Pacific Rim Palm Oil Ltd v PT Asiatic Persada and Others
[2003] SGHC 243

Case Number : Suit 770/2002

Decision Date : 17 October 2003

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Alvin Yeo, Chou Sean Yu, Linda Wee (Wong Partnership) for the plaintiffs; Cavinder Bull (Drew & Napier LLC) for the first defendant; Chan Kok Chye, Kalaiselvi Singaram, Sim Kang Ho (Infinitus Law Corporation) for the second to fifth defendants

Parties : Pacific Rim Palm Oil Ltd — PT Asiatic Persada; Santoso Senangsyah; Rizal Senangsyah; Andi Senangsyah; Veronica Untu

Contract – Breach – Agreement to advance money for dischange of debts – Whether repudiatory breach of loan agreement

Trusts – Quistclose trusts – Factors in support – Advance of money for discharge of debts – Whether Quistclose trust created in circumstances

1 In this action, the Plaintiffs, Pacific Rim Palm Oil Limited, seek repayment of US$5 million advanced to the 1st Defendant, PT Asiatic Persada, pursuant to a Loan Agreement dated 26 January 2000. The Plaintiffs (formerly known as CDC Industries Holdings (Mauritius) Limited) are a company incorporated in Mauritius and whose principal business is in the production and sale of palm oil and other related products. CDC Group Plc, the holding company of the Plaintiffs, is the British Government's development investment vehicle in pre-emerging and emerging markets. It has investments in diverse businesses around the world.

2 The 1st Defendant is a company incorporated in Indonesia. Its principal business is the operation of a palm oil plantation in Jambi, Indonesia. The 2nd to 5th Defendants are shareholders of the 1st Defendant. The 2nd, 3rd and 4th Defendants are brothers and the 5th Defendant is the wife of the 2nd Defendant. The 2nd to 5th Defendants are also parties to the Loan Agreement.

The Plaintiffs' position

3 By a Share Sale and Purchase Agreement dated 26 January 2000 entered into between the Plaintiffs and the 1st to 5th Defendants, the 5th Defendant sold 224,400,000 shares in the 1st Defendant to the Plaintiffs. Consequently, the Plaintiffs hold 51% and the 2nd to 5th Defendants hold 49% of the issued share capital of the 1st Defendant. At the same time, the Plaintiffs also entered into a Management Agreement with the 1st Defendant. In connection with the Plaintiffs' investment in the 1st Defendant, the Plaintiffs agreed to refinance the then existing indebtedness of the 1st Defendant in an aggregate sum of US$28 million. Accordingly, a Loan Agreement dated 26 January 2000 was entered into between the Plaintiffs and the 1st to 5th Defendants. The loan of US$28 million was for the express and sole purpose of repaying existing debts that were owed by the 1st Defendant and its wholly owned subsidiaries, PT Jammer Tulen and PT Maju Perkasa Sawit to Bank Mandiri, Indonesia and the Indonesian Bank Restructuring Agency ("IBRA").

4 Of the total loan package of US$28 million, US$23 million was for the settlement of the debts owed by 1st Defendant and that of the wholly owned subsidiaries to Bank Mandiri Indonesia. The

balance US$5 million, which is the subject matter of this action, was also for the express purpose of discharging certain debts owed by 1st Defendant and PT Jammer Tulen to IBRA (hereafter collectively referred to as the "IBRA Debt"). Pursuant to the Loan Agreement, the Plaintiffs duly remitted on 2 February 2000 the sum of US$28 million to the 1st Defendant's bank account with Citibank N.A. Singapore ("the Asiatic Citibank account"). The Asiatic Citibank account was opened on 26 January 2000 specifically to receive the loan from the Plaintiffs. On 4 February 2000 and 17 March 2000, the sums of US$23 million and US$5 million were respectively transferred to another Singapore Citibank N.A. account in the names of 2nd and 3rd Defendants ("the Senangsyahs' Citibank account"). The 2nd to 5th Defendants admit that the transfer and receipt of the US$5 million by the 2nd and 3rd Defendants was for and on behalf of themselves and the 4th and 5th Defendants. The US$5 million has remained all the while since the transfer in the Senangsyahs' Citibank account. It is currently subject to an injunction order obtained against the 2nd to 5th Defendants on 4 July 2002.

5 The 2nd to 5th Defendants did not settle the IBRA Debt with IBRA. In May 2002, IBRA took steps to auction the IBRA Debt and that of PT Asiatic Mas Corporation. Batavia Financial Services Fund 1 ("Batavia"), a Cayman Island company, was the successful bidder. This happened on 1 August 2002. Consequently, so the argument ran, the sole purpose that the loan be applied for payment to IBRA is no longer capable of performance by each of the Defendants. The US$5 million must therefore be returned to the Plaintiffs since the Defendants have no legal right to continue to keep it.

6 The Plaintiffs' claims are based on several alternative causes of actions. The first is that the transaction between the Plaintiffs and Defendants has given rise to a Quistclose trust of the US$5 million, enforceable in equity, in the Plaintiffs' favour. Secondly, breach of the Loan Agreement. This is an alternative plea. The Plaintiffs contend that because of the 2nd to 5th Defendants' failure to discharge the debt due to IBRA for over two years, the Defendants are in breach of Clause 3.1 of the Loan Agreement and the implied term that the Defendants would utilise the US$5 million to settle and repay the IBRA Debt as soon as practicable with the use of reasonable diligence, and within a reasonable time. The breaches are repudiatory in character and the Plaintiffs have accepted their repudiatory breaches as terminating the Loan Agreement by commencing this action.

7 The Plaintiffs have in the further alternative pleaded that each of the 2nd to 5th Defendants never had any intention of using the US$5 million to settle the IBRA Debt, but had in fact fraudulently misappropriated the money for their own benefit. Alternatively, the 2nd and 3rd Defendants had received the US$5 million knowing that the money was trust money to be used for the specific and sole purpose of settling the IBRA Debt, and had failed to apply the money for such purpose in breach of trust while the 4th and 5th Defendants had dishonestly assisted in the 2nd and 3rd Defendants' breach of trust. In the circumstances, the 2nd to 5th Defendants became constructive trustees for the Plaintiffs of all monies received by them relating to the Plaintiffs' sum of US$5 million. There is also a further alternative plea that the 2nd to 5th Defendants unlawfully conspired with each other and with one Wim Iskandar for the sole or predominant purpose of defrauding and/or injuring the Plaintiffs. The Plaintiffs contend that the transfer of the US$5 million to the Senangsyahs' Citibank account was in breach of Clauses 4.1 and 7.1 of the Shareholders' Agreement. The necessary consent or affirmative votes required by the clauses was not obtained for the transfer of the US$5 million. The Plaintiffs had also not approved the transfer or authorised Wim Iskandar to effect the transfer. As at 17 March 2000, he was no longer President Director of the 1st Defendant and the 3rd Defendant was at the material time not an authorised signatory of the Asiatic Citibank account.

1st Defendant's position

8 The 1st Defendant's position is clear. From the outset, it openly declared that it was not contesting the Plaintiffs' claim against it and that the Plaintiffs are entitled to the US$5 million. It admitted in the Defence filed on 12 March 2003 that the loan of US$28 million was for the specific purpose of enabling the 1st Defendant to settle its existing debts as well as those of its wholly owned subsidiaries, PT Jammer Tulen and PT Maju Perkasa Sawit, which were then due and owing to PT Bank Mandiri and IBRA. The latter had taken over several separate debts owed by the 1st Defendant, PT Jammer Tulen and PT Maju Perkasa Sawit to several Indonesian banks. In its Defence, the 1st Defendant admitted that the US$5 million in the Senangsyahs' Citibank account was intended to be used by the 2nd to 5th Defendants to settle with IBRA the debts of the 1st Defendant and that of its wholly owned subsidiary PT Jammer Tulen.

9 The 1st Defendant has also admitted in the Defence that the transfer of US$5 million on or about 17 March 2000 to the Senangsyahs' Citibank account was effected without proper authorisation of the 1st Defendant and in breach of the Shareholders' Agreement dated 26 January 2000. Prior to the transfer, a special consent of the 1st Defendant's shareholders or board of commissioners was required by Clause 7 of the Shareholders' Agreement. Wim Iskandar, who had caused the transfer of US$5 million to the Senangsyahs' Citibank account, had acted without the proper authorisation of 1st Defendant.

10 The 1st Defendant agrees with the Plaintiffs that the 2nd to 5th Defendants should have used the US$5 million to repay the IBRA Debt within a reasonable time. It admitted that as at the date of the Writ of Summons filed on 3 July 2002, the 2nd to 5th Defendants had not settled the IBRA Debt with the application of the sum of US$5 million received by the 2nd to 5th Defendants on or about 17 March 2000. Counsel for the 1st Defendant, Mr. Cavinder Bull, submits that as the funds have not been dissipated and are available to satisfy any judgment against the 2nd to 5th Defendants, the Plaintiffs would have suffered no loss arising from the 1st Defendant's breach of the Loan Agreement. To that extend, he submits that no order be made against the 1st Defendant.

2nd to 5th Defendants' position

11 The 2nd to 5th Defendants deny they have breached the terms of the Loan Agreement. They further deny that the purpose for which the US$5 million is being held in the Senangsyahs' Citibank account has failed.

12 The Loan Agreement was varied after the date of execution. The transfer of US$5 million to the Senangsyahs' Citibank account was the result of a variation of the Loan Agreement. The Plaintiffs had agreed to allow the 2nd to 5th Defendants to negotiate the settlement terms and eventual repayment of the debts with IBRA as and when they deemed it appropriate. In addition, by the transfer of US$5 million to the Senangsyahs' Citibank account, the 2nd to 5th Defendants would be personally responsible for the debt owing by the 1st Defendant and its subsidiaries to IBRA and for any shortfall should US$28 million be insufficient to pay IBRA and Bank Mandiri for the outstanding debts.

13 The IBRA Debts could not be settled because IBRA was insisting on treating as a composite debt ("the one obligor policy"), the debts of the entire Asiatic group of companies (which included companies other than 1st Defendant and PT Jammer Tulen) and IBRA was therefore unwilling to discharge the debt of any one company individually. The 2nd to 5th Defendants had been actively

negotiating with IBRA on settlement of the debts by the time IBRA advertised the auction in May 2002. They have since reached an agreement with Batavia to purchase the 1st Defendant's debt and they would apply the sum of the US$5 million for that purpose. There was no agreement that the US$5 million could not be used in this manner as opposed to settling with IBRA directly.

14 The 2nd to 5th Defendants deny that the transfer of the US$5 million to the Senangsyahs' Citibank account was in breach of Clauses 4.1 and 7.1 of the Shareholders' Agreement. They maintain that the transfer was outside the scope of the Shareholders' Agreement. Moreover, the Plaintiffs had consented to the transfer. At the material time, Wim Iskandar who was the Plaintiffs' nominated director, was the President Director or Director of 1st Defendant and he had authorised the transfer of US$5 million to the Senangsyahs' Citibank account. The 2nd to 5th Defendants were not aware that Wim Iskandar had acted without proper authorisation from the 1st Defendant.

15 The Plaintiffs' counter argument is that even if the Plaintiffs had agreed to the transfer of the money to the Senangsyahs' Citibank account, the transfer was in order to settle the debts of the 1st Defendant and PT Jammer Tulen. This agreement was repudiated (which repudiation was accepted by the Plaintiffs) when IBRA placed the debts on auction for sale to third parties. The placement of debts on auction meant that the 2nd to 5th Defendants were no longer in a position to deal with IBRA on repayment of the debts. The 2nd to 5th Defendants maintain that the purchase of the debt from Batavia was within the spirit of the agreement.

Findings and Decision

(i) Quistclose trust

16 Counsel for the Plaintiffs, Mr. Alvin Yeo S.C., submits that, in equity, the failure of the purpose for which the loan of US$5 million was made gives rise to a resulting trust (a "Quistclose" trust") in favour of the Plaintiffs to repay the loan. The reference to a "Quistclose trust" is a reference to the trust found in *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567. The case is authority for the proposition that where money is advanced by A to B, with the mutual intention that it should be used exclusively for a specific purpose, there will be implied (in the absence of any contrary intention) a stipulation that if the purpose fails the money will be repaid, and the arrangement will give rise to a relationship of a fiduciary character, or trust.

17 In Quistclose case, a company called Rolls Razor Ltd was in financial difficulty, with a significant overdraft. To alleviate the financial difficulties a loan of was obtained from Barclays Bank. Despite its finances, the directors had recommended a final dividend, which was approved at the company's annual general meeting. The company had no liquid assets from which to pay the dividend. A condition precedent to the making of the loan by Barclays Bank was that Rolls Razor obtained separate finance to pay the dividend. It borrowed money from Quistclose Investments Ltd. It was a condition of that loan that the money be used solely to pay the dividend. Quistclose paid the loan into a special bank account specifically set up for the purpose of holding the money advanced by Quistclose. Rolls Razor then went into liquidation, with the dividend still unpaid. The House of Lords held that the money did not form part of the company's assets for the purpose of the liquidation. Lord Wilberforce in his judgment said of the trust (at 581-582):

> "..when the money is advanced, the lender acquires an equitable right to see that it is applied for the primary designated purpose (see In re Rogers, 8 Morr.243 where both Lindley LJ and Kay LJ recognised this): when the purpose has been carried out (i.e. the debt paid) the lender has his

remedy against the borrower in debt: if the primary purpose cannot be carried out, the question arises if a secondary purpose (i.e. repayment to the lender) has been agreed, expressly or by implication: if it has, the remedies of equity may be invoked to give effect to it; if it has not (and the money is intended to fall within the general fund of the debtor's assets) then there is the appropriate remedy for recovery of a loan. I can appreciate no reason why the flexible interplay of law and equity cannot let in these practical arrangements, and other variations if desired: it would be to the discredit of both systems if they could not. In the present case the intention to create a secondary trust for the benefit of the lender, to arise if the primary trust, to pay the dividend, could not be carried out, is clear and I can find no reason why the law should not give effect to it."

18 In *Twinsectra Ltd v Yardley and Others* [2002] 2 AC 164, Lord Millet at p 193 said that the beneficial interest in the money remains with the lender of the money until the purpose for which the money was paid is fulfilled.

19 Is there evidence from which a resulting trust based on the principles in *Barclays Bank Ltd v Quistclose Investments Ltd* could be created. A starting point is to inquire whether the advance of US$5 million to the Defendants was to be at the Defendants' free disposal or was it for a specific purpose. It is common ground that the advance of US$28 million was for the discharge of the then existing debts owed by 1st Defendant and that of its wholly owned subsidiaries. The difference or dispute lies in the identity of the party with whom the Defendants were required to deal with to settle the debts and how the debts were to be settled.

20 The Plaintiffs say that IBRA had by then taken over the debts owed by the 1st Defendants and its subsidiaries to several Indonesian banks. The Defendants were thus required to settle the IBRA Debt directly with IBRA. The loan was for that specific and sole purpose. In this way, it is said that the arrangement was tantamount to the trust upheld in the case of *Barclays Bank Ltd v Quistclose Investments Ltd*. The purpose of the loan had failed in that the 2nd to 5th Defendants did not settle and repay IBRA for the IBRA Debt. Accordingly, a secondary and resulting trust arose and the 2nd to 5th Defendants hold the sum of US$5 million standing in the Senangsyahs' Citibank account on trust for the Plaintiffs who are entitled to the same.

21 Counsel for the 2nd to 5th Defendants, Mr. Chan Kok Chye, in Closing Submissions accepts that the 2nd and 3rd Defendants were assigned the task of using the US$5 million to pay off the debts of 1st Defendant and PT Jammer Tulen. He went on to emphasise that the transfer of US$5 million to the Senangsyahs' Citibank account was to allow the 2nd and 3rd Defendants to negotiate and pay the IBRA Debt to the "Relevant Banks" as and when the exchange rate was more favourable. This was because the loan amount would not have been sufficient to discharge the outstanding bank loans and the 2nd to 5th Defendants were responsible for any excess amount owing.

22 It is the 2nd to 5th Defendants' case that repayment of the indebtedness was not limited to settling directly with IBRA. It could include entities such as Batavia. Clause 3.1 of the Loan Agreement states that the proceeds of the Advance [US$28 million] shall be applied in or towards the repayment of the existing liability of the Borrower [1st Defendant] to the Relevant Banks in a total aggregate amount of US$28 million. The 2nd to 5th Defendants say the definition of "Relevant Bank" in the Loan Agreement supports their argument. Clause 1.2.22 defines "Relevant Bank" as: "Bank Mandiri, IBRA and any other relevant institution providing financial accommodation to, (or as in the case of IBRA), controlling any relevant institution providing financial accommodation to, the Borrower

and the Existing Subsidiaries and "Relevant Bank" means any of them." The words "any other relevant institution providing financial accommodation [to the 1st Defendant]" in Clause 1.2.22 of the Loan Agreement must necessarily include someone like Batavia.

23 Mr. Chan further submits that the Quistclose trust is not applicable for the reason that the purpose of the loan, which is for repaying the IBRA Debt, is still possible and that a discharge could still be obtained from Batavia. The advance of US$5 million could still be utilised to pay Batavia who had agreed on 10 March 2003 to sell the debts of 1st Defendant to the 2nd Defendant. The 2nd to 5th Defendants could not make use of the money in the Senangsyahs' Citibank account because of the injunction obtained by the Plaintiffs. The purpose of the loan would have been achieved had the 2nd to 5th Defendant not been prevented by the mareva injunction order from utilising US$3,574,239.88 for the purchase of this debt.

24 I agree with Mr. Yeo's submission that the expansive definition canvassed by Mr. Chan is unfounded. It is not possible to read the words "any other relevant institution providing financial accommodation to [the 1st Defendant]" in Clause 1.2.33 of the Loan Agreement to include Batavia. When read with Clause 3.1, those words are plainly referable to the original lenders. Clause 3.1 talks about "repayment of the existing liability of the [1st Defendant] to the Relevant Banks". Mr. Chan's submission does violence to the general principle that commercial contracts should be construed in a practical and realistic manner. Far from "providing financial accommodation", Batavia would be looking to profit handsomely from the sale of the debt relating to 1st Defendant which it had bought from IBRA at a discount of 70% of the face value. In any case, the Batavia agreement was only in relation to the 1st Defendant's indebtedness and not that of PT Jammer Tulen.

25 In coming to a decision on this issue of special purpose of the loan of US$5 million, regard should be given to all the circumstances of the advance. They are:

(i) the Plaintiffs are the shareholders of the 1st Defendant. They became shareholders (51% of the issued share capital of the 1st Defendant) at a time when 1st Defendant was in dire financial straits and required the loan to pay Bank Mandiri and IBRA. As a result of their investment in the 1st Defendant, the Plaintiffs were appointed Corporate Manager of the 1st Defendant's business. Against the background of the fallout caused by the Asian financial crisis, it would only be prudent to deal directly with IBRA given the objectives in mind.

(ii) The 1st Defendant's various admissions in pleadings as regards the special purpose of the advance.

(iii) The 2nd to 5th Defendants' letter dated 19 February 2001 to the 1st Defendant's auditors, Prasetio Utomo & Co. It contained an acknowledgment of receipt of US$5 million and the 2nd to 5th Defendants' promise to utilise the US$5 million to settle the debts of the 1st Defendant and PT Jammer Tulen. They also acknowledged that those debts have been transferred to IBRA.

26 In addition, three other things tell in the Plaintiffs' favour for the existence of a Quistclose trust in this case. Firstly, the loan of US$28 million was paid into a separate account specifically opened to receive the advance from the Plaintiffs. It is a factor tending to suggest that a Quistclose trust was intended. Secondly, by the time the Loan Agreement was signed, the IBRA Debt has been transferred to IBRA. The advance was to be applied in or towards the repayment of the IBRA Debt.

This tends to show that the money was for the sole purpose of paying a specific party namely IBRA and for a specific debt. The 1st Defendant in Clause 12.1.2 covenanted that it will "cause the Advance by [the Plaintiffs] to be applied exclusively to the purpose specified in Clause 3.1". Moreover, other than the debts owing to Bank Mandiri and the debts taken over by IBRA, there were no other financial institutions providing financial accommodation in the contemplation of the parties at the time the Loan Agreement was signed. The parties clearly intended to deal with Bank Mandiri and IBRA to discharge the debts owing to Bank Mandiri and IBRA. Thirdly, so long as the IBRA Debt burden was outstanding, the Plaintiffs' interests as investors in the 1st Defendant would be subject to uncertainties. The benefit to the Plaintiffs for advancing the money to the 1st Defendant at that time and in those circumstances is the protection of their investment and removal of uncertainties arising from the IBRA Debt.

27 On the various payments by the 2nd to 5th Defendants to IBRA between September 2000 and December 2000, although there are no receipts of payment from IBRA, I am satisfied on a balance of probabilities that the payments were to reduce the indebtedness of the 1st Defendants and PT Jammer Tulen. I accept the testimony of Harianto Wijaya that the PT Jammer Tulen debt was not assigned to Batavia and IBRA had refunded to Batavia what it had initially paid IBRA for the PT Jammer Tulen debt. The payments to IBRA by the 2nd to 5th Defendants between September and December 2000 are significant for the reason that it is conduct consistent with the 2nd to 5th Defendants' obligation to deal with IBRA directly. Moreover, the 3rd Defendant in his written testimony stated that the payments were made to appease IBRA.

28 I am of the view that the Plaintiffs have on the evidence established a common intention and I so find that the sum of US$5 million was for the specific purpose of settling and repaying IBRA directly the debts of 1st Defendant and that of PT Jammur Tulen. I also find that those debts were not fully settled and they became incapable of settlement and repayment after they were successfully auctioned off by IBRA. The 2nd to 5th Defendants could no longer pay IBRA to discharge the debts of 1st Defendant and PT Jammer Tulen. The subsequent refund by IBRA to Batavia for the amount it had paid for the PT Jammer Tulen debt would not colour my finding that the purpose of the Quistclose trust had failed. The 2nd to 5th Defendants have to return the US$5 million now that the stated purpose cannot be achieved.

29 In reaching this conclusion, it is unnecessary for me to consider the validity and enforceability of the agreement between Batavia and the 2nd Defendant. Assuming without deciding that the 10 March 2003 agreement between Batavia and 2nd Defendant is valid and enforceable, by its terms the 1st Defendant's debt is not by payment to Batavia discharged but is assigned to the 2nd Defendant. The 2nd Defendant would in fact be taking over Batavia's interests in the debts. The purpose of the loan from the Plaintiffs would still not be achieved. There is no evidence to support Mr. Chan's submission that after payment the 2nd Defendant would request Batavia to release the debt in favour of the 1st Defendant or alternatively after assignment to the 2nd Defendant, the latter would give the 1st Defendant an appropriate release from the debt.

(ii) <u>Repudiatory breach of the Loan Agreement</u>

30 This is an alternative plea to the Plaintiffs' claim under the Quistclose trust. The Plaintiffs are claiming the return of the US$5 million by reason of the Defendants' repudiatory breach of the Loan

Agreement, which repudiation the Plaintiffs have accepted. Even if I have ruled in the opposite direction that the Quistclose trust is not made out, I am of the view that the terms of the Loan Agreement have not been fulfilled.

31 The Plaintiffs say that although there is no time fixed or stated in the Loan Agreement for the Defendants to settle the IBRA Debt, they say that it is an implied term of the Loan Agreement that the Defendants are to utilise the US$5 million to settle and repay the IBRA Debt as soon as practicable with the use of reasonable diligence, and within a reasonable time, or in any event upon reasonable notice given by the Plaintiffs to do so. The Plaintiffs submit that "reasonable time" runs, at the earliest, from the transfer of the funds to the Senangsyahs' Citibank account or at the latest, from the Plaintiffs' initial communication in April 2001 that the debt is to be settled as soon as possible. It is contended that reasonable notice to settle the IBRA debt was given by the Plaintiffs since April 2001.

32 In support of the proposition that "reasonable time" is to be implied into the Loan Agreement, the Plaintiffs drew upon a passage in *Chitty on Contract* (28th ed) Vol.1, paragraph 22-020 states:

> "Where a party to a contract undertakes to do an act, the performance of which depends entirely on himself, and the contract is silent as to the time of performance…the law implies an obligation to perform the act within a reasonable time having regard to all the circumstances of the case."

33 The 2nd to 5th Defendants do not dispute the proposition that in the absence of a stipulation as to time for performance of an obligation, it is an implied term that it should be performed within a reasonable time. Mr. Chan's contention is that no term could be implied in this case, as it would be contrary to intentions of the parties. Between 20 and 27 January 2000, the Loan Agreement was varied to allow the 2nd to 5th Defendants to negotiate the repayment of the IBRA Debt as and when they deem it appropriate. In any case, there is no breach of the Loan Agreement since the inability to settle and repay the IBRA debt directly with IBRA was due to IBRA's one obligor policy.

Alleged variation of the Loan Agreement

34 The 2nd to 5th Defendants' contention is that the Loan Agreement was varied. The persons involved in the variation were Derek Pierson and Wim Iskandar for the Plaintiffs and 2nd and 3rd Defendants respectively. The former employees did not testify at the trial. Mr. Chan submits that the transfer of US$5 million to the Senangsyahs' Citibank account was to enable the 2nd to 5th Defendants to pay the debts of 1st Defendant and PT Jammer Tulen when the exchange rate was more favourable. The IBRA Debt was in Indonesian Rupiahs and that currency was expected to fall further. The contention that the 2nd to 5th Defendants are responsible for any excess amount owing or shortfall adds nothing to the weight of the evidence. The fact of the matter is that US$5 million was a loan to the Defendants. There was no obligation on the part of the Plaintiffs to discharge the IBRA Debt. Obviously the Defendants would have to make up the difference, if any, between the advance of US$5 million and the IBRA Debt. It is not disputed that the 2nd and 3rd Defendants were required to negotiate with IBRA on the amount to be paid to extinguish the IBRA Debt and how much was paid to IBRA in the end was dependent on their negotiation skills and management of foreign exchange risks.

35 The 1st Defendant in its Defence admitted to the Loan Agreement but made no mention of the variation as alleged or at all. Mark Wakeford ("Wakeford"), the Chief Executive Officer and a

director of the Plaintiffs, testified that from his review of the documents in the possession of the Plaintiffs, the alleged variation is not evidenced anywhere in writing. As far as he is aware, no such variation was agreed to by the Plaintiffs. The 3rd Defendant admitted to receiving reminders from Wakeford to settle the IBRA Debt. Over that period of time from April 2001 to May 2002, the 3rd Defendant did not allude to the alleged variation. His repeatedly informed the Plaintiffs that settlement was imminent when in truth he was no longer in communication with IBRA about the IBRA Debt. His response detracts from or militates against the existence of the alleged variation. Moreover, the alleged variation does not make business sense from the Plaintiffs' point of view in that having invested in the 1st Defendant they would have wanted a speedy discharge of the IBRA Debt.

36 I am therefore not persuaded that the Loan Agreement was varied in the manner contended by the 2nd to 5th Defendants. In my judgment, it is an implied term of the Loan Agreement that the Defendants would make reasonable efforts to extinguish the IBRA Debt within a reasonable period of time. What amounts to a reasonable period of time would depend upon the circumstances of the case. I now turn to consider (i) what are the circumstances, which ought to be taken into consideration in determining what time is reasonable and (ii) did the 2nd to 5th Defendants act within a reasonable time.

37 IBRA advertised the auction of debts on 29 May 2002, some 2 years and 4 months after the date of the Loan Agreement, and more than a year after Wakeford had first started chasing the 2nd to 5th Defendants to see to the repayment of the IBRA Debt. The Plaintiffs say that in the circumstances, a period of over 2 years from the date of the Loan Agreement is certainly not reasonable or acceptable. The 2nd Defendant in cross-examination admitted that by late 2000 or early 2001, they were already late in settling the IBRA Debt. Mr. Yeo submits that it cannot be said that the 2nd to 5th Defendants have been "reasonably diligent" in attempting to settle the IBRA Debt when they were the ones who refused or were reluctant to do so despite IBRA willingness to do so. The failure to settle the IBRA Debt within a reasonable time is tantamount to a repudiation of the Loan Agreement, which the Plaintiffs have accepted by suing for the repayment of the loan.

38 The 2nd Defendant under cross-examination confirmed that he and the 3rd Defendant started negotiating with IBRA in 1999, even before the Loan Agreement was executed. In January 2001, IBRA made certain proposals to the 2nd to 5th Defendants. In my judgment, once IBRA had put forward their proposals in January 2001, the 2nd and 3rd Defendants were obliged to make reasonable efforts and act in a responsible manner. From then onwards to the end May 2002, they had not resolved the IBRA Debt issue. The contemporaneous documents disclosed that the 2nd and 3rd Defendants were not engaging IBRA at all in discussions. The 2nd and 3rd Defendants did not respond to IBRA's last proposal on 6 February 2001 and repeated on 12 February 2001. IBRA was asking for payment of Rp 20 billion by 15 February 2001. In my judgment, the period that had elapsed since January 2001 to May 2002 was more than reasonable and the Plaintiffs are therefore entitled (unless valid reasons exist) to treat the contract as at an end and to demand the return of the loan or sue for damages.

One Obligor Policy

39 Was there an excuse for not concluding settlement with IBRA. The 2nd to 5th Defendants say that they were prevented from so doing by the one obligor policy.

40 It is submitted on behalf of the Plaintiffs that there is no truth to this one obligor policy.

Contrary to the 2nd to 5th Defendants' allegation that the Plaintiffs were notified in writing and orally of this one obligor policy, the allegation remained unsubstantiated.

41 The 2nd Defendant admitted in cross-examination that the one obligor policy was not stated in any documents issued by IBRA. The 3rd Defendant's oral testimony is that in early 2000, he and the 2nd Defendant were informed of the one obligor policy. But IBRA changed its mind in order to allow payment by the 2nd to 5th Defendants of the IBRA Debt between September and December 2000. After the December 2000 payment, IBRA reverted to its pre-September 2000 position. I find his oral testimony somewhat far-fetched. The part payments by the 2nd to 5th Defendants are in any case inconsistent with the 2nd to 5th Defendants' contentions that IBRA had insisted that the debts be settled collectively. Moreover, the various letters from IBRA recording a proposal of settlement by IBRA and discussions between IBRA and the 2nd and 3rd Defendants paint a picture that is different from the one obligor policy. I give no weight to the oral testimony of the 2nd Defendant and 3rd Defendant on the one obligor policy to the extent that the testimonies are inconsistent with other evidence.

42 By January 2001, IBRA had presented the 2nd to 5th Defendants with a proposal for the complete settlement of the debts of the 1st Defendant and PT Jammer Tulen first. The minutes of a meeting with IBRA held on 11 January 2001, on which the 2nd and 3rd Defendants were cross-examined on, records that IBRA was ready to settle the 1st Defendants' and PT Jammer Tulen's debts by 15 January 2001. They are to be settled first followed by those of PT Asiatic Mas Corporation and PT Sawit Jambi Lestari about six months later. The 2nd Defendant during cross-examination agreed that IBRA was proposing that the debts of the 1st Defendants and PT Jammer Tulen be repaid first before the other companies. IBRA's letter of 16 January 2001 was to the same effect save that the date of payment was changed to 19 January 2001. IBRA sent chasers when it did not hear from the 2nd or 3rd Defendant. On 6 and 12 February 2001, IBRA asked for payment of Rp 20 billion by 15 February 2001.The 2nd Defendant agreed during cross-examination that the Rp20 billion was for the debts of the 1st Defendant and PT Jammer Tulen. When that money was not paid, on 16 February 2001, IBRA gave notice that the matter would be transferred to its Litigation Department.

43 Wakeford stated that when he learnt that the IBRA debt remained unpaid, he started to correspond with the 3rd Defendant from about April 2001 to press him to settle the IBRA Debt. It was at this stage that he learnt that the 2nd to 5th Defendants had in fact been negotiating with IBRA on a global settlement of not only the IBRA Debt but also debts owed by PT Asiatic Mas Corporation, a company owned by the 2nd to 5th Defendants. They were trying to restructure not only the IBRA Debt, but also that of PT Asiatic Mas Corporation, and in doing so, they were attempting to negotiate a waiver from IBRA of the interest and default penalties that had accrued on the debts. The 2nd Defendant admitted in cross-examination that IBRA had proposed to write off 100% of penalty interest and 50% of interest, but the 2nd and 3rd Defendants had wanted a complete write-off of both types of interest. I note that IBRA had in the 11 January 2001 meeting with the 2nd and 3rd Defendants informed them that the debtors were not eligible for 100% interest discount and penalty waiver.

44 If indeed the one obligor policy was standing in the way of settling the IBRA Debt, I find the conduct of the 2nd and 3rd Defendants in assuring Wakeford from about April 2001 to May 2002 that

the IBRA Debt "would be settled soon" or "would be settled before end of 2001" rather incongruous. The 3rd Defendant admitted in cross-examination that Wakeford would call him from time to time over the phone to press him to settle the IBRA Debt. By a letter dated 12 September 2001 from the Plaintiffs to the 3rd Defendant, the 2nd to 5th Defendants were asked to consider settling the IBRA Debt first. The 3rd Defendant wrote to the Plaintiffs on 30 April 2002 stating that their negotiations with IBRA were almost finalised when in fact IBRA had ceased discussions come 16 February 2001. In that letter, the 3rd Defendant informed the Plaintiffs that they have since 2000 fully paid the debts of PT Jammer Tulen and part of the 1st Defendant's debt. I was not given an explanation as to why the 2nd to 5th Defendants used their own money to pay IBRA when there was US$5 million sitting in the Senangsyahs' Citibank account. The final communication on this topic was a fax dated 7 May 2002 to the 3rd Defendant. Wakeford confirmed in that fax a discussion he had at a meeting with the 3rd Defendant on the evening of 6 May 2002 where the 3rd Defendant promised to finalise the settlement of the IBRA Debt by end May 2002. All these assurances led the Plaintiffs to believe that the IBRA Debt would be settled imminently when that was furthest from the truth. The Plaintiffs learnt from a press announcement in Indonesia published on 29 May 2002 advertising an auction of the debts handled by IBRA and that included the debts owed by the 1st Defendant and PT Jammer Tulen. PT Asiatic Mas Corporations' debts were also being auctioned.

45 Mr. Yeo submits that the 2nd to 5th Defendants' allegations of the one obligor policy and IBRA's constant change of mind as to whether to allow the 2nd to 5th Defendants to settle the 1st Defendants' and PT Jammer Tulen's debts are lies raised as an afterthought. The 2nd Defendant's oral testimony that he and 3rd Defendant had verbally accepted IBRA's proposal on 11 January 2001 runs counter to clear position set out in the documentary evidence. His further said that the proposal in the letters of 6 and 12 February 2001 to pay Rp 20 billion for the IBRA Debt were not good enough for him as IBRA had not informed him that the proposal has been approved by the executive committee of IBRA. His excuse sounded contrived to me. By February 2001, the IBRA Debt was Rp 20 billion (as required by IBRA to be paid) and the US$5 million would have been sufficient to take care of this payment. In view of the way the evidence emerged at the trial, I am entitled to find that the one obligor policy has not been proven on the balance of probabilities. IBRA gave the 2nd to 5th Defendants every opportunity to settle the IBRA Debt fully but they chose not to do so. I accept the Plaintiffs' contention that the fact that the 2nd to 5th Defendants did not do so only reflects a deliberate decision on their part not to utilise the monies to settle the IBRA Debt fully.

46 "Repudiation" has been held to occur in circumstances where a party acts so as to indicate an inability to perform its obligations. The 2nd to 5th Defendants' failure to conclude the discharge of the IBRA Debt was such as to amount to a repudiation of the contract. The attitude of the 2nd to 5th Defendants was indicative of a categorical refusal to perform their obligation and the facts lead to that conclusion. Given the 2nd to 5th Defendants' repudiatory conduct it was open to the Plaintiffs to determine the agreement at common law. I accept that the contract was lawfully rescinded on 3 July 2002 insofar as it concerns future performance. It remains alive for the awarding of damages for the breach that constitutes the repudiation.

47 Before I leave this topic, I shall deal with one other point. It is submitted on behalf of the 2nd to 5th Defendants that credit be given for the payments they made to IBRA. In my view the submission is unfounded. The legal basis for this credit has not been explained. The Plaintiffs had not undertaken any liability to discharge or extinguish IBRA Debt which remains the responsibility and

obligation of the 2nd to 5th Defendants. This obligation was confirmed to the 1st Defendant's auditors on 19 February 2001. The fact that they did not make use of the US$5 million loan but their own funds has no legal consequence on the Plaintiffs and their claim for a repayment of the sum of US$5 million. Moreover, the 2nd to 5th Defendants have not pleaded set-off or filed a counterclaim against the Plaintiffs in respect of this sum of IDR 11,210,088,000.

(iii) *Other causes of action*

48 These other issues would arise if I had reached the opposite conclusion on the main points. Some attention was nonetheless given to the other alternative causes of action founded on fraudulent misappropriation, conspiracy to injure, constructive trust, and knowing receipt and assistance even though I need not come to a decision on them. I would also mention, without deciding on the matters, that I have my doubts and reservations about these various causes of action that remain live issues and must necessarily be dealt with in some detail by the 2nd to 5th Defendants in their Closing Submissions. These are factors to be taken into account when quantum of the costs of the action is considered.

Conclusion

49 In view of my decision that the requirements of the Quistclose trust are fulfilled, a trust accordingly arose. The Loan Agreement was lawfully rescinded because of the Defendants' breach. Since the US$5 million loan is still standing in the account of the 2nd and 3rd Defendants and to give effect to my decision, I make the following orders:

(i) The sum of US$5 million standing in the Citibank NA account no. 763720 in the names of the 2nd and 3rd Defendants is hereby declared to be held on trust for the Plaintiffs absolutely.

(ii) The sum of US$5 million standing in Citibank NA account no. 763720 (in the names of the 2nd and 3rd Defendants) is to be paid by the 2nd and/or 3rd Defendants forthwith to the Plaintiffs.

(iii) Interest at 6% per annum on the sum of US$5 million from the date of the writ of summons until to date of payment be paid by the 2nd to 5th Defendants to the Plaintiffs.

(iv) The mareva injunction order dated 4 July 2002 is extended until compliance with paragraphs (ii) and (iii) above.

(v) The Plaintiffs' costs be paid by the 2nd to 5th Defendants.