Japan Asia Investment Co Ltd and Another v Mobile Technology Investments Co Ltd and Another
[2009] SGHC 215

Case Number : Suit 29/2008

Decision Date : 24 September 2009

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Philip Ling Daw Hoang and June Hong Chih Siu (Wong Tan & Molly Lim LLC) for the plaintiffs; Gurdaib Singh s/o Pala Singh (Gurdaib, Cheong & Partners) for the first defendant; The second defendant in person

Parties : Japan Asia Investment Co Ltd; Nobuteru Shiga — Mobile Technology Investments Co Ltd; John Worrall D'arcy Grove

Contract

24 September 2009 Judgment reserved.

Woo Bih Li J:

Introduction

1 In this action, the plaintiffs Japan Asia Investment Co Ltd ("JAIC") and Nobuteru Shiga ("Shiga") claimed specific performance of an oral agreement, allegedly entered into on 15 October 2007 between them and Simon Grove Co Ltd ("SG") and Mobile Technology Investments Co Limited ("MTI") with respect to the plaintiffs' investment in MTI. They also claimed damages. The oral agreement was said to have been reached between Hideaki Shimizu ("Shimizu") representing JAIC and Shiga on the one hand and John Worrall D'Arcy Grove ("Grove"), the second defendant, representing MTI and SG on the other hand. The thrust of the oral agreement was that the parties had agreed that MTI would issue ordinary shares, instead of preference shares, to certain investors.

2 As between the plaintiffs, JAIC was the primary contender. As between the defendants, Grove was the real contender. Mr Gurdaib Singh had represented both defendants initially but when the trial started, Mr Singh represented MTI only and Grove represented himself. I add that although Grove alluded from time to time about his lack of knowledge or experience in court procedure and court craft, he did not appear to be at any significant disadvantage.

3 Grove's defence was essentially three-fold. First, he denied that any oral agreement was in fact reached on 15 October 2007. Secondly, he asserted that any oral agreement on that date was not binding. This was because any such oral agreement would be a variation of an earlier written investment agreement dated 19 July 2007 ("the 19 July 2007 IA") and would be invalid unless it was in writing and signed as required under cl 19.1 of the 19 July 2007 IA which stated:

> 19.1 No variation of this Agreement (or of any of the documents referred to in this Agreement) shall be valid unless it is in writing and signed by or on behalf of each Party. The expression "variation" shall include any amendment, supplement, deletion or replacement however effected.
>
> [emphasis in original]

Thirdly, Grove asserted that Shimizu had no authority to enter into any oral and legally binding

agreement on 15 October 2007 on behalf of JAIC or Shiga.

4 Grove also made a counterclaim against JAIC and Shiga for conspiracy but this counterclaim was withdrawn during the second tranche of the trial on 17 July 2009.

Glossary

5 I set out below the following definitions for easy reference:

"AL"	-	Audrey Lee, a solicitor in WP.
"Articles"	-	Articles of Association of MTI.
"Au"	-	P. L. Au of P. L. Au & Co, a firm of certified public accountants practising in Hong Kong and who was said by Grove to be providing corporate secretarial services to MTI.
"Conyers"	-	Conyers Dill and Pearman, a firm of solicitors in the British Virgin Islands ("BVI").
"DJAIC"	-	Darwinian JAIC Global Investment Partners Co Ltd.
"EC"	-	Elaine Chan, a partner in WP.
"Grove"	-	See [1] above.
"I3D"	-	Ideaworks 3D Limited.
"investment shares"	-	The RPS A and RPS B to be issued under the 19 July 2007 IA.
"JAIC"	-	See [1] above.
"MTI"	-	See [1] above.
"Olswang"	-	A firm of solicitors in the United Kingdom
"RPS A"	-	Class A Redeemable Preference Shares in the capital of MTI.
"RPS B"	-	Class B Redeemable Preference Shares in the capital of MTI.
"SG"	-	See [1] above.
"Shiga"	-	See [1] above.
"Shimizu"	-	See [1] above.
"WP"	-	WongPartnership, a law firm in Singapore.

"Yamaguchi"	-	Shuichiro Yamaguchi.
"19 July 2007 IA"	-	See [3] above.
"15 October 2007 agreement"	-	An oral agreement allegedly reached between Shimizu and Grove at a meeting between Shimizu, Grove, EC and AL at the office of WP on 15 October 2007. See [1] also.

6 I will also adopt the following:

(a) Any reference to an affidavit of evidence-in-chief will begin with "AEIC" followed by the paragraph or page number where appropriate.

(b) Any reference to the agreed bundle of documents will begin with the prefix "AB" followed by the page number.

(c) Any reference to the defendants' bundle of documents dated 26 and 29 December 2008 will begin with the prefix "DBD" followed by the page number.

(d) Any reference to the defendants' further bundle of documents dated 15 May 2009, which was treated as a supplementary bundle, will begin with the prefix "DSBD" followed by the page number.

(e) Any reference to the plaintiffs' core bundle of documents will begin with the prefix "PCB" followed by the page number.

(f) Any reference to the notes of evidence will begin with "NE" followed by the date of the hearing and the page number.

Background

7 JAIC is a company incorporated in Japan and is listed on the Tokyo Stock Exchange. It is a venture capital company investing in unlisted companies, managing and investing in local and overseas funds and providing consultancy services to the investee companies and asset management. Shimizu is one of JAIC's general managers.

8 Shiga is a citizen of and resident in Japan. He is a businessman dealing in fur garments and jewellery.

9 MTI is a company incorporated in the BVI. It was previously known as Drummonds Group Limited ("Drummonds"). According to Grove, Drummonds had the exclusive right to invest in I3D, a company incorporated in England and Wales. I3D was in the business of developing mobile gaming software.

10 Grove is a subject of the United Kingdom. He resided in Japan since he was three years of age. At age 11, he studied in Westminster School in London and visited his parents in Japan during school holidays. After completing his studies in Westminster school, he studied at the School of Oriental and African Studies which is part of the University of London. He obtained a Bachelors degree with honours in the Japanese and Korean languages. He started work in Japan as an investment banker and stockbroker.

11 Grove is the holder of one ordinary share in MTI and its only director, holding the position of managing director.

12 SG is a company incorporated in Anguilla and is named after Grove's father, Simon Grove. At all material times, Shimizu and the WP lawyers, like EC, believed that SG belonged to Grove and at all material times, Grove was representing SG. It turned out that SG does not belong to Grove. It belongs to Yamaguchi. The shares thereof are held in the names of Yamaguchi's family members and Yamaguchi is a director thereof. Grove asserted that Yamaguchi is his partner and at all material times, he (Grove) controlled SG. He did not elaborate as to how he came to control SG but that is not material for present purposes.

13 DJAIC is a company incorporated in Hong Kong. It was said to be owned by JAIC and another company of Grove. Some time before 19 July 2007, Shimizu and Grove had given instructions to WP about a joint venture to manage an investment fund to be marketed to third parties. The fund was to invest in I3D shares and to provide a convertible loan to I3D. Initially MTI was to be the investment fund company and DJAIC was to be the fund manager.

14 However, a few days before 19 July 2007, WP received urgent instructions to prepare an investment agreement which resulted in the 19 July 2007 IA. This agreement was between JAIC, DJAIC and MTI. It provided that JAIC and DJAIC would invest US$3m and US$500,000 respectively in MTI. In return, MTI would issue two million RPS A to JAIC and one million RPS B to JAIC as well as 500,000 RPS B to DJAIC. According to Shimizu, the real investor of the US$500,000 was Shiga who used DJAIC as his nominee because, at that time, only institutional investors were allowed.

15 It was intended that MTI would then lend US$2m to I3D as a convertible loan and the remaining US$1.5m would be used to exercise an option to acquire 50,000 shares in I3D as elaborated in [21] below.

16 The 19 July 2007 IA was signed by Grove, in the office of WP, on behalf of DJAIC and MTI. This agreement was then sent to Japan for execution. I shall say more about that later.

17 Although JAIC and DJAIC were the only ones named as the investing parties (in MTI) under the 19 July 2007 IA, it was not disputed that SG was also to invest in MTI at the same time.

18 Hence, WP also drafted a Sale and Purchase Agreement ("SPA") between MTI and SG under which SG would sell to MTI 50,000 class B ordinary shares in I3D. The consideration for these 50,000 shares was stated in the SPA to be $1 but in the course of the trial and before the defendants' reply submissions were filed, the parties accepted that SG was in fact supposed to be allotted 3,500,000 RPS A in exchange for its 50,000 class B ordinary shares in I3D, which would be substituted for class D ordinary shares in I3D.

19 I should also mention in passing that the class D shares in I3D do not have any pre-emption restriction on them. Although Grove had emphasized this feature of such class D shares and I accept its commercial significance, it is not material for present purposes.

20 Aside from the 19 July 2007 IA and the SPA, there were two other documents, *ie*, a profit-sharing deed and a letter from Grove to MTI. The drafts of the SPA and these two other documents were each dated 20 July 2007. Although these were draft documents only, they were executed by the intended parties to the extent mentioned below. The SPA was executed by Grove on behalf of SG and by Grove and Shimizu on behalf of MTI. The profit sharing deed was supposed to be between

MTI, DJAIC, SG and Grove. It was signed by Grove and Shimizu on behalf of MTI and by Grove on behalf of SG, while Grove signed for himself. Apparently no one signed on behalf of DJAIC. The letter from Grove to MTI was signed by Grove.

21 The profit-sharing deed provided for the sharing of profits between MTI and DJAIC from any sale by MTI of the I3D shares which MTI had acquired or intended to acquire. The letter from Grove was an undertaking to MTI to procure I3D to cancel an option (which Grove allegedly had to acquire 50,000 class B ordinary shares in I3D) and to grant MTI an option to acquire 50,000 class D shares (see [15] above).

22 I should also mention that Shimizu had signed the SPA and the profit sharing deed jointly with Grove on behalf of MTI because, according to him, he thought that he too had been appointed a director of MTI by then but it transpired that this was not so. I shall elaborate on this later.

23 Coming back to the 19 July 2007 IA, completion thereunder was to be effected on the "Completion Date" as defined therein. This was a date following five business days after various conditions set out in cl 3.1 (of the 19 July 2007 IA) had been fulfilled or waived.

24 Clause 5.6 of the 19 July 2007 IA stated:

> In the event that Completion shall not take place due to any failure to satisfy any or all the conditions precedent mentioned in Clause 3 or the occurrence of any event which is beyond the reasonable control of the Investors, this Agreement shall *ipso facto* cease (save for Clauses 1, 3.3, 9, 10, 11, 13.2, 14, 15, 17, 24 and 25)…
>
> [emphasis in original]

25 In addition, there was a long-stop date of 30 July 2007 under the 19 July 2007 IA. Under cl 3.3 of that agreement, MTI had undertaken to procure the fulfilment of the conditions in cl 3.1 by that date. Clause 3.3 also provided that if any of the conditions stated in cl 3.1 was not fulfilled on or before the long-stop date or such other date as the parties mutually agreed to in writing, then the 19 July 2007 IA "shall *ipso facto* cease and determine", save for the same provisions stated in cl 5.6. [emphasis in original]

26 For present purposes, the material condition was the one under cl 3.1(a). This was the approval by the shareholder of MTI to adopt proposed amendments to its Articles and approving the allotment and issue of the investment shares. There were many proposed amendments. The most important one for present purposes was the proposed amendment of the Articles to include preference shares.

27 It transpired that the amendments could not be done by 26 July 2007 which was the date which JAIC and Shiga intended to remit US$3.5m into a client account of Olswang. Accordingly, Shimizu requested and Grove agreed to and did sign a letter of assurance dated 24 July 2007 to the effect that he would sign all necessary documents being prepared by Au regarding the "new issue of shares to be issued in MTI at your request and without precondition…".

28 The US$3.5m was then remitted by JAIC and Shiga to a client account of Olswang and, apparently, subsequently utilised as intended under the 19 July 2007 IA. The convertible loan agreement between MTI and I3D (for the loan of US$2m to I3D) was signed by Shimizu on behalf of MTI[note: 1] apparently because Shimizu still thought then that he had been appointed a director of MTI. Pursuant to the 19 July 2007 IA and the SPA, MTI initially received 100,000 class D ordinary shares in I3D. This was reduced to 50,000 class D ordinary shares as a result of an allegation that the

share transfer form for the initial 50,000 class B ordinary shares from SG was not stamped and hence, the transfer of the intended 50,000 shares from SG to MTI was apparently reversed. Grove did not accept the validity of that reason but the reason and the validity thereof were not material for present purposes.

29 It transpired that the question of amending the Articles became more problematical. Initially, Au informed Shimizu on 25 July 2007 that the proposal to amend the Articles required time. To expedite matters, Au asked whether the intended investors (meaning JAIC and DJAIC) would accept ordinary shares in MTI instead of preference shares.[note: 2] On 26 July 2007, Shimizu rejected this suggestion as he thought that it would be like cheating the investors although he did not elaborate why he said that.[note: 3] Presumably, it was because the investors were supposed to receive preference, instead of ordinary, shares. Accordingly, Shimizu informed Au that he would like to follow the 19 July 2007 IA.[note: 4] Thereafter, Shimizu followed up with Au on the amendments.[note: 5]

30 Then, on 15 August 2007, Au sent an email stating that in his opinion, the investment should be implemented by way of contract and not by amending the Articles. He also said that if the amendments were insisted upon, "then the amendment made is too big and cause high legal fee for the consultancy".[note: 6] This sparked off a series of email and views for about two months until early October 2007. I will attempt to summarise the substance of the email and views.

31 On the one hand, a share registrar in the BVI had advised Au that it was not possible or extremely difficult to amend the Articles with all the lengthy amendments envisaged and that the amendments should be covered by contract only.[note: 7] On the other hand, the informal advice which WP had received from Conyers was that the Articles had to be amended to state the classes of shares which MTI would be authorised to issue.[note: 8] There was also the issue of the fees to be incurred if amendments had to be made to the Articles.

32 Subsequently, by an email dated 5 October 2007, Shimizu informed WP to forward their opinion (which incorporated Conyers' opinion) to Au and ask for a reply by 10 October 2007. If there was no reply, WP was to proceed as advised by Conyers as long as the total fee was lower than US$10,000.[note: 9]

33 However, by an email dated 8 October 2007, Grove said he had discussed the matter with Shimizu who had decided to fly to Singapore to review this issue and to conclude and check on some other MTI/DJAIC matters with WP. So Grove instructed WP not to take any further action till he and Shimizu met with them on Monday, 15 October 2007.[note: 10]

34 Ironically, Au sent an email the next day dated 9 October 2007 to WP to say that the amendments (to the Articles) must be made after all.[note: 11]

35 In any event, Grove sent another email dated 10 October 2007 to WP to wait until a meeting the following week before taking any step to amend the Articles.[note: 12] This email was not copied to Shimizu unlike his earlier 8 October 2007 email referred to in [33] above but Grove said that the 10 October 2007 email was also sent after he had had a discussion with Shimizu that day.

36 Shimizu flew to Singapore. He met up with Grove first on 15 October 2007. Thereafter, both of them attended a meeting at the office of WP. The solicitors who attended to them were EC and AL.

37 The plaintiffs' case was that at this meeting, Shimizu (on behalf of JAIC and Shiga) and Grove

(on behalf of MTI and SG) had agreed to change the structure of the investment in that ordinary shares in MTI would be issued to all the investors instead of preference shares. The investors identified at this meeting with WP were JAIC, Shiga (instead of DJAIC) and SG. JAIC was already one of the named parties under the 19 July 2007 IA. Shiga was to replace DJAIC as he was all along the true investor and had used DJAIC as his nominee, as mentioned above at [14]. As for SG, it was undisputed that it was also supposed to receive 3.5 million preference shares in MTI although it was not a party to the 19 July 2007 IA but was a party to the SPA. Consequently, WP was instructed to prepare an agreement to reflect these changes.

38 Grove's position initially was that no agreement had in fact been reached at that meeting.

39 On 16 October 2007, Shimizu sent an email to Au stating:

> Regarding MTI issue, I had a meeting with Mr.Grove and Wongpartnership yesterday. As our conclusion, we would like to change the treatment as follows:
>
> 1) We don't use Preference share A or B, and make all the investments ordinary shares.
>
> 2) As a result, we increase capital of MTI and new paid in capital should be 7,000,000 ordinary shares (at par value of US$1) with following breakdown:
>
> - Japan Asia Investment Co., Ltd 3,000,000 shares (at US$1/share)
>
> - Mr Nobuteru Shiga 500,000 shares (at US$1/share)
>
> - Simon G rove Ltd 3,500,000 shares (at US$1/share)
>
> (Darwinian JAIC is replaced by Mr.Nobuteru Shiga since actual investment was made by him.)
>
> 3) At ordinary share level, we would like to make 50:50 = JAIC& Mr.Shiga: Simon Grove Ltd & Mr.Grove. Therefore, pls let us know the existing paid –in capital made by Mr.Grove. We would like to make adjustment by decreasing SimonGrove Ltd shares or increasing JAIC shares.(I think decreasing number of Simon Grove shares is easier.)
>
> Based on the above, Ms.Elaine Chan or Ms. Audrey Lee with Wongpartnership will contact you later for detailed information to increase capital and register the above shareholders immediately. We believe this is quick and simple solution with low cost. We would like to complete the registration of the aove [*sic*] shareholders as soon as possible.
>
> Your prompt attention and cooperation would be appreciated.

40 Shimizu's email was followed by an email, also dated 16 October 2007, from WP to Au to ask him to prepare the draft resolutions for the issuance of the new shares and to let them have the drafts for review.

41 On the same day, Grove responded to Shimizu's email of 16 October 2007 to Au. Grove's email to Au stated:

> The structure is *as described as Shimizu* san however there is one important detail that must be included.
>
> As Shimizu san is based in Japan and works with JAIC everyday, he is not aware of the smaller level of detail of matters occurring at Ideaworks3D.
>
> It is therefore difficult for him to have visibility as to the significance of any events at Ideaworks which may or may not be negative for MTI.-events which may destroy the shareholder value of I3D.
>
> The management of MTI must defend the shareholder value of I3D to the best of its efforts and this requires MTI to make decisions related to the management of I3D.
>
> This is why the shareholders resolution signed by I3D CEO Frazer Wilson on the day of the financing included one seat on the board to represent MTI's interest.
>
> As Shimizu san has spoken with me that he wishes not to be involved in this level of micro management or take up a seat on the board of I3D to protect MTI's interest, and that is the work that I had been doing with I3D on behalf of Simon Grove Co. Ltd before those shares where [*sic*] invested in kind in MTI, I will continuing [*sic*] this work indefinately [*sic*] until we take the company (I3D) to an exit for MTI either by listing or potentially a trade sale.
>
> I will therefore remain as the single authorised managing director of MTI until exit of the investment or my resignation and will represent the company in all matters relating to I3D defending the sharevalue, increasing it where possible through working with I3D (especially on visits to Japan) and working with the single objective of moving the company I3D towards a successful exit for the investors of MTI.
>
> [emphasis added]

42 In response to Grove's email, Shimizu sent another email to Au also dated 16 October 2007 stating:

> What Mr. Grove mentioned in his e-mail especialy [*sic*] about his representation of MTI must be limited into [*sic*] Adrian's option share litigation issue only and it is not same with our understanding at all. I think he is intentionally enlarging his single authority role in MTI and it cannot be accepted by JAIC. Therefore, pls don't take his message as it is. I believe that Wongpartnership is now working for document on this issue. Pls wait for it for a while.

43 On 17 October 2007, WP sent the draft of a new IA to Shimizu and Grove with an email stating that the new agreement "will supercede" the SPA and the 19 July 2007 IA.

44 Thereafter, Shimizu and Grove were not able to resolve the ordinary share issue. The draft of the new agreement was neither approved nor signed.

45 After a letter of demand was sent, the plaintiffs commenced the present action to compel MTI to issue three million ordinary shares to JAIC and 500,000 ordinary shares to Shiga and to compel Grove to procure MTI to do so and to claim damages. I should mention in passing that the reliefs prayed for in the Statement of Claim (Amendment No 1) sought an order for an allotment and issue of shares without actually specifying that they were to be ordinary shares (instead of preference

shares) but it was clear in the circumstances that what the plaintiffs were seeking was the issuance of ordinary shares by MTI.

The 19 July 2007 IA

46 Before I deal with the issue as to whether Grove had agreed to the use of ordinary shares at the 15 October 2007 meeting with WP, I would like to elaborate on the 19 July 2007 IA.

47 As I mentioned above, Grove executed it on behalf of DJAIC and MTI on 19 July 2007. JAIC did not do so that day but was supposed to execute it later.

48 In the plaintiffs' Statement of Claim (which was included with the Writ of Summons filed on 16 January 2008), no mention was made of the 19 July 2007 IA. The plaintiffs pegged their case simply on an agreement entered into on or about 15 October 2007 as evidenced by the draft agreement from WP.

49 In Shimizu's AEIC of 28 November 2008, he referred to the 19 July 2007 IA as "the previous Investment Agreement". He stated, at para 34 of his AEIC, that after the previous IA was signed by Grove (on behalf of the parties I have mentioned), the sum of US$3m and US$500,000 were remitted into a client account of Olswang. Yet, in an earlier para, *ie*, para 9 of his AEIC, he had also said that those two sums had been paid in accordance with the terms of the 15 October 2007 agreement.

50 It seemed to me that Shimizu had tripped himself up because he was then trying to avoid any reliance on the 19 July 2007 IA as it contained the all-important cl 19 (see [3] above). Indeed, his AEIC did not mention whether the 19 July 2007 IA had been executed by JAIC and it was not clear then whether this had been done.

51 The uncertainty was resolved soon after the trial started when the original hard copy of the 19 July 2007 IA was produced in court by Mr Ling, plaintiffs' counsel. The original 19 July 2007 IA had been executed on behalf of JAIC. Although Mr Ling mentioned that it had been executed by Shimizu, Grove said he recognised the signature to be that of the president and CEO of JAIC (who is Toyoji Tatsuoka). Grove's observation was not disputed. According to Mr Ling's instructions, the execution in Japan was done on 24 July 2007.[note: 13] Grove did not accept that Mr Tatsuoka executed it on 24 July 2007 and sought to make something out of that date in the defendants' reply submission. In my view, the actual date of execution by Mr Tatsuoka is not material for present purposes.

52 With the disclosure that JAIC had also signed the 19 July 2007 IA, it became quite clear by then, if not earlier, that the plaintiffs had to concede that there was a binding agreement under the 19 July 2007 IA and that the various steps taken between 19 July 2007 to 14 October 2007 were taken pursuant to that agreement and not in anticipation of the 15 October 2007 agreement.

53 In addition, soon after the trial started, the defendants decided to amend their defence to include reliance specifically on cl 19 of the 19 July 2007 IA. They had not raised cl 19 specifically in their original defence even though their original defence had already asserted that that was a concluded agreement by virtue of the 19 July 2007 IA. I allowed the amendment, as well as other amendments by the parties, in the first tranche of the trial between 6 to 9 January 2009.

54 Notwithstanding the defendants' reliance on cl 19, the plaintiffs continued with their claim.

The 15 October 2007 agreement

55 I have set out above the problems that the parties faced regarding the amendments to the Articles.

56 During the trial, Grove blamed Shimizu for the delay in making the amendments. In summary, the reasons he gave for blaming Shimizu were that:

(a) because he had signed the letter of assurance on 24 July 2007 (see [27] above), he and MTI were relieved of any obligations under cl 3.3 of the 19 July 2007 IA to procure that the amendments were effected;

(b) Shimizu had taken it upon himself to be responsible for documentation;

(c) Shimizu should have insisted that the amendments were carried out promptly instead of allowing the long delay which I mentioned above.

57 I am of the view that Shimizu was not to blame for the delay for the reasons stated below.

58 First, Grove's letter of assurance was obviously an assurance which Shimizu wanted because funds were going to be paid before the amendments had been done. It is clear to me that the letter of assurance was in addition to MTI's obligation under cl 3.3 of the 19 July 2007 agreement and not in substitution thereof.

59 Secondly, although Shimizu appeared to be more involved in the documentation process, his explanation was that this was because Grove was not too concerned with documentation and he (Shimizu) had to follow up on the documentation.

60 Thirdly, whether I accept Shimizu's above explanation or not, it is clear to me from the exchange of email and views between 15 August 2007 and 4 October 2007 that Grove himself appeared to support Au's initial opinion not to proceed with the amendments to the Articles as such. Even if Grove did not support that initial opinion, he was, at the very least, discussing it with Shimizu and WP. Indeed, the email dated 5 October 2007 from Shimizu (see [32] above) suggested that it was Shimizu who was pushing to proceed along the lines suggested by Conyers. WP were then told by Grove on 8 and 10 October 2007 not to take any further action until the 15 October 2007 meeting (see [33 and 35] above). According to Grove, this was because Shimizu wanted to hold back further action till he resolved various matters but, according to Shimizu, Grove wanted to hold back because of his concern over legal costs.

61 I note that Grove was not able to give any satisfactory explanation why Shimizu would want to hold back on 8 or 10 October 2007 when three days earlier, Shimizu was telling WP to proceed if they received no reply from Au by 10 October 2007. It seemed to me more likely than not that the parties had asked WP to hold off any further action because of Grove's concern over legal costs.

62 I also note that initially Grove had himself said that Shimizu had done a great job in trying to resolve the amendment issue.[note: 14]

63 I find Grove's attempt to blame Shimizu for the outstanding amendment issue to reflect poorly on his sincerity.

64 It was not disputed that prior to the meeting on 15 October 2007 at WP's office, Shimizu and Grove had met. According to Shimizu, he had discussed changing the shares to be issued by MTI from preference to ordinary shares as a way forward. Grove agreed. Shimizu said that during this

discussion, Grove had raised a matter about potential or existing litigation between the founder of I3D, one Adrian Sack, and I3D itself in respect of some option for shares that Adrian Sack was claiming. Shimizu said that he agreed that Grove be given limited authority to represent MTI in its discussions with I3D on this issue as Grove was concerned about such litigation. At one stage, Shimizu said that as Grove had agreed to the ordinary share structure, he (Shimizu) had in return agreed that MTI give Grove a limited authority to discuss with I3D on the litigation with Adrian Sack.[note: 15] However, subsequently, Shimizu said that Grove's agreement to the ordinary share structure was not connected with Shimizu's agreement to give Grove the said limited authority.[note: 16] In any event, it was immaterial whether these two matters were connected because Shimizu did not resile from his agreement to give Grove the said limited authority.

65 Both Grove and Shimizu then proceeded to WP's office. There, instructions were given for the change to the ordinary share structure to be effected, as well as the other changes I mentioned above, *eg*, inserting Shiga in place of JAIC.

66 Shimizu's evidence was corroborated by EC and AL. EC and AL said it was Shimizu who did most of the talking but they considered the instructions they had received to be jointly from Shimizu and Grove as Grove had not objected. It was clear to EC and AL that the instruction to WP to prepare a draft agreement to implement the ordinary share structure was a joint one as Grove did not object. To them, the 16 October 2007 email from Shimizu to Au (set out at [39] above) correctly reflected what transpired at the meeting. However, EC and AL vacillated as to whether or not such instructions represented an agreed decision to adopt the ordinary share structure.[note: 17]

67 They agreed that during the meeting with WP, Grove had raised the matter about potential or existing litigation between Adrian Sack and I3D itself in respect of some option for shares that Adrian Sack was claiming. Grove was concerned about this litigation as I3D had not disclosed it to him before and Grove wanted to be authorised by MTI to deal with I3D on this matter. His intention was to press I3D to settle the matter with Adrian Sack and, if need be, to threaten I3D with legal action by MTI. On the other hand, Shimizu did not want Grove to go so far as to threaten I3D with MTI's own legal action. WP was to draft a power of attorney or letter of authority for Grove to pursue the matter with I3D but not to threaten or initiate legal action. As far as EC was concerned, this letter of authority was not linked to the change of preference shares to ordinary shares.

68 I come now to Grove's position, conduct and evidence.

69 In his pleadings, Grove had denied that any agreement had been reached on 15 October 2007. For example, para 5 of the Defence (Amendment No 2) stated that there was no agreement as alleged by the plaintiffs "or at all". Para 9(b) of the same pleading stated, "The Defendants assert that there was no agreement entered into between the parties on the 15th October 2007, oral or otherwise."

70 Yet, significantly, he did not state in his very lengthy AEIC his own version as to what had transpired at that meeting even though he did elaborate in his AEIC on the reasons why he would not have agreed to the change from preference to ordinary shares.

71 When Grove finally gave his oral evidence, his version was that at the initial meeting with Shimizu on 15 October 2007 and in the course of the meeting at WP's office, he had spoken to Shimizu in Japanese to state the following in respect of the change from preference to ordinary shares:

(a) he would of course retain his authority as the single authorised signatory of MTI;

(b) the status quo would remain, meaning that he would remain the sole director (and managing director) of MTI;

(c) the change to ordinary shares would change a lot of things, to which Shimizu said that those changes could be considered when they looked at the draft of the new agreement (to be prepared by WP).

72 I have no hesitation in rejecting Grove's version for several reasons.

73 First, his pleading was on the basis that there was no agreement at all. This was different from saying that he had agreed to or that he was agreeable to the ordinary share structure on terms. His oral evidence supported the latter but not the former.

74 Secondly, as mentioned above, his AEIC did not disclose any version at all.

75 Thirdly, if his version were true, why did he initially object to EC giving evidence for the plaintiffs? At the beginning of the trial, Mr Ling drew my attention to the fact that he had caused a subpoena to be issued for EC to give evidence. Grove objected to EC being a witness primarily on two grounds. First, he claimed that MTI was the client of WP and what was discussed at the meeting was privileged. Secondly, he asserted that EC would be a biased witness as WP had rendered considerable legal services to JAIC over five or six years. Grove maintained his objection initially but eventually decided to relent in an attempt to avoid any argument that an adverse inference should be drawn against him for his objection. Eventually, both EC and AL gave evidence for the plaintiffs.

76 Why would Grove have objected in the first place if what he was going to say was true? Was he truly afraid that EC (or AL) would be biased just because WP had allegedly rendered considerable legal services to JAIC?

77 In his oral evidence, Grove expanded on his belief about bias. He pointed to the following:

(a) EC and Mr Ling were graduates from the same university and were apparently part of the same law firm at one time;

(b) EC had recommended Shimizu to Mr Ling when WP could not act in the potential dispute with Grove and EC did not disclose this to Grove at the time;

(c) EC had been contacted by Mr Ling in September 2007 for documents in anticipation of litigation even before the 15 October 2007 meeting and this was also not disclosed to Grove;

(d) it was EC who suggested to Shimizu to use ordinary shares but she had not shared this suggestion with Grove.

78 I find Grove's allegation of bias to be an unwarranted attack. It illustrated his desperation and again his lack of sincerity.

79 First, the evidence of AL and EC was not inconsistent with Grove's eventual oral evidence since his qualifications were allegedly said in Japanese and EC and AL each accepted that they did not understand Japanese. Their evidence, however, would be inconsistent with Grove's version if I rejected his evidence that he had qualified in Japanese his acceptance about the issuance of ordinary

shares. He would only have himself to blame if I did not accept that evidence of his.

80 Secondly, even if EC and Mr Ling had graduated from the same university or were part of the same law firm at one time, such facts were neither here nor there. Mr Ling was not the litigant. It was preposterous to suggest that EC would lie for Ling's client because of those connections. Even if WP had provided considerable legal services to JAIC in the past, this in itself did not mean that EC (or AL) would lie. In any event, the evidence of EC and AL did not suggest any biasness on their part.

81 Thirdly, EC was entitled to recommend Shimizu to another lawyer since WP could not act for JAIC in the potential dispute with Grove. Furthermore, it was not for EC to tell Grove that she had recommended Mr Ling when Shimizu was seeking legal advice for a potential litigation. If she had done so, she would have opened herself to criticism from Shimizu for disclosing a confidential request from him. I have no doubt that if the shoe were on the other foot, Grove would not have expected EC to disclose to Shimizu a similar request from Grove.

82 Fourthly, the reference to WP having been contacted by Mr Ling in September 2007 arose in a letter dated 18 June 2008 from WP to Gurdaib Cheong & Partners (acting for MTI).[note: 18] However, EC clarified during cross-examination that the date of September 2007 mentioned in that letter should have been to the month of November 2007 instead.[note: 19] Although Grove said he would review her clarification with her, he omitted to do so. If he had made it clear that he was challenging her clarification, she (and Mr Ling as well) would have been given the chance to produce evidence (if any) to establish the correct month when Mr Ling made his request for documents. Furthermore, AL corroborated EC's evidence in that it was in November 2007 that EC had asked her to forward some documents to Mr Ling.[note: 20] It is clear to me that there was a genuine error in WP's letter but Grove decided to make it out to be something else. Again, I would not expect EC to tell Grove about Ling's request for documents.

83 Fifthly, as regards EC's suggestion of using ordinary shares instead, this suggestion was disclosed first in Shimizu's evidence. He said that during a discussion with EC before 15 October 2007 on the amendment issue, she had made this suggestion to move things forward. As this suggestion was made during an oral discussion with Shimizu, it is not surprising to me that EC did not then call Grove to say the same thing. While email from WP was regularly sent or copied to both Shimizu and Grove, there was no suggestion that it was the practice of EC or AL to repeat to Grove what was orally said to Shimizu or vice versa. I did not see any bias or sinister motive from EC's omission and I was of the view that Grove was again trying to find fault with EC for this omission.

84 Grove was suggesting that he had been caught by surprise when Shimizu discussed the alternative of using ordinary shares at their own meeting of 15 October 2007 before they went to WP's office. However, as mentioned at [29] above, the use of ordinary shares was in fact first suggested much earlier in late July 2007 by Au to simplify matters. So it was not the surprise that Grove was suggesting. Ironically, it was then Shimizu who rejected the idea (as he thought it was unfair to the investors) but by 15 October 2007 he was prepared to adopt this route.

85 Grove submitted that silence on his part, during the meeting with WP, could not constitute acceptance of the ordinary share structure raised by Shimizu at that meeting. I do not accept that submission. Depending on the circumstances, silence may evince agreement, see *Midlink Development Pte Ltd v The Stansfield Group Pte Ltd* [2004] 4 SLR 258 at [50] to [52]. This was not a case of Shimizu making an offer to Grove and Grove remaining silent on the offer without more. I accept Shimizu's evidence that the ordinary share structure was discussed and agreed with Grove at their own meeting before the meeting with WP. At the later meeting, Shimizu was conveying what had

been agreed earlier. In such a situation, Grove's silence evinced his agreement. I also observed that Grove is not a docile character who would remain silent on any important matter he disagreed with. I reject his submission at para 97 of the defendants' reply submissions that he (merely) entertained the idea of the ordinary share structure in the initial discussion with Shimizu on 15 October 2007 and that he remained silent at the later meeting with WP on the same day as a matter of etiquette as he did not want to countermand Shimizu's instructions to WP. I also reject Grove's submission (in the same and next paragraph thereof) that he acted passively because he relied on Shimizu's previous numerous representations that he (Shimizu) was not authorised to enter into any binding investment agreement and that the negotiations were subject to contract. They may well be subject to contract but, in my view, that was not the reason why he did not demur.

86 I can understand why EC and AL were hesitant to say whether the instruction represented a decision reached by Grove and Shimizu. They were reluctant witnesses and it seems to me that they were hesitant to draw inferences or conclusions. I have no such hesitation. I conclude that Grove did agree to the ordinary share structure at the first meeting and then again, by his non-objection, at the second meeting at WP. This was not a situation where the ordinary share structure was raised as one of various possible options for discussion as Grove was suggesting when he cross-examined EC. It was a route which Grove and Shimizu agreed to adopt. It is a separate matter whether Grove's agreement was binding on him in law or whether Grove changed his mind later.

87 Shimizu's email of 16 October 2007 (see [39] above) also indicated that agreement had been reached to use ordinary shares. So did WP's email to Au of 16 October 2007 asking him to prepare the necessary draft resolutions (see [40] above). If parties were still at the discussion stage only, WP would not have sent this email.

88 The first sentence of Grove's email of 16 October 2007 said and I reiterate, "The structure is as described as Shimizu san however there is one important detail that must be included" (see [41] above). In my view, the first part of this first sentence supported the point that both of them had agreed to the ordinary share structure. Whether the agreement was subject to the qualification about the alleged important detail raised by Grove in his email is a separate matter which I shall come to.

89 Grove sought to explain away the first part of the first sentence by saying that he was merely agreeing to the number of the shares and the proportionate shareholding but not the nature of the shares (see his AEIC at para 339). I do not accept such a disingenuous explanation. It is clear that his email was confirming what Shimizu had set out in his earlier email of 16 October 2007 to Au about the use of ordinary shares as well as the inclusion of Shiga in place of DJAIC as a shareholder in MTI.

90 Coming back to Grove's qualification, Shimizu's reply email of 16 October 2007 (see [42] above) had disagreed with Grove's qualification that he was to be the single authorised managing director of MTI and said that he was intentionally enlarging his authority which was limited to dealing with the Adrian Sack issue. Grove did not correct or challenge this email then. It is also obvious to me that Grove's allegation that Shimizu did not want to take up a seat on the board, for reasons stated in his email of 16 October 2007 to Au, was fabricated by Grove. Indeed, Shimizu was checking as to whether he had been appointed a director of MTI as I shall elaborate below.

91 The attendance notes of AL of the 15 October 2007 meeting at WP's office and her evidence (as well as EC's) supported Shimizu's version, *ie*, that Grove was to be given authority limited to dealing with the Adrian Sack issue and, even then, he was not to threaten litigation against I3D on that issue. Neither EC nor AL said that there was a discussion about Grove remaining as the single authorised managing director.

92 Grove had sought to overcome this situation by saying that the question of his remaining as the single authorised managing director had been discussed in Japanese with Shimizu. Grove also said that this discussion was in addition to the discussion with WP about his limited authority on the Adrian Sack issue. I am surprised by this allegation. I am of the view that he had concocted the allegation that there were discussions about both his limited and general authority, one with WP and one solely with Shimizu in Japanese, because he knew that he could not deny the discussion on his limited authority in the light of AL's attendance notes and her evidence. Indeed, AL had gone on to draft a letter of limited authority (Exhibit P1-5) for consideration by Grove and Shimizu. During the trial, Grove described the wording therein as farcical[note: 21] but he did not say so to AL when he received the draft thereof on or about 23 October 2007 or put this to AL when he cross-examined her.

93 Grove said that the letter for his limited authority was discussed because he needed a letter to show I3D that he had authority from MTI to discuss with I3D about the Adrian Sack issue. However, I am of the view that it did not make sense to discuss such a letter of limited authority if in fact he was to have the general authority (as the single authorised managing director) as he claimed. Also, if in fact Grove had raised the point with Shimizu about his remaining as the single authorised managing director (at the meeting with WP), why did he keep it to himself and Shimizu and instead take the trouble to mention only the limited authority to WP? He suggested that Shimizu had said that they would consider various related matters when the draft of the new agreement was being considered, but still, this did not satisfactorily explain why only the letter of limited authority was discussed with WP and why such a letter was necessary if in fact he was to have general authority. I find that Grove did not raise the issue about his general authority or his remaining as the single authorised managing director with Shimizu on 15 October 2007. However, after the 15 October 2007 meeting with WP, Grove changed his mind and decided to slip in the qualification about his remaining as the single authorised managing director of MTI in his email (see [90] above).

94 In his oral evidence, Grove said that his reference in his email to the point about his remaining as the single authorised managing director of MTI was also intended to cover his concern over two performance fee agreements. One was under the profit sharing deed (see [20 and 21] above). The parties to that deed were MTI, DJAIC, SG and Grove. The other was an agreement he had had with Yamaguchi. He said that as the single authorised managing director of MTI, he could ensure that his personal interests under those agreements were protected in that he could ensure that MTI carry out or continue with both these agreements, although there was no suggestion that MTI was a party to the alleged agreement between Yamaguchi and him. Grove intimated that if ordinary shares were issued, he could be removed as a director of MTI whereas the preference shares were not supposed to carry any voting rights. Yet, in cross-examination, Grove accepted that his apprehension as to whether the profit-sharing agreements would continue came about after 15 October 2007.[note: 22] It seemed to me that his apprehension came about after Yamaguchi and he began to fall out with each other. After all, SG was supposed to be issued with 3.5 million ordinary shares in MTI which would be the same number as the 3.5 million ordinary shares to be issued to JAIC and Shiga. Therefore, JAIC and Shiga would not be able to remove him without SG's support. If he had fallen out with Yamaguchi, his concern might be understandable especially if he was not in fact controlling SG.

95 I am of the view that it was after 15 October 2007 that he began to be concerned about the profit sharing agreements and started to change his mind about the issuance of ordinary shares by raising his qualification about remaining as the single authorised managing director and, later, by raising the profit sharing agreements. I need not elaborate on these agreements as I do not accept his allegation that he had raised the qualification with Shimizu on 15 October 2007.

96 As evidence that he was to remain as the single authorised managing director in MTI, Grove

mentioned that he was referred to as the sole director of MTI in an annexure in the 19 July 2007 IA. I do not accept this argument. The reference in that agreement was a reference to his status at the time that the agreement was entered into. It was equivocal as to what he and Shimizu had intended to do once the investments in MTI were made. Indeed, before the 19 July 2007 IA was signed by Grove, EC had pointed out in an email dated 17 July 2007 to Shimizu (which was also sent to Grove) that WP had not prepared an agreement to regulate the rights of the preference shareholders of MTI as they had no instructions to do so.[note: 23] In her email the next day, *ie*, 18 July 2007 to Shimizu and Grove, she said that given the urgency of the matter, the investment agreement they were drafting would only address the essential terms of the subscription of shares in MTI but would not include provisions "relating to the appointment of director to MTI's board, meeting of shareholders and shareholders' rights".[note: 24] Grove replied on 18 July 2007 to say that after consideration by Shimizu and him, they had decided that only the essential terms would suffice.[note: 25] Again, this instruction was equivocal. It did not necessarily mean that the preference shareholders would have no rights as between themselves or that there would never be other rights vis-à-vis MTI.

97 Grove had attempted to refer to EC's use of the singular "director" in her email of 18 July 2007 to suggest that EC knew all along that there would be only one director, *ie*, Grove alone. I do not agree. That email was not brought to EC's attention when she was being cross-examined. It seems to me that she was unaware as to what Grove and Shimizu were contemplating and that was why she sent her email. The reference to the singular "director" in her email was either a reference to the post of director or an error.

98 Indeed, there were email and oral inquiries from Shimizu to Au after 19 July 2007 asking whether he (Shimizu) had been appointed as a director of MTI and Au was apparently asking Grove whether he could disclose the information to Shimizu.[note: 26]

99 It would be surprising if JAIC and Shiga were prepared to let Grove remain as the single authorised director of MTI (whether as managing director or not) without some form of counterbalance once they had made their investments in MTI but I make no finding on this since it is not the issue I have to decide and there may be other litigation involving JAIC and/or Shiga and Grove.

100 Grove also sought to argue that Shiga was not really the investor of the US$500,000 mentioned above. He pointed out that in a document prepared by Shimizu entitled "Projection for [DJAIC] Balance Sheet Projection", the US$500,000 was recorded as a loan to DJAIC under long-term liabilities.[note: 27] On the other hand, there was an email dated 19 June 2007 from Shimizu to Grove stating that the real investor of the US$500,000 would be actually Shiga or Grove.

101 More importantly, Grove did not raise any dispute over Shiga to EC or AL at the meeting on 15 October 2007 with WP. Furthermore, Grove's email of 16 October 2007 to Au had confirmed the structure as stated in Shimizu's earlier email of the same date to Au. It will be recalled that that email of Shimizu had specifically mentioned that DJAIC would be replaced by Shiga as it was Shiga who had made the actual investment. It seems to me that Grove was also back-peddling on Shiga to try and avoid the fact that he had agreed to both the issuance of ordinary shares and Shiga replacing DJAIC as an investor.

102 I should also mention that Grove also made a belated attempt in the defendants' reply submissions to argue that it was too late to change the consideration to SG (for its 50,000 class B/class D shares in I3D) from $1 (as stipulated in the SPA) to $3,500,000 RPS A because MTI had already received the 50,000 shares in I3D from SG for $1. However, I note that even before

15 October 2007, the parties had already acted on the basis that SG was to receive 3,500,000 RPS A in exchange for its shares in I3D. Therefore, once there was agreement on 15 October 2007 to use ordinary shares instead of preference shares, SG was to receive ordinary shares too. As I mentioned at [18] above, SG's entitlement to the 3,500,000 RPS A was a non-issue until the defendants filed their reply submissions. Indeed, Grove's email of 16 October 2007 to Au also did not challenge the allotment of ordinary shares to SG mentioned in Shimizu's earlier email of the same date. In any event, Grove's belated argument is irrelevant to the question whether there was in fact an oral agreement on 15 October 2007 to use ordinary shares.

Whether Grove's agreement to the ordinary share structure was binding on him

103 As regards the issue whether Grove's oral agreement on the ordinary shares was binding on him, cl 19.1 of the 19 July 2007 IA suggested that it was not.

104 In order to avoid cl 19.1, Mr Ling submitted that the 19 July 2007 IA had ceased and determined on 15 October 2007 by virtue of Grove's oral agreement to use ordinary shares. I do not accept this argument as it was on the premise that Grove's oral agreement was binding on him.

105 Coming back to cl 19.1, Mr Ling submitted that although "variation" was defined therein to "include any amendment, supplement, deletion or replacement however effected", the "deletion" and "replacement" would apply only to situations where a particular word, phrase, sentence or paragraph was deleted or replaced but not to the replacement of the entire 19 July 2007 IA. He relied on the *noscitur a sociis* canon of construction which literally means "it is known by its associates" and effectively means that an unclear word or phrase is to be determined by the words immediately surrounding it (see Black's Law Dictionary, 7th Ed at p 1084). He submitted that the 15 October 2007 agreement was to replace the entire 19 July 2007 IA and, therefore, it did not come within the meaning of "variation" in cl 19.1 and need not be in writing or signed to be binding.

106 However, the beginning phrase of cl 19.1 stated, "No variation of this Agreement…" [emphasis added]. The variation referred to is therefore a variation of the 19 July 2007 IA as a whole and not to a variation of parts of that agreement. While a variation of the 19 July 2007 IA might be done by varying a part of that agreement, depending on the nature of the variation, the point is that the beginning phrase in cl 19.1 refers to a variation of the whole and not the parts or a part of that agreement. Accordingly, in my view, the reference to "any amendment, supplement, deletion or replacement" is a reference to any amendment, supplement, deletion or replacement of the agreement as a whole even though, for example, an amendment of the agreement might be made by amending a part thereof.

107 Secondly, if the "replacement" means only a replacement of part of the agreement, then it has no additional meaning to "amendment" as such a replacement would already be an amendment. There is also a principle of interpretation that each word should have some meaning and a meaning which would render it otiose is not to be preferred.

108 Thirdly, the definition of "variation" in cl 19.1 is not exhaustive. The second sentence in cl 19.1 states that the word "variation" "shall include" various means of variation. In my view, even if the 15 October 2007 agreement replaces the 19 July 2007 IA in its entirety, that would come within the meaning of "variation". Clause 19.1 was meant to protect all the parties. It does not make sense that any amendment of part of the 19 July 2007 IA must be in writing and signed in order to be effective but a replacement of the whole does not need to meet such requirements.

109 Fourthly, a comparison of the marked copy of the draft of the 15 October 2007 agreement as

compared with the 19 July 2007 IA reveals 214 insertions and 487 deletions made in the former.[note: 28] This is significant. I would add that although the draft of the 15 October 2007 agreement was prepared after the meetings on 15 October 2007, I do not think that one can be divorced from the other as the agreement on 15 October 2007 was manifested in the draft.

110 Fifthly, it also seems to me that the change to the ordinary share structure and the inclusion of Shiga in substitution of DJAIC were in substance amendments to the 19 July 2007 IA and not a complete replacement thereof.

111 Accordingly, I find that the 15 October 2007 agreement is caught by cl 19.1 and is not binding on Grove as it was only an oral agreement.

112 Another point comes to my mind. Even if cl 19.1 does not apply, it does not follow that the oral agreement is necessarily binding on Grove. On the facts before me, I conclude that the oral agreement was subject to contract meaning that it was no more than an agreement in principle which would only be binding on the parties if and when a written contract was entered into to give effect to the oral agreement. This is reinforced by the fact that in an earlier email dated 17 July 2007 from Shimizu to Grove, Shimizu was chasing for the then written agreement and a written confirmation from I3D stating, "Without written confirmation, we cannot do anything since JAIC is not an individual".[note: 29] I will say no more on this point which was not specifically pleaded by the defendants.

113 I would add that although cl 3.3 and cl 5.6 of the 19 July 2007 IA provided that that agreement "shall *ipso facto* cease" if the conditions in cl 3.1 were not completed by the long-stop date of 30 July 2007 or at all, Mr Ling specifically said that he was not stipulating that that agreement had ceased before 15 October 2007.[note: 30] Instead, he was relying on cl 5.6 to say that as the parties had agreed on 15 October 2007 to abandon the preference shares in place of the ordinary shares, the 19 July 2007 IA had ceased and determined. This was the argument I referred to in [104] above.

114 I do not think cl 5.6 is applicable because it contemplates completion not taking place at all. Under the 15 October 2007 agreement, the parties were trying to complete the 19 July 2007 IA but using different shares. In any event, as I mentioned, Mr Ling's argument was on the premise that the 15 October 2007 agreement was binding but it was not.

Authority of Shimizu

115 In the circumstances, it is unnecessary for me to decide on the issue whether Shimizu had the authority to enter into a binding agreement on behalf of JAIC and Shiga on 15 October 2007.

Conclusion

116 Accordingly, I dismiss the plaintiffs' claim for an order for specific performance relating to the issue of ordinary shares in MTI and for damages.

Costs

117 In my view, neither JAIC nor Grove acted honourably in the present action.

118 As I mentioned, initially JAIC was trying to avoid reference in its pleadings to the 19 July 2007

IA. It also did not reveal, until later, that its representative (Mr Tatsuoka) had signed the agreement. I did not think that such an omission was inadvertent.

119 On the other hand, Grove's conduct was even less honourable. I have mentioned how he sought to blame Shimizu for the delay in getting the amendment issue resolved, how he suggested biasness on the part of EC (and AL) and his concoction regarding what was said on 15 October 2007 as between he and Shimizu.

120 Furthermore, at one point in his evidence, he was desperate enough to say that an agreement, once entered into, could not be varied or that it was practically too messy and complex to do so and it would be fantasy to suggest otherwise.[note: 31]

121 It is one thing to say that there is a prescribed manner to vary on the one hand and another thing to allege that an agreement cannot be varied at all. Indeed, when it suited him, he agreed that he was prepared to give Au instructions, after 15 October 2007, to prepare a resolution for MTI to issue ordinary shares to vary the original structure in respect of preference shares, if there had been an agreement on ordinary shares and other issues he had raised. However, to him, this was not an acknowledgement that he had orally agreed on the new structure on 15 October 2007. I need not mention other instances of his lack of sincerity.

122 Although JAIC had started and continued with this action, most of the getting-up and the trial was in respect of the issue whether Grove had orally agreed to the ordinary share structure on 15 October 2007.

123 There was also no need to drag EC and AL in as witnesses. Although it was not Grove who wanted them to give evidence, JAIC required them to do so in the light of Grove's denial of his oral agreement. If he had accepted Shimizu's version, subject to what he had allegedly said to Shimizu in Japanese, all he needed to do was to seek clarification on whether EC and AL understood Japanese. Once such a clarification was obtained, their attendance as witnesses could have been dispensed with.

124 In the circumstances, I make the following order on costs:

(a) The parties are to bear their own costs of the action, subject to the other sub-paragraphs below.

(b) The hearing fees are to be shared equally between JAIC and Grove. If JAIC has already paid for them, Grove is to indemnify JAIC for his half share and pay his share within 14 days of a written notice from JAIC's solicitors stating the total amount of the hearing fees paid by JAIC and the breakdown, *ie*, how much for each day and for which period with supporting evidence.

(c) Any charges (including disbursements) of EC and AL for preparation and attendance as witnesses are to be shared equally between JAIC and Grove. Grove is to indemnify JAIC for his half share and pay his share within 14 days of a written notice from JAIC's solicitors stating the total amount of such charges with evidence of such charges.

(d) I grant liberty to apply in respect of (b) and (c) above in case there should be a dispute about the quantum or the mechanics of those sub-paragraphs.

(e) As for Grove's counterclaim, he is to pay the getting-up costs thereof to JAIC to be agreed or taxed.

125 I come now to Summons 1151 of 2009. This was an application by the defendants for:

(a) leave to call one Hiroshi Oda as a witness;

(b) plaintiffs to produce certain documents;

(c) leave for defendants to submit additional documents.

126 On 24 April 2009, I dismissed the first prayer, made certain orders on the second prayer and allowed Grove to file and serve a supplemental list of documents with a supporting affidavit. Costs of the summons were reserved. I now order that Grove pay JAIC's costs of the first prayer to be agreed or taxed and each party is to bear its or his own costs of the other prayers.

[note: 1]AB 206

[note: 2]DBD 352

[note: 3]DBD 354 and 357

[note: 4]DBD 359

[note: 5]See, for example, DBD 365 and 459

[note: 6]DBD 474

[note: 7]See, for example, DBD 474, PCB 79 and 83

[note: 8]PCB 103 (which refers wrongly to amendment of the memorandum of association)

[note: 9]PCB 105

[note: 10]PCB 106

[note: 11]PCB 108

[note: 12]DBD 605

[note: 13]NE 28/7/09 p 61

[note: 14]NE 27/7/09 p 164 and 28/7/09 p 9

[note: 15]NE 15/7/09 p 53

[note: 16]NE 16/7/09 p 80

[note: 17]NE 20/7/09 p 54, 21/7/09 pp 37-38

[note: 18]See DSBD 279

[note: 19]NE 23/7/09 p 6

[note: 20]NE 21/7/09 p 97

[note: 21]NE 28/7/09 p 128

[note: 22]NE 30/7/09 pp 152 to 158

[note: 23]DBD 186

[note: 24]DBD 196 and 197

[note: 25]DBD 198

[note: 26]PCB 210, 219, 220

[note: 27]DBD 466

[note: 28]PCB 206

[note: 29]DBD 184

[note: 30](NE 15/7/09 p 79, 16/7/09 pp 119-121, 20/7/09 p 99, 21/7/09 p 55)

[note: 31]NE 23/7/09 p 138-140