders of the Plaintiff.

17 On the Maturity Date, *ie*, 23 September 2016, notwithstanding the Plaintiff's above warning, the Defendant issued the Conversion Shares and forwarded to the Plaintiff Share Certificate No. 222 for 6,695,133 shares the Defendant had now issued to the Plaintiff. The Plaintiff alleged that this act by the Defendant of issuing the Conversion Shares was an event of default within the meaning of clause 9 of the Loan Agreement.

18 On 28 September 2016, the Plaintiff issued an announcement on the SGX that it disputed and did not recognise the issuance of the Conversion Shares by the Defendant as the issuance was performed in breach of the terms of the Deed of Addendum.

19 Thereafter, there was a protracted exchange of correspondence between the parties' solicitors. On 28 September 2016, the Plaintiff's solicitors gave the Defendant formal notice that the Plaintiff disputed the validity of the Defendant's issuance of the Conversion Shares due to the Defendant's breach of clauses 2.4 and 2.5 of the Deed of Addendum.

20 Clause 2.5, which sets out the terms of the Conversion exercise, is set out at [12] above. Clause 2.4 is about the appointment of an accounting firm to determine the value of the Defendant. The relevant sub-clauses under clause 2.4, which is titled "Enterprise Value", state:

> 2.4.1 The "**Enterprise Value**" of the [Defendant] for the purposes of this Deed shall be the enterprise value of the [Defendant] as determined by an Approved Accounting Firm appointed by mutual agreement of the Parties no later than six (6) months prior to the Maturity Date provided that the costs of the Approved Accounting Firm shall be borne by the [Defendant].
>
> 2.4.2 The Approved Accounting Firm shall determine the Enterprise Value and Equity Value of the [Defendant] as at the Maturity Date and on the basis that the conversion of the Convertible Loan contemplated under clause 2.3 (the "**Conversion**") shall take place on the Maturity Date.
>
> [emphasis in original]

21 The Defendant's solicitors by a letter dated 3 October 2016 wrote to the Plaintiff's solicitors to say that the issuance of the Conversion Shares was done in accordance with clause 2.5(i) of the Deed of Addendum. They contended that there were no conditions for the Conversion exercise in accordance with the

Mainboard Rules of the SGX Listing Manual ("the Listing Manual") or as required by the SGX, and if there were, the Plaintiff did not inform the Defendant of them. On the same day, the Plaintiff wrote to the Defendant demanding, among other things, the payment of the outstanding amount under the Convertible Loan, *ie* $3,884,246.53.

22 Then, under cover of a letter dated 19 October 2016, the Plaintiff's solicitors forwarded to the Defendant's solicitors a copy of the SGX's email dated 14 October 2016 from one Ms Chee May Leng stating that shareholders' approval was required for the Conversion exercise, citing Rule 1006(b) of the Listing Manual. The email states:

> As the relative figure under Listing Rule 1006(b) significantly exceeds 20%, the transaction constitute [*sic*] a major transaction under Listing Rule 1014 and will require shareholders' approval.

As I said to counsel at the hearing, this email from the SGX did not assist the Plaintiff's case for reasons which I explain at [56] below.

23 The Defendant's solicitors replied on 25 October 2016 to say that it was for the Plaintiff to consult the SGX on the Conversion exercise. The Defendant expected the Plaintiff to consult the SGX and then inform the Defendant of any requirement or condition imposed by the SGX which had to be complied with prior to performing the Conversion exercise.

24 I should point out at this juncture that because the Defendant had made losses for the years 2013 to 2016 (ten months up to June 2016), conversion of the shares was done based on negative figures in the Defendant's accounts.

25 Apart from the alleged event of default on 23 September 2016 (see [17] above), the Plaintiff alleged there was an earlier event of default consisting in

the Defendant's act of replacing Tan as its chief executive officer ("CEO") with one Thomas Laboulle ("Laboulle") on 1 August 2016. In this regard, the Plaintiff relied on clause 9.1.12 of the Loan Agreement, which states:

> Displaced/Curtailed Management: Tan Kum Wah Clarence ceasing to be a Director of any Group Company or the chief executive officer of the Group or Tan Kum Wah Clarence having his authority as chief executive officer of the Group curtailed; …

The Defendant's case

26 The Defendant disputed the Plaintiff's allegations. The Defendant submitted that the Conversion exercise was valid and carried out in accordance with the Deed of Addendum. The Defendant disagreed with Chada's narrow interpretation of clause 2.5 of the Deed of Addendum that the Convertible Loan may only be converted to shares to the extent that it did not require the approval of the Plaintiff's shareholders.

27 The Defendant argued that as clauses 2.3.2 and 2.4 (see [11] and [20] above) were inserted for the exclusive benefit of the Defendant, it was entitled to waive the obligations contained in those clauses. Clause 2.4 clearly stated that conversion was to be effected at the higher of two values and it was therefore for the Defendant to waive its right to obtain a potentially higher valuation, and the Defendant did waive that right.

28 The Defendant by its email dated 5 September 2016 (see [15] above) informed the Plaintiff of its decision to waive its rights under clause 2.3.2 of the Deed of Addendum. The Defendant also told the Plaintiff that it would convert the Convertible Loan to shares based on the post-money value of its most recent investment in September 2015, which was approximately $113m. Since the Defendant also provided financial information to the Plaintiff on the same day

in that email, Tan contended that it fell on the Plaintiff to consult the SGX as to whether the approval of the Plaintiff's shareholders was required for the conversion of the Plaintiff's loan into shares in the Defendant.

29 More significantly, Tan pointed out that clause 2.7 of the Deed of Addendum gave the Defendant a grace period of 60 days from the date of the occurrence of any event of default to remedy the default. Clause 2.7 reads:

> **Event of Default**
>
> If at any time for any reason any Event of Default (as defined in the Loan Agreement) has occurred and is continuing, the [Defendant] shall have sixty (60) days from the date of occurrence of the Event of Default to remedy such default insofar as such default is capable of being remedied. If the default fails to be remedied within the aforesaid period, the [Plaintiff] may, by notice to the [Defendant] declare the Convertible Loan in whole or in part, be immediately due and payable.

30 Tan contended that the event giving rise to the first alleged event of default (see [25] above) occurred not on 1 August 2016 but on 1 July 2016 when he stepped down as CEO. However, he remained in an executive position in the Defendant's management as executive deputy chairman until 1 November 2016. He noted that the Plaintiff did not take issue with the change of CEO when informed of the change by email on 5 September 2016 (see [15] above). It was only on 3 October 2016 that the Plaintiff's solicitors raised the issue. Accepting the Plaintiff's argument that 1 August 2016 was the correct date (as that was when the replacement of CEO was announced on the Defendant's website), the 60 days' grace period expired on 30 September 2016. By then, the Defendant had already issued the Conversion Shares and the issue of default no longer arose.

31 Tan pointed out that in the interval between 1 July 2016 and the Maturity Date, the Defendant did not receive any notice from the Plaintiff pursuant to clause 2.7 declaring that the Convertible Loan was immediately due and payable.

32 Tan added that there was no condition in the Deed of Addendum that there must be no event of default subsisting at the date of conversion. Accordingly, on 23 September 2016, upon the conversion of the Convertible Loan and the issue and allotment of the Conversion Shares, the Defendant had discharged all its obligations under the Deed of Addendum. Hence, the Plaintiff could not on 3 October 2016, as it did (see [21] above), declare that the Convertible Loan was due and payable immediately.

The decision

33 The main issue before me was whether the Defendant carried out the Conversion exercise in compliance with the terms of the Deed of Addendum. I also had to decide whether clause 2.5 of the Deed was a condition precedent. A secondary issue to be addressed was whether there was an event of default when Tan was replaced as the Defendant's CEO by Laboulle (see [25] above).

Change of CEO

34 The secondary issue is straightforward and may be dealt with first. The Plaintiff's complaint on the change of CEO seemed only to be that it was informed late of Laboulle's appointment by the Defendant, namely by email on 5 September 2016 when the press announcement was issued on 1 August 2016. I noted that the press release exhibited in Chada's second affidavit also announced that Tan had been promoted to the position of deputy executive chairman.

35 The wording of clause 9.1.12 of the Loan Agreement (see [25] above) does not seem to cover a situation where Tan was *promoted* within as opposed to *removed* from the Defendant's management. Consequently, I found little merit in this complaint of the Plaintiff.

Conversion exercise

36 I turn next to the primary issue, which is whether the Conversion exercise was performed in accordance with the terms of the Deed of Addendum.

37 I pause here to make a preliminary point about clause 2.5 of the Deed (see [12] above), which refers to requirements imposed by the SGX for the purpose of the Conversion exercise. In this regard, I wish to highlight at the outset that it is not the Defendant but the Plaintiff which is listed on the SGX. Hence, only the Plaintiff is subject to regulations contained in the Listing Manual. The Defendant has no *locus standi* to approach the SGX, let alone on behalf of the Plaintiff, to seek the SGX's approval under clause 2.5 or to seek clarification on the applicability of provisions in the Listing Manual. Hence, it must be implicit in clause 2.5(i) (see [12] above) that it was the Plaintiff, not the Defendant, which bore the responsibility of ensuring that the Conversion exercise complied with the SGX's requirements.

38 The secondary issue here is whether the Defendant, by performing the Conversion exercise on 23 September 2016, wrongfully deprived the Plaintiff of an opportunity to consult the SGX during the period between 5 and 23 September 2016. 5 September 2016 is the date on which the Defendant informed the Plaintiff that it would proceed with the Conversion exercise on 23 September without appointing an accounting firm to determine the Defendant's Enterprise and Equity values (see [15] above).

Waiver of clauses 2.3.2 and 2.4

39 It is logical to deal first with the Defendant's argument (at [28] above) that it had no obligation to appoint an accounting firm to determine its Enterprise and Equity value prior to performing the Conversion exercise because it had waived that requirement. The Defendant argued that it was entitled to, and did, waive clauses 2.3.2 and 2.4 of the Deed of Addendum, which contained that requirement, on the basis that the requirement was for its exclusive benefit. At this juncture, it would be appropriate to look at the two authorities the Defendant cited in support of this argument.

40 First, the Defendant relied on the following extract from *Chitty on Contracts* vol 1 (Hugh Beale, ed) (Sweet & Maxwell, 32nd Ed, 2016) ("*Chitty*") at para 22-046:

> Where the terms of a contract include a provision which has been inserted solely for the benefit of one party, he may, without the assent of the other party waive compliance with that provision and enforce the contract as if the provision had been omitted.

41 The Defendant next cited *Transvic Investment Pte Ltd v Amva Investment Pte Ltd and others* [1994] 3 SLR (R) 303 ("*Transvic*"). That case simply reinforces the point made at para 22-046 of *Chitty*. It involved a sale and purchase of a piece of property. The agreement made completion of sale subject to (a) the vendors obtaining approval from the competent authorities for subdivision and (b) under clause 13, the issuance of a separate certificate of title to the property. Although permission for subdivision was granted, the Registrar of Titles informed the owners' solicitors that a separate certificate of title would not be issued as the property remained under the Registration of Deeds Act (Cap 269, 1989 Rev Ed). The owners' solicitors thus informed the purchaser that the sale was aborted. The purchaser sued the owners, claiming specific performance

of the agreement. Allowing the purchaser's claim, the court held that clause 13 was for the exclusive benefit of the purchaser. Therefore, the purchaser was entitled to waive the requirement to issue separate title in order to complete his purchase.

42 In my view, the Defendant could not have waived the requirement under clause 2.4 to appoint an accounting firm to determine the Equity Value of the Defendant because that requirement was not to the exclusive benefit of the Defendant. The Plaintiff correctly pointed out that it too would have benefited from an objective and independent assessment of the Defendant's Equity Value performed by an "Approved Accounting Firm". And this is no doubt the intention behind clause 2.4. An independent valuation of the Defendant would avoid the risk of opacity and lack of objectivity inherent in any assessment of the Defendant's value conducted by the Defendant itself. Here, the Defendant purported to conduct such an evaluation based on the post-money valuation of its most recently completed investment and arrived at a figure of "~$113m". It was therefore unsurprising that Chada expressed doubts about that valuation in his second affidavit. In any event, the Defendant in these proceedings produced no evidence to support that valuation.

43 Furthermore, the Deed of Addendum appears expressly to preclude the possibility of doing away with an independent valuation of the Defendant prior to the Conversion exercise. In this regard, clause 2.3.1 clearly states:

> On the Maturity Date, the Convertible Loan *shall subject to Clause 2.5 be converted into new Ordinary Shares* ("the Conversion Shares") in accordance with this Clause 2.3 and the terms and conditions of this Deed
>
> [emphasis added]

That must mean that the Conversion exercise had to comply with the conditions for conversion set out under clause 2.5. In the same vein, the Plaintiff submitted that there were no provisions in the Deed of Addendum that allowed the Defendant to dispense with the requirement in clause 2.3.2.

44 Finally, it appeared to me that the Plaintiff's conduct in attempting to waive the valuation requirement in fact indicated that it had the opposite intention, at least with respect to clause 2.3.2. In calculating the Conversion Shares it issued to the Plaintiff on the basis of the post-money valuation of the most recently completed investment (in September 2015), the Defendant was not waiving but in fact *attempting to comply* with the requirement in clause 2.3.2, because clause 2.3.2 sets out precisely that basis of calculation.

45 For these reasons, I reject the Plaintiff's argument that it rightfully waived the requirements contained in clauses 2.3.2 and 2.4 of the Deed of Addendum.

Breach of clause 2.5

46 I turn now to consider whether the Conversion exercise was performed in accordance with clause 2.5 of the Deed of Addendum (see [12] above). Clause 2.5 stipulates that if the SGX requires the Plaintiff to obtain the approval of its shareholders for the allotment of the Conversion Shares, then under clause 2.5(i), the Plaintiff would agree to convert only such portion of the Convertible Loan to shares to the maximum extent possible without triggering the requirement of shareholders' approval.

47 The issue here is two-fold: first, whether the requirement of obtaining shareholders' approval was triggered; and second, whether clause 2.5 is in any

case a condition precedent of the Deed of Addendum. I will consider each issue in turn.

Shareholders' approval

48 It is appropriate for me to begin here by setting out the rules in the Listing Manual that are relevant to the Conversion exercise, as I will be referring to those rules closely in my analysis below of whether clause 2.5 had been complied with.

> **Part IV Classification of Transactions**
>
> **1004**
>
> Transactions are classified into the following categories:—
>
> (a) Non-discloseable transactions;
>
> (b) Discloseable transactions;
>
> (c) Major transactions; and
>
> …
>
> **1006**
>
> A transaction may fall into category (a),(b), (c) or (d) of Rule 1004 depending on the size of the relative figures computed on the following bases:—
>
> …
>
> (b) The net profits attributable to the assets acquired or disposed of, compared with the group's net profits.
>
> (c) The aggregate value of the consideration given or received, compared with the issuer's market capitalisation based on the total number of issued shares excluding treasury shares.
>
> …
>
> **1007**
>
> (1) If any of the relative figures computed pursuant to Rule 1006 is a negative figure, this Chapter may still be applicable to the transaction at the discretion of the Exchange, and issuers should consult the Exchange.

> …
>
> **Part VI Discloseable Transactions**
>
> **1010**
>
> Where any of the relative figures computed on the basis set out in Rule 1006 exceeds 5% but does not exceed 20%, an issuer must, after terms have been agreed, immediately announce the following:—
>
> (1) Particulars of the assets acquired or disposed of, including the name of any company or business, where applicable.
>
> …
>
> **Part VII Major Transactions**
>
> **1014**
>
> (1) Where any of the relative figures as computed on the bases set out in Rule 1006 exceeds 20%, the transaction is classified as a major transaction. The issuer must, after terms have been agreed, immediately announce the information required in Rules 1010, 1011, 1012 and 1013, where applicable.
>
> (2) A major transaction must be made conditional upon approval by shareholders in general meeting. A circular containing the information in Rule 1010 must be sent to all shareholders. This rule does not apply in the case of an acquisition of profitable assets if only the limit is breached in Rule 1006(b). …
>
> …
>
> [emphasis in original]

49 The broad effect of the applicable rules, which I have just cited, is that a transaction which meets the criteria of "Major Transactions" under Rule 1014(1) cannot proceed without the approval of the shareholders of the listed company, in this case the Plaintiff, intending to enter into that transaction. Accordingly, the first question which arises is whether the Conversion exercise was such a transaction. This turned on whether the Conversion met the criteria under Rules 1006 and 1014.

Major Transaction

50 In my judgment, there is no basis for the Plaintiff to say that the Conversion exercise was a "Major Transaction" which it could enter into only upon obtaining its shareholders' approval. The simple reason for this is that neither relative figure within the meaning of Rules 1006(b) and 1006(c) for the Defendant exceeded the 20% threshold stipulated in Rule 1014(1). The Conversion exercise was therefore not a "Major Transaction" under Rule 1014 which required shareholders' approval.

51 This view is supported by both the Plaintiff's and the Defendant's evidence. When the Plaintiff first wrote to the SGX on 5 October 2016, it stated that the relative figure under Rule 1006(b) was a negative value, and that the relative figure under Rule 1006(c) was 16.8%. The Defendant's computation of the latter figure differs slightly; according to Tan's affidavit, that figure should be 17.5%. But the point is that all of these figures do not exceed the 20% threshold stipulated in Rule 1014(1). Therefore, the Conversion exercise is not a Major Transaction which attracts the need to obtain shareholders' approval.

Rule 1007(1)

52 This being the case, the next question arising from the Rules relates to Rule 1007(1). This rule imposes an obligation on the listed company in question, here the Plaintiff, to "consult the Exchange" if any of the relative figures under Rules 1006(b) and 1006(c) are negative (see [24] above). As I mentioned, the relative figure in the present case under Rule 1006(b) was negative. This is because the Defendant had sustained losses continually from 2013 to 2016. That negative figure was, according to the Defendant, -12.02%.

53 So the Plaintiff was understandably concerned that although the Conversion exercise was not a Major Transaction, it still had to be reported to the SGX under Rule 1007(1). Thus, the Plaintiff reported the Conversion exercise to the SGX on 5 October 2016 and asked the SGX whether shareholders' approval needed to be obtained before the Conversion exercise could proceed. It will be observed that 5 October 2016 is well past the Maturity Date of 23 September 2016 on which the Conversion exercise was contractually stipulated to take place; I will come back to this point below (at [64] to [68]) to address the Plaintiff's inaction before that date.

54 The important point here is that the Plaintiff was mistaken to argue that its communications with the SGX had somehow demonstrated that the Conversion exercise was contingent on the Plaintiff's obtaining shareholders' approval. This is because the SGX never said any such thing. This will be seen from my examination below of a chain of email correspondence between the Plaintiff's solicitors and the SGX. I begin by quoting from the email which began that correspondence, namely, the email dated 5 October 2016 from the Plaintiff's solicitors to the SGX:

> Pursuant to Rule 1007(1) of the Listing Manual, the [Plaintiff] is required to consult the SGX-ST on whether shareholders' approval is required for the Conversion.
>
> In view of the amount of the Convertible Loan and that Globalroam has been loss-making for many years, the [Plaintiff] is of the view that shareholders may wish to have a say in the conversion. Furthermore the business of Globalroam is different from the core business of the [Plaintiff] today.
>
> The [Plaintiff] seeks SGX's confirmation on whether shareholders' approval is required for the Conversion. …

55 It is clear from this email that the Plaintiff's central concern was that it was about to enter a transaction, *ie* the Conversion exercise, by which it would obtain a not insignificant amount of equity in a loss-making company. So it

wanted to know whether such a transaction required the approval of its shareholders before it could be entered into.

56 The SGX's reply to that email failed to address the Plaintiff's concern. On behalf of the SGX, Ms Chee May Leng wrote to the Plaintiff's solicitors via email on 14 October 2016 to say, mistakenly, that since the relative figure under Rule 1006(b) exceeded 20%, the Conversion exercise was a Major Transaction under Rule 1014 and required shareholders' approval before proceeding. But as I have explained (at [50] to [51] above), none of the relative figures in fact exceeded 20%, and so the Conversion exercise was not in fact a Major Transaction; Ms Chee was plainly wrong.

57 Probably confused by Ms Chee's answer, one of the solicitors for the Plaintiff wrote her a reply email, saying:

> Could you please clarify your email [dated 14 October 2016]? Actually, the issue we're concerned with is the fact that the relative figure under Rule 1006(b) is negative, and not that it exceeds 20%; and that, as a result of this negative figure, shareholders' approval for the conversion is required.

58 Before the SGX could reply, the same solicitor sent another email to the SGX on 28 October 2016 to say:

> Further to our last email – before you respond to us, perhaps it would be better if we speak on the phone to clarify matters.

59 It is appropriate for me to pause here to deal with an evidential issue raised by the Defendant about the fact that the Plaintiff's solicitors spoke on the phone to Ms Chee. The Defendant submitted that an adverse inference should be drawn against the Plaintiff pursuant to s 94 of the Evidence Act (Cap 97, 1997 Rev Ed) ("the Act") as the Plaintiff did not disclose in these proceedings what transpired in that telephone conversation.

60 The Defendant's reliance on s 94 of the Act is misconceived. That section concerns the rule against the admission of parol evidence in the context of interpreting contracts or deeds. The relevant provision is in fact s 116 of the Act, and in particular, illustration (g) under that section:

> **Court may presume existence of certain fact**
>
> **116.** The court may presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> *Illustrations*
>
> The court may presume —
>
> …
>
> (*g*) that evidence which could and is not produced would if produced be unfavourable to the person who withholds it.

61 In my view, s 116 and illustration (g) do not significantly assist the Defendant. On the one hand, I accept that I am entitled to find that evidence of the telephone conversation would, if produced, be unfavourable to the Plaintiff, who appears to have withheld that evidence. But beyond that, I do not see any specific fact which may be inferred from the lack of that evidence which would significantly assist the Defendant's case. This is because Ms Chee's next email, which she sent on 1 November 2016 after the alleged telephone conversation, was just as mistaken as her email on 14 October 2016, and this already sufficiently undermines the Plaintiff's case without my having to draw any adverse inference. Moreover, the meaning of the November email is so plain that it could not reasonably be altered or otherwise affected by any fact I might reasonably presume to have been conveyed during the alleged telephone conversation..

62 Turning to Ms Chee's November email proper, I note that it reads quite simply as follows:

> We note that the relative figure under Listing Rule 1006(b) is negative and as the relative figure under Listing Rule 1006(b) also significantly exceeds 20%, the transaction constitutes a major transaction under Listing Rule 1014 and will require shareholders' approval.

63 Again, this email missed the point entirely. The Plaintiff was concerned about Rule 1007(1), not Rule 1006(b). For reasons unknown, Ms Chee failed again to appreciate that the Plaintiff was in these emails consulting the SGX pursuant to its obligation to do so under Rule 1007(1) because the relative figure in Rule 1006(b) was negative for the Defendant. Yet, she still insisted erroneously that as the Defendant's relative figure under Rule 1000(c) exceeded 20%, the Conversion exercise was a Major Transaction. Accordingly, the SGX cannot possibly be construed as saying, through Ms Chee's emails, that the Plaintiff did require its shareholders' approval before the Conversion exercise could proceed *because* the Defendant's relative figure under Rule 1006(b) was negative. This was simply not the point of either of Ms Chee's emails. Consequently, the Plaintiff could not in these proceedings rely on those emails as evidence of such a requirement. And while one would have hoped for a more informed response on the part of the SGX, the Defendant cannot be blamed for the Plaintiff's fruitless attempt to consult the SGX under Rule 1007(1) on whether shareholders' approval was required for the Conversion exercise.

The Plaintiff's inaction

64 In any event, the Plaintiff's attempt to consult the SGX was too late. Thus, even if Ms Chee's emails could be read to mean that the Conversion exercise was conditional on the approval of the Plaintiff's shareholders, such a requirement would have come too late, because by the time it was presumably

given (through Ms Chee's emails in October and November), the Conversion exercise had already taken place. In this regard, it must be noted that Rule 1007(1) does not itself impose any requirement on the listed company, here the Plaintiff, to obtain shareholders' approval; it says only that the listed company must *consult* the SGX if its relative figure under Rule 1006(b) is negative. The SGX, after being consulted, may or may not impose a requirement on the Plaintiff to obtain its shareholders' approval. As I have found, the SGX in the present case imposed no such requirement on the Plaintiff; and even if it did, it imposed the requirement only after the Maturity Date because the Plaintiff consulted the SGX only after that date, which was by then too late. Thus, it cannot be said that the Conversion exercise, which was contractually stipulated to take place on the Maturity Date, could not proceed without the approval of the Plaintiff's shareholders. In any case, the Plaintiff certainly had no basis later to thrust upon the Defendant the responsibility of clarifying the existence of that requirement for reasons I have already explained (see [37] above).

65 In my judgment, the Defendant was correct to say that the Plaintiff knew well before 23 September 2016, which is the date on which the Defendant performed the Conversion exercise, that the Plaintiff needed to consult the SGX pursuant to Rule 1007(1). In this regard, the Defendant referred me to Khetan's email dated 13 September 2016, which was sent by the Plaintiff to the Defendant, and which expressly mentioned Rule 1007 (see [16] above). This showed that the Plaintiff was aware of its obligation under that rule to consult the SGX on the Conversion exercise well before time. The Defendant therefore placed the blame squarely on the Plaintiff, pointing out that it was not for the Defendant to make the application for approval.

66 I accept that the Plaintiff could have and should have, during the period between 5 September 2016 (when the Plaintiff received the Defendant's email

indicating its intent to go through with the Conversion exercise without appointing an accounting firm: see [15] above) and 23 September 2016, asked the SGX whether the Plaintiff's acquisition of the Conversion Shares required its shareholders' approval, given that it was based on negative figures. In this regard, Chada's first and second affidavits were noticeably silent on the reason(s) for the Plaintiff's inaction.

67 That the Plaintiff had no excuse for its inaction during the period between 5 and 23 September 2016 is supported by the following statement in the Defendant's email on the former date:

> Will inform you *after 23 September 2016* on the amount to be converted and the number of shares S I2I is entitled to.
>
> [emphasis added]

68 While the Plaintiff could be excused for thinking that the Defendant indicated that it would only perform the Conversion exercise after 23 September 2016, *ex hypothesi* giving the Plaintiff time beyond that date to speak to the SGX, the Plaintiff should not have overlooked the fact that 23 September 2016 was the Maturity Date of the Convertible Loan. Therefore, the Conversion exercise could only take place *on* and not *after* 23 September 2016. In fact, the Plaintiff was well aware of this because it gave notice of event of default to the Defendant on 3 October 2016 after the Maturity Date of the Convertible Loan had expired.

69 For these reasons, I find that the Conversion exercise on 23 September 2016 was not conditional on the approval of the Plaintiff's shareholders even though the relative figure under Rule 1006(b) was negative. There might have been such a condition if the SGX had imposed it on the Plaintiff before the Conversion exercise was due to take place. But the Plaintiff only had itself to

blame for failing to consult the SGX prior to 23 September 2016 on this matter. In addition, the SGX's confused answers to the Plaintiff in the form of Ms Chee's emails in October and November were no justification for the proposition that shareholders' approval was required before the event. In any case, the Defendant cannot be blamed for the confusion in those answers and for the fact that the answers did not come before 23 September 2016. There is therefore no basis for me to hold that the Conversion exercise was performed in breach of clause 2.5.

Condition precedent

70 The gravamen of the Defendant's case was that compliance with clause 2.5 was in any event not a condition precedent to the issuance of the Conversion Shares under clause 2.3.1 as the Plaintiff had contended.

71 At law, a condition is precedent if it provides that the contract is not to be binding until the specified event occurs: *Chitty* ([40] *supra*) at para 2-158. The Plaintiff relied on the case of *Oriental Investments (SH) Pte Ltd v Catalla Investments Pte Ltd* [2013] 1 SLR 1182 to support its argument that clause 2.5 was a condition precedent. That case is relevant to the present case only for the court's holding there (at [79]) that whether or not a clause is a condition precedent is a matter of construction, nothing more. The Plaintiff also relied on the following extract from Sir Kim Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 6th Ed, 2015) at para 16.05:

> Agreements may be made subject to all sorts of matters. It is then a question of interpretation in each case whether the parties intended to enter into an immediately binding contract, performance of which was suspended pending fulfilment of the condition or whether they intended no contract to arise at all. If the former is the correct conclusion it is also necessary to consider whether the condition is sufficiently certain to be

> legally enforceable. If it is not the whole contract will be void for uncertainty.

72 The Plaintiff relied heavily on the words "shall subject to Clause 2.5 be converted into new Ordinary Shares" appearing in clause 2.3.1 (see [43] above) of the Deed of Addendum to argue that clause 2.5 was a condition precedent which contemplated that the Convertible Loan can only be converted to the extent that shareholders' approval was not required.

73 I did not accept the Plaintiff's argument. Applying the definition of a condition precedent from *Chitty*, I see nothing in the Deed of Addendum which suggests that the entire deed has no contractual effect unless clause 2.5 is complied with.

74 Even if the Plaintiff is correct to say that clause 2.5 is a condition precedent, I find that the Defendant fulfilled the requirements contained in that clause. The Defendant did exactly what the Plaintiff itself said the Defendant was required under clause 2.5 to do in the Plaintiff's email of 13 September 2016 (see [16] above). The Plaintiff said in that email that "the conversion is only to be made up to the maximum extent as may be possible without triggering SGX's requirement to obtain shareholders' approval". The Defendant accordingly converted the correct number of shares from the Convertible Loan so as to dispense with shareholders' approval, in compliance with the threshold in Rule 1014(1) and so that shareholders' approval would not need to be obtained under clause 2.5. Since there was no breach of clause 2.5 and no event of default had occurred as at the Maturity Date (23 September 2016) when the Conversion Shares were issued, the Plaintiff could not complain.

75 In regard to the Defendant's non-compliance with clause 2.4 in failing to appoint an approved accounting firm to determine the Defendant's enterprise

value, it is noteworthy that the Plaintiff raised no objections whatsoever to the Defendant's post-money valuation until after the event. This silence also was not explained in Chada's two affidavits. As observed earlier (at [65]), the Plaintiff knew that it had to consult the SGX under Rule 1007(i) since one of the relative figures were negative, but it took no action towards that end. It was therefore disingenuous of the Plaintiff to state in Chada's first affidavit (at para 48) that:

> … there is no obligation on the Plaintiff under the Deed of Addendum to inform the Defendant of SGX's requirements in a timely manner prior to the conversion date. In fact, there is no duty specifically conferred on the part of the Plaintiff to inform the Defendant whether shareholders' approval is required by the applicable laws or by SGX under the Deed of Addendum. …

76 It seemed to me therefore that while both parties were to a degree blameworthy for what transpired, the Plaintiff bore the greater responsibility as it was required to check with SGX on the need to comply with the Rules in the Listing Manual.

77 Moreover and far more significantly, Chada's second affidavit did not address at all the point raised in Tan's affidavit that, under clause 2.7 of the Deed of Addendum (see [29] above), the Defendant was entitled to a grace period of 60 days to remedy any event of default as notified by the Plaintiff. Only after the Defendant's failure to rectify the default within 60 days of the occurrence would the Plaintiff be entitled to give notice to the Defendant to declare that the Convertible Loan in whole or in part was immediately due and payable. There was nothing to suggest that the Plaintiff complied with clause 2.7.

78 It was also my perception that the Plaintiff, as the Defendant submitted, had a change of heart and decided ultimately that it did not want the Convertible

Loan to be converted to the Conversion Shares. Instead, it wanted repayment of the outstanding loan after the Maturity Date of the Convertible Loan and after the Defendant had issued the Conversion Shares. By then, however, it was too late.

79 For all the reasons above, I dismissed the Plaintiff's application in its entirety.

Lai Siu Chiu
Senior Judge

David Chan, Joseph Tay Weiwen and Claire Yeo (Shook Lin & Bok LLP) for the Plaintiff;
Sarbjit Singh Chopra and Roshan Singh Chopra (Selvam LLC) for the Defendant.

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