IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC(I) 06

Suit No 2 of 2015

Between

(1) **TELEMEDIA PACIFIC GROUP LIMITED**
(2) **HADY HARTANTO**

… *Plaintiffs*

And

(1) **YUANTA ASSET MANAGEMENT INTERNATIONAL LIMITED**
(2) **YEH MAO-YUAN**

… *Defendants*

JUDGMENT

[Civil Procedure] — [Costs]
[Civil Procedure] — [Damages] — [Interest]

Telemedia Pacific Group Ltd and another
v
Yuanta Asset Management International Ltd and another

[2016] SGHC(I) 06

Singapore International Commercial Court — Suit No 2 of 2015
Patricia Bergin IJ
7 November 2016

7 December 2016 Judgment reserved

Patricia Bergin IJ:

1 These reasons relate to the form of final orders to be made consequent upon the judgment delivered in these proceedings on 30 June 2016: see *Telemedia Pacific Group Ltd and another v Yuanta Asset Management International Ltd and another* [2016] SGHC(I) 03 ("the Judgment"). These reasons should be read with the Judgment. For convenience, I will adopt the abbreviations used in the Judgment.

2 The plaintiffs were successful in their claims for breach of contract, breach of fiduciary duties and conversion. The heads of damage in respect of those claims were agreed to be a shortfall in loan proceeds, the unauthorised sales of 101.5m NexGen shares in February and March 2011, the unauthorised sales of 60m NexGen shares in August 2011 and the unauthorised sales of 225m NexGen shares in October 2011.

3 The plaintiffs were unsuccessful in the balance of their claims with which I will deal when I deal with the question of costs. The defendants were wholly unsuccessful in their claims in their Counterclaim.

4 The parties were directed to confer for the purpose of agreeing on the form of final orders, including the outstanding issues relating to the quantum of damages, interest and costs (see the Judgment at [545]). Although the parties communicated between July 2016 and October 2016, it became clear that agreement could not be achieved and the matter was fixed for further hearing on 7 November 2016. On that occasion, short oral submissions were made in addition to the written submissions that had been filed with the Court and judgment in respect of these matters was reserved. Subsequently, the parties have made additional short submissions in correspondence to the Court.

5 Before turning to the matters for determination in respect of quantum, interest and costs, I should refer to a controversy that arose from [402] of the Judgment which states:

> The parties are entitled to share equally in the profits of the joint project and are burdened equally with any losses of the joint project. The only way in which that can be ascertained is by some form of an accounting exercise. However it is reasonably clear that the defendant has taken for himself the sale proceeds of secret sales of the 60 million NexGen shares in August 2011 and the 225 million NexGen shares in October 2011.

6 The defendants have retained an expert accountant to assist them in ascertaining the profits and/or losses of the joint venture that are to be equally shared. On 7 November 2016 I indicated to the parties that the finalisation of the joint venture relationship as a whole is not part of these proceedings and I did not intend to entertain submissions in relation to that accounting exercise.

However I indicated that if the parties wished to include an order in these proceedings finalising their joint venture relationship they should file a Consent Order by 21 November 2016. This did not occur. As has been the habit of these parties, they each wrote to the Court after this date seeking orders in respect of this process, albeit not orders that would finalise their relationship immediately. Although the defendants requested a further delay of 21 days in the delivery of these reasons, I am not satisfied that this is appropriate. However I will grant leave to the parties to relist the matter on seven days' written notice for the purpose of making any Consent Orders finalising the parties' relationship.

Quantum of damages

7 The first head of damage with which the parties have dealt, both in writing and orally, is the shortfall in the loan funds.

Shortfall in loan funds

8 The retention of the loan funds by the defendants was not in issue at trial, albeit that the entitlement to the funds was in issue. The plaintiffs claimed that an amount of S$850,475.73 had been retained while the defendants claimed that S$1,633,963.87 had been retained (see the Judgment at [418]).

9 During the parties' post-Judgment communications the plaintiffs advised the defendants on 21 July 2016 that they had re-calculated the shortfall to be S$1,693,785.47. On 16 August 2016 the plaintiffs advised the defendants that "at the very least" they were entitled to S$850,475.73 for the shortfall in the loan funds. On 18 October 2016 the plaintiffs' submissions to the Court explained the difference between these two figures as follows:

> (a) Out of the sums that were transferred from Yuanta to AEM said to be loan proceeds, a sum of $1,459,710.82

> was re-transferred back to Yuanta on 13 April 2011 and was used for the re-purchase of 36.258m NexGen shares that the Defendants had *wrongfully* sold. The cost of the re-purchase should be borne by the Defendants, and the sum of S$1,459,710.82 that AEM re-transferred back to Yuanta for the purpose of the share re-purchase should thus be deducted from the loan proceeds said to have been provided by Yuanta to AEM. AEM never had the benefit of this amount;
>
> (b) Further, the sum of S$850,475.73 stated in the Plaintiffs' Closing Submissions was calculated on the basis that the Defendants was [*sic*] entitled to withhold 10% out of the loan amount that EFH paid to Yuanta as its commission. Upon a further review of the evidence, however, the Plaintiffs have come to realise that the amount that EFH paid to Yuanta did not represent 100% of the loan proceeds, but merely 97% of the loan proceeds. This was because EFH had deducted 3% from all loan proceeds as its loan fee at the outset, before transferring the remainder 97% of the loan proceeds to Yuanta. The Plaintiffs' previous calculation (S$850,475.73) erroneously overstated the amount of commission the Defendants were entitled to deduct from the loan proceeds, because it excluded the 3% loan that EFH had deducted from the outset. This 3% should be charged to the Defendants, or otherwise taken from the Defendants' share of the 10% commission. The Defendants was [*sic*] only entitled to withhold the remainder 7% of the loan proceedings (sic) as its share of the commissions (3% having already been deducted by EFH at the outset). This is consistent with clause 3 of the Non-Recourse Loan Agreement (see C-19) which stipulates that the fees and charges associated with any loan shall be within 10% of the loan amount.

10 In their written submissions filed on 3 November 2016 the defendants took issue with the plaintiffs' entitlement to any amount, submitting that the shortfall should be paid to the joint venture vehicle, AEM. The defendants also submitted that the shortfall figure should be S$1,293,710.82.

11 During oral submissions on 7 November 2016, the plaintiffs claimed that the findings made in the Judgment entitled them to the proceeds in respect of the shortfall. That submission cannot be sustained. These were funds that were destined for the joint venture vehicle for investment and were funds made available by EFH on the pledging of the NexGen shares less the 3% fee charged by EFH. In addition, the defendants were entitled to retain 10% of the loan funds by way of commission (see the Judgment at [425]).

12 The submissions and the calculation by the defendants is to be preferred. It provides for the reduction of the S$1.8m paid to the plaintiff on 29 June 2011 but brings to account the amount for the repurchase of the shares of S$1,459,710.82. Subject to what is said below in relation to interest, the defendants will be ordered to pay that amount into a joint trust account held by the solicitors for the respective parties pending the finalisation of the joint venture accounting exercise between the parties. This is necessary having regard to the fact that Crédit Agricole closed the AEM account in October 2011 (see the Judgment at [155]-[157]).

Unauthorised sales in February/March 2011

13 The amount claimed by the plaintiffs for the unauthorised sales of the NexGen shares in February and March 2011 is S$1,774,733.20. On 8 August 2016, the defendants notified the plaintiffs of their contention that the profits obtained from the sale and re-purchase of the 101.5m NexGen shares were made using funds from the joint venture and therefore the plaintiffs were only entitled to 50% of that alleged profit.

14 The plaintiffs' written submissions of 18 October 2016 included a contention that when the 101.5m NexGen shares were sold, they had not at that

time been pledged to EFH. In this regard, the plaintiffs relied upon the finding that the defendants were not authorised to sell or otherwise deal with the shares that had not yet been pledged against any loan (see the Judgment at [214]). The sale proceeds from the unauthorised sales of the 101.5m NexGen shares were not funds of the joint venture, but were funds generated from the sale of shares that belonged to the plaintiffs. The plaintiffs submitted that they have already given a credit for the cost of re-purchase of those shares in their final calculation. The plaintiffs claimed that the amount of S$1,774,733.20 represents the net profit.

15 In their written submissions of 3 November 2016 the defendants relied upon the following passage of the Judgment, at [403]:

> … The plaintiffs are entitled to any profit made from the sale of its shares in February and March 2011, except they are only entitled to 50% of the profits from the sale of any shares treated as converted from the warrants that became an asset of the joint venture when the plaintiff was "reimbursed".

16 The defendants claim that the damages in respect of the sale of the NexGen shares in February and March should be S$871,521.94. That calculation is based on the sale proceeds of S$4,893,310.62 less the purchase price of S$3,150,266.75 rendering an overall profit of S$1,743,043.87 with 50% of the profits of S$871,521.94 being the plaintiffs' entitlement.

17 In their oral submissions, the plaintiffs accepted that the defendants were entitled to 50% of the proceeds of 30m NexGen shares which was equivalent to S$225,000. This should be deducted from S$1,774,733.20, the amount calculated by the plaintiffs.

18 Accordingly, subject to what is said below in relation to interest, the defendants will be ordered to pay the plaintiffs an amount of S$1,549,733.20.

Unauthorised sales in August 2011

19 The plaintiffs claim an amount of S$1,383,509. The defendants do not take any real objection to that figure. Subject to what is said below in relation to interest, the defendants will be ordered to pay the plaintiffs an amount of S$1,383,509 for the unauthorised sales of the 60m NexGen shares in August 2011.

Unauthorised sales in October 2011

20 The plaintiffs claim an amount of S$2,171,250 for the unauthorised sales of 225m NexGen shares in October 2011.

21 The defendants in their written submissions pointed out that damages should be calculated as at the time of the sales in the eight tranches which occurred at different prices throughout the period amounting to a total of S$1,992,341.50.

22 The issue here is whether damages should be assessed at the date of the conversion, *ie*, the time of unauthorised transfer of the shares to Yuanta as the plaintiffs claim, or the dates of the actual sales as the defendants claim.

23 I am satisfied that the plaintiffs are entitled to the amount they claim as at the date of the conversion. Accordingly, subject to what is said below in relation to interest, the defendants will be ordered to pay the plaintiffs S$2,171,250.

Punitive damages

24 The plaintiffs contend that the defendants' overall conduct in "brazenly carrying out the unauthorised share sales, exacerbated by their dishonest communications" with the plaintiffs about the location of the shares is sufficiently outrageous and reprehensible to call for the imposition of punitive damages.

25 In this regard the plaintiffs relied upon the following findings in the Judgment:

(a) At [262]:

> The fact that [the defendant] would inform the plaintiff that the 60m NexGen shares had been moved to a custodian account when, I am satisfied that he was fully cognisant that he had sold the shares and distributed the profits from those sales to himself, his associates or relatives, demonstrates that he was willing to be dishonest with the plaintiff.

(b) At [263]:

> I regard the defendant's conduct in selling the 60m NexGen shares in August 2011 and the 225m NexGen shares in October 2011 and his communications with the plaintiff about the whereabouts of the NexGen shares as dishonest.

(c) At [276]:

> I do not accept his explanations of remembering incorrectly as genuine. I do not accept his suggestion that his emails to the plaintiff advising that the 60m NexGen shares were in a custodian account were "negligent". I regard his claims as an attempt to deflect the Court from reaching a conclusion that his conduct in this regard was dishonest. I am satisfied that the defendant secretly sold the 60m NexGen shares and intended to dupe the plaintiff into believing that they had not been sold.

(d) At [278]:

> I do not accept the defendant's evidence that the plaintiff instructed him on the so-called "several occasions" to sell the NexGen shares in February and March 2011 to obtain urgently needed funds. I do not accept Mr Goh's evidence that the plaintiff telephoned him around midnight on 10 February 2011 to give such an instruction.

26 The parties relied upon *Airtrust (Hong Kong) Ltd v PH Hydraulics & Engineering Pte Ltd* [2016] 1 SLR 1060 ("*Airtrust*") in support of their respective contentions regarding punitive damages. I note that an appeal against the High Court's decision on punitive damages in *Airtrust* was heard recently and the matter is pending the Court of Appeal's determination. That was a case in which the plaintiff agreed to purchase from the defendant a reel drive unit ("RDU") pursuant to a Sale and Purchase Agreement ("the Agreement"). The defendant was aware at the time of entry into the Agreement that the plaintiff purchased the RDU specifically for lease to a third party for the laying of undersea cables in the Bass Strait for a Nexus Energy project.

27 Approximately one month after the entry into the Agreement the parties agreed that certification of the RDU would be conducted by a company known as ABSG Consulting Inc ("ABSG"). ABSG subsequently issued certificates for the design reviews of the RDU that it carried out as well as the manufacturing processes and the factory acceptance test. However ABSG did not provide a full certification for the RDU. The RDU suffered a major failure of one of the gear box assemblies in the course of laying a second reel and thereafter the hydraulic drive motor and gear assembly on one of the towers of the RDU came off from its mounting and collapsed.

28 The plaintiff sued the defendant for breach of contract as a result of the failure of the RDU. One of the issues for determination was whether the RDU met the relevant industry standards and certifications that were stipulated in the Agreement. Another issue was whether the defendant's liability was excluded under a clause of the Agreement. There was no issue between the parties at trial that the exclusion would not apply if fraud on the part of the defendant was established. An issue for determination in this regard was whether the defendant had obtained the certification fraudulently. Another issue was whether in the circumstances the plaintiff could, as a matter of law, and should be awarded punitive damages for the breach of contract.

29 The Court in *Airtrust* was satisfied that the plaintiff had established that the defendant had fraudulently modelled some of the critical structural connections of the RDU and fraudulently stipulated the reason for the absence of certain aspects in the design so as to deliberately and dishonestly mislead the certifier into giving certification for the structural design of the RDU. The Court was also satisfied that the defendant had misled the plaintiff into believing that it had obtained full certification when it knew it had not. In those circumstances, the defendant was not able to rely upon any exclusion of liability clause in the Agreement.

30 After referring to the decision of the Supreme Court of Canada in *Whiten v Pilot Insurance Company* [2002] 1 SCR 595 at 645, the Court in *Airtrust* observed that the fundamental purpose of punitive damages is retribution, deterrence and denunciation (at [261]). The Court (at [264]) also referred to *MFM Restaurants Pte Ltd and another v Fish & Co Restaurants Pte Ltd and another appeal* [2011] 1 SLR 150 ("*MFM Restaurants*") in which the Court of Appeal (at [52]) referred to this area of the law being in a "state of flux".

However the Court in *Airtrust* concluded (at [264]) that unless there was a Court of Appeal decision ruling out the availability of punitive damages for breach of contract, it was inclined to hold that it had power in "an exceptional case" to award punitive damages for breach of contract when a defendant's conduct had been "so highly reprehensible, shocking or outrageous" that the Court finds it necessary to condemn and deter such conduct by the imposition of punitive damages.

31 In *Airtrust*, the Court awarded punitive damages because the defendant had behaved fraudulently in misleading a building certification agency by intentionally submitting building models that misrepresented the reality and misleading the plaintiff into believing that full certification had been obtained when it had not. The Court decided that it was an "exceptional case" and that the defendant's overall conduct was sufficiently outrageous and reprehensible to justify such an award.

32 In the present case, the defendants did not contend that the Court does not have power to award punitive damages in such circumstances. Rather, it was submitted that the circumstances of this case do not warrant the imposition of punitive damages. In this case, there was no claim of fraud. Although the plaintiffs sought to introduce such a claim on the first day of the trial it was disallowed (see the Judgment at [163]). The defendants claimed an entitlement to sell the NexGen shares pursuant to the Agreements between the parties. That issue was decided against the defendants.

33 It is the case that adverse credibility findings were made against the defendant (see the Judgment at [254]-[259], [262]-[263], [276], [289], [306], [366] and [395]-[396]). However there were also adverse credit findings made

against the plaintiff (see the Judgment at [326], [337] and [345]). Deficiencies were found in both the plaintiff's evidence and the defendant's evidence (see the Judgment at [276] and [360]).

34 There is a difference between conduct that is high-handed in respect of which there is no possible explanation other than flagrant and reprehensible disregard for another party's rights, and conduct pursued on the basis of a claimed right caused by alleged misconduct of that other party. It is this latter conduct that the defendant pursued although he was clearly secretive and dishonest about what he was actually doing at the time. His claims of such an entitlement were pursued in the proceedings but were rejected.

35 It is not necessary in the circumstances of the conclusions that I have reached to analyse the nature of the power to award punitive damages. I have decided that even assuming there is the existence of such a power, this is not a case in which such damages should be awarded. It is not an exceptional case of high-handed and reprehensible conduct that requires punishment. These parties were in a relationship that was fraught with difficulties, and each had competing claims on the other over a series of transactions that were worth millions of dollars with what could only be described as very loose checks and balances. These parties were not candid with each other. The complexities of their rather short and fraught relationship had been exposed in the Judgment and it is not necessary to repeat them here. The damages to be awarded will, in my view, be ample compensation for the plaintiffs in the circumstances of this case.

Interest

36 The next issue relates to the plaintiffs' claim for interest on the award of damages. The plaintiffs contend that in so far as the damages are awarded for

breach of fiduciary duty, they are entitled to compound interest on each amount at the rate of 5.33% per annum for the period of five years.

37 In support of this contention the plaintiffs relied on the following passage of Lord Denning MR's judgment in *Wallersteiner v Moir (No 2)* [1975] 1 QB 373 at 388:

> In addition, in equity interest is awarded whenever a wrongdoer deprives a company of money which it needs for use in its business. It is plain that the company should be compensated for the loss thereby occasioned to it. Mere replacement of the money – years later – is by no means adequate compensation, especially in days of inflation. The company should be compensated by the award of interest. … On general principles I think it should be presumed that the company (had it not been deprived of the money) would have made the most beneficial use open to it: cf. *Armory v Delamirie* (1723) 1 Stra. 505. It may be that the company would have used it in its own trading operations; or that it would have used it help its subsidiaries. Alternatively, it should be presumed that the wrongdoer made the most beneficial use of it. But, whichever it is, in order to give adequate compensation, the money should be replaced at interest with yearly rests, i.e., compound interest.

38 The plaintiffs also relied on the following passage of *Deutsche Bank AG v Chang Tse Wen* [2013] 1 SLR 1310 ("*Deutsche Bank*") at [152]:

> Previously, the equitable jurisdiction for courts to grant compound interest only existed in cases involving deceit or equitable fraud, such as misapplication of funds by fiduciaries in breach of their fiduciary duties. However, this rule was abolished by the House of Lords in *Sempra*, where it was held that the award of compound interest was no longer so restricted. *Sempra* was followed locally by Chan Seng Onn J in *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2009] 2 SLR(R) 385 ("*Oriental Insurance*"), whose analysis I agree with. In *Oriental Insurance*, Chan J concluded at [137] that:
>
> > For the reasons I have stated, I would follow this decision of the House of Lords in *Sempra Metals* and it also accords with commercial and economic reality because a claimant in long-running case such as this

> will be severely under-compensated in damages were the court to have power only to award simple interest and no discretion to award any compound interest even in a deserving case. *The correct legal position in Singapore is that the courts are not so hampered and have an unfettered discretion to award simple or compound interest as damages as is appropriate that would justly compensate the person for the loss that he has suffered.* [Emphasis added; emphasis in original omitted].

39 There is no issue that the Singapore International Commercial Court ("SICC") has the power to award compound interest in an appropriate or "deserving" case. The issue between the parties is whether such an award is appropriate in the circumstances of this case.

40 The plaintiffs submitted that the defendants have had the full benefit of the misappropriated or misapplied funds and/or the secret profits for five years. The plaintiffs emphasised that the defendants have, by their own admission, applied the funds from the unauthorised sales for purposes that were unrelated to the joint venture. The plaintiffs also emphasised that the defendants concealed the misapplication of the sale proceeds from them, which was made worse by the fact that the plaintiffs placed a great deal of trust in the defendants and were entitled to expect the defendants would act in the best interests of the joint venture (see the Judgment at [225]). The plaintiffs submitted that in those circumstances, compound interest would be the only way in which the plaintiffs would be properly compensated. Alternatively, the plaintiffs claim simple interest at 5.33% for five years.

41 The defendants contend that in accordance with *Deutsche Bank*, compound interest is only awarded as damages where it would justly compensate the person for the loss suffered. The defendants emphasised that in *Deutsche Bank*, the Court held that parties claiming compound interest have the

burden of proving that they have suffered losses for which an award of compound interest would be appropriate. Although in that case the plaintiff claimed that but for the defendant's breaches, the plaintiff would have applied the cash towards investments in safer interest bearing deposits, the evidence did not establish what the plaintiff would have done with the funds and the Court was left to speculate. In those circumstances, the application for compound interest was refused and an award of simple interest was made.

42 In the present case, the evidence upon which the plaintiffs relied in support of their claim for compound interest went more to establishing the nature of the defendants' conduct that might ground a claim for punitive damages, rather than establishing what the plaintiffs would have done with the moneys that were paid away to third parties. The plaintiffs did not lead evidence to establish what they would have done with the funds received from the unauthorised sales. One alternative may have been re-investment in the joint venture before the end of 2011. However, what might have happened thereafter is left only to speculation. In these circumstances, I am not satisfied that this case is deserving of an award of compound interest. I am satisfied that it is appropriate to make an award of simple interest.

43 There is a further issue of the timeframe during which such interest should be awarded. The plaintiffs contend that interest should be awarded for a period of five years from the dates of the breaches. The defendants claim that the appropriate timeframe should be calculated from the date that the plaintiffs commenced the proceedings, which would result in a period of two years. The defendants relied upon the decision in *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd and another* [2008] 2 SLR(R) 623 where the Court of Appeal held that the commencement date for the calculation of interest

should begin from the date of the Writ in circumstances where there was an inordinate delay by the plaintiffs in commencing the proceedings. The defendants submitted that in the present case the plaintiffs had been content to sit on their claim for nearly three years before taking any action. The defendants also submitted that the plaintiffs have offered no reasonable explanation for the delay before commencing the proceedings.

44 The plaintiffs commenced proceedings against Crédit Agricole and it was not until towards the end of those proceedings that they commenced the present proceedings. It is true that the trial judge in the Earlier Proceedings referred to the plaintiffs' failure to bring proceedings against the defendants as "bizarre" (see the Judgment at [391]). However, it was not until the hearing in the Earlier Proceedings that the plaintiffs were made aware of all or some of the arrangements between the defendants and EFH. The defendants were certainly not forthcoming in relation to the whereabouts of the NexGen shares that had been transferred to Yuanta and it took the plaintiffs' legal representatives considerable forensic skills to uncover the true position. I am not satisfied that the delay in bringing the proceedings is a matter warranting denial of the claims of interest from the date of the breaches.

45 The plaintiffs are entitled to simple interest on the damages in accordance with the formula S$[principal sum] x (0.0533 x 5) = interest payable.

46 The damages payable into the joint account in respect of the shortfall of the loan funds is S$1,459,710.82. Interest on that amount according to this formula is S$389,012.93. Therefore, the defendants are to pay a total of S$1,848,723.75 into the joint account referred to earlier.

47 The damages payable by the defendants to the plaintiffs in respect of the unauthorised sales amount to S$5,104,492.20. Interest on that amount for the five year period according to the abovementioned formula will be S$1,360,347.17. Therefore, the defendants are to pay damages to the plaintiffs in the amount of S$6,464,839.37.

Costs

48 The plaintiffs seek orders that the defendants pay 95% of the costs of their claims and the Counterclaim and the total amount of disbursements (excluding the costs of engaging the experts) on an indemnity basis.

49 The defendants contend that the plaintiff should only be awarded 10% of the costs of their claims and should bear the defendants' expenses incurred in the engagement of experts to meet the plaintiffs' failed Portfolio Claim.

Percentage of costs

50 The Court has the "full power" to determine by whom and to what extent costs are to be paid: see para 152 of the Singapore International Commercial Court Practice Directions ("PD 152"). In assessing costs, the Court is to have regard to O 110 r 46(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the ROC") which provides that the costs of any proceedings in the SICC are to be borne by the unsuccessful party unless the Court orders otherwise (see PD 152(2)(a)). The Court may apportion costs between the parties if it is satisfied that such apportionment is reasonable, taking into account the circumstances of the case (see PD 152(2)(b)). The Court may take into consideration factors such as the conduct of all parties before, as well as during, the proceedings, the amount or value of any claim involved, the complexity or difficulty of the

subject matter involved, the skill, expertise and specialised knowledge involved, the novelty of any questions raised and the time and effort expended on the proceedings (see PD 152(3)(a)-(f)).

51 The plaintiffs submitted that the majority of their claims were allowed and to the extent that they were disallowed, it was primarily on the basis of contractual interpretation (see the Judgment at [379]-[380]), lack of pleading (see the Judgment at [452]) and expert opinion (see the Judgment at [512]-[518]). It was submitted that this did not substantially add to the work that would otherwise have been required for the purposes of establishing the facts in support of the claims that were allowed.

52 The plaintiffs submitted that the dismissal of their SPA claim was neutralised by the dismissal of the defendants' Counterclaim. It is not necessary to decide whether the dismissal of the SPA claim was "neutralised". However the respective dismissals of these claims will be taken into account when determining the appropriate costs order.

53 The plaintiffs submitted that a reduction of only 5% from their costs of their claims and the Counterclaim is a fair reflection of their entitlement to an award of costs.

54 The plaintiffs submitted that this case raised novel issues concerning the nature of non-recourse loan agreements. The defendants contended that the case was determined purely on a matter of construction of the Agreements and did not involve any novel concepts. On balance, I agree with the defendants' submissions. It was ultimately a matter of construing the Agreements between the parties to determine whether the defendants had no entitlement to deal with any of the shares as claimed by the plaintiffs, or the defendants' discretion to

sell the shares was unfettered as they claimed. The position, as construed, was that the defendants could deal with the shares but only those that had been pledged against a loan that had been provided (see the Judgment at [214]).

55 The plaintiffs also submitted that the case raised complex, analytical and evidential issues because of the nature of the transactions and the agreements between the parties on the one hand and between the defendants and EFH on the other. Although the defendants submitted that this was not so, I agree with the plaintiffs' submissions that there were quite some complex analytical and evidentiary matters that needed to be addressed. The management of the trial was very efficient and all counsel brought discipline to the way they approached the proceedings. Although the case took only seven days, there was extensive material and evidence covered in that period. The detailed written submissions and the Judgment evidence the fact of such extensive material and evidence.

56 The defendants submitted that there was no material reference in the Judgment to the agreements between the defendants and EFH and they disputed that the back-to-back nature of the transactions could have given rise to complex, analytical and evidential issues. It is not accurate to claim that there was no material reference to the agreements between the defendants and EFH in the Judgment. There was material reference to the arrangements between Yuanta and EFH and also to the agreements (see for instance the Judgment at [28]-[42]; [374]-[377]). As I have said, there were complex, analytical and evidentiary issues to be determined.

57 The defendants acknowledged that O 110 r 46(6) of the ROC provides that O 59 of the ROC does not apply to proceedings in the SICC. However they submitted that the guidelines provided by O 59 of the ROC in respect of the

Court's discretion to award costs is nonetheless useful in determining what is a reasonable quantum of costs. In particular, the defendants relied upon the provision that costs for more than two solicitors for a party would only be allowed in "exceptional circumstances" in cases involving a high degree of complexity of facts and/or law or where there are many issues of both fact and law and the trial is lengthy.

58 The plaintiffs' Schedule of Costs includes professional fees of S$969,445.57 and disbursements of S$82,784.54, making a total of S$1,052,230.11. The professional fees are for five solicitors with reference to the areas of work for which each solicitor was responsible. There is no breakdown of the work that was done by those solicitors. Rather, there is simply a claim that the five solicitors spent so many hours in their relevant areas of work in preparation for and during the trial. The defendants relied upon the costs guidelines providing for a daily tariff of S$15,000 for party-and-party costs for trials involving "simple" contract corporate law disputes if no novel issues of law or complex fact exists, and a daily tariff of S$17,000 for party-and-party costs for trials involving complex contract disputes. The defendants submitted by comparison with these daily tariffs it can be seen that the plaintiffs' claims are excessive. The plaintiffs' submitted that as O 59 of the ROC does not apply to the SICC, so the defendants' submissions in reliance upon its terms, even by analogy, should be rejected. Order 59 of the ROC does not apply and it is necessary to consider each case on its merits.

59 The defendants submitted that the plaintiffs should only be awarded 10% of the total costs of the proceedings and should be ordered to pay the defendants' costs of meeting the Portfolio Claim. The defendants submitted that these orders are justified because: (1) only a small part of the plaintiffs' "myriad

of claims" was successful; (2) the Portfolio Claim and the conspiracy claim which took a significant amount of time to prepare for were both dismissed; (3) the experts' evidence was only relevant to the Portfolio Claim; (4) the Portfolio Claim was a late claim which resulted in unnecessary loss of time and expense; and (5) the amount awarded to the plaintiffs is a "miniscule sum" compared with the claim that was originally made of S$140m and S$157m.

60 There is no doubt that the plaintiffs were put to additional expense in tracing the transactions that were contained in Exhibit P6. It was unsatisfactory that the plaintiffs had to expend additional time and effort in trying to find out where the NexGen shares might have been (see the Judgment at [420]-[421] and [482]). The plaintiffs were successful in establishing breaches of fiduciary duty, breaches of contract and conversion by the defendants. However, the plaintiffs' remedies were limited because of the construction of the Agreements, pursuant to which damages were to be awarded only for those shares that had not been pledged against any particular loan.

61 The Portfolio Claim was an aspect of the plaintiffs' claim for damages in consequence of the defendants' breaches. The parties relied upon their respective experts in this regard. Ultimately, there was very little that divided the expert opinions. They agreed that the disposals of shares by the defendants had an impact on the share price and the difference between them was the degree of that impact (see the Judgment at [454]). Ultimately the plaintiff was not successful in this aspect of its damages claim.

62 The conspiracy claim was also unsuccessful. However, having regard to the way in which the conspiracy claim was pleaded and run, there was little extra time taken in the trial in respect of this aspect of the matter.

63 The exercise of the discretion to award costs, particularly where it is appropriate to apportion costs or to fix a percentage, is far from an exact science. It is necessary to take into account the realities of the outcomes and to make an assessment of the successful parties' entitlements where some of the claims were unsuccessful.

64 I do not regard the defendants' assessment of a reduction of 90% as fair or just. The plaintiffs were successful in establishing the breaches to which reference has been made. The unsuccessful claims, but for the Portfolio Claim, did not add a great deal of time to the trial, albeit that the SPA claim involved quite a deal of evidence by the defendants. Against that, the defendants were unsuccessful in their Counterclaim.

65 The Portfolio Claim was, as I have said, a consequential claim in respect of the proven breaches. It seems to me that the most appropriate order in respect of that claim is that the plaintiffs should pay the defendants' costs of instructing their experts and all costs associated with that aspect of the claim. Otherwise, I am satisfied that the appropriate percentage of the costs to be paid by the defendants to the plaintiffs for the successful outcome, taking into account those parts of the claims that were unsuccessful, is 75%, excluding any costs incurred by the plaintiffs in respect of the retention of experts and the Portfolio Claim.

66 Orders will be made that the defendants pay 75% of the plaintiffs' costs of the proceedings (excluding any costs incurred by the plaintiffs in respect of the Portfolio Claim), and that the plaintiffs pay the defendants' costs of retaining their expert in respect of the Portfolio Claim and their costs incurred in defending the Portfolio Claim.

Indemnity costs

67 The plaintiffs submitted that the unauthorised sales were dishonestly concealed from them and they were put to the inconvenience, expense and effort of trying to identify the location of the shares that were transferred to Yuanta's account (see the Judgment at [420]). It was submitted that the effort that was required to uncover the truth of the defendants' dealings and in constructing the Chart of Transactions (Exhibit P6) was exacerbated by the provision of misleading accounts in relation to the trades or sales of the shares, with which the defendants persisted during the trial. The plaintiffs also relied upon the findings that untruthful evidence was given by the defendant which added to the time and expense the plaintiffs incurred in establishing the claims that were allowed (see the Judgment at [241]-[242], [262]-[263], [274]-[278]). In those circumstances, the plaintiffs submitted that they are entitled to an award of costs on an indemnity basis.

68 The plaintiffs also referred to the "immense difficulty" and significant expense to which they were put by the defendants' persistent non-disclosures of critical information and documents. The plaintiffs had to issue subpoenas which ultimately produced the taped phone conversations between the defendant and Mr Goh. This was over a suggestion by the defendants that there were no such conversations because those parties allegedly communicated by private mobile phone. The plaintiffs submitted that the defendants sought to prevent them from accessing the information and bank documents on the "spurious cover of bank secrecy". It was submitted that had the defendants co-operated to provide disclosure, or to procure disclosure by Crédit Agricole, there would have been no need for the subpoenas and orders for Crédit Agricole to produce the relevant documents.

69 The plaintiffs also emphasised the defendants' conduct of the trial, in particular, their refusal to disclose key documents which necessitated a large amount of correspondence and specific discovery requests. The plaintiffs also emphasised the urgent work created by the last-minute introduction of Mr Goh as a witness. There is no doubt that the late application for leave to call Mr Goh caused additional work for the plaintiffs well after the timeframe within which the evidence in the proceedings had been scheduled for completion.

70 The plaintiffs also submitted that the extent and nature of the defendants' breaches of contract and fiduciary duties were exacerbated by the positions which the defendants persistently maintained during the trial. Particular emphasis was placed on the claims by the defendants that they had sold the 60m and 225m NexGen shares with authority when they had plainly carried out those sales in secret. There is of course a difference between selling the shares with notice on the basis that it was thought the sales were authorised, and selling them on the same basis secretly. The latter process may of course undermine the claim that it was thought the sales were authorised. However, in this case the defendants put forward a not unarguable (but ultimately unsuccessful) claim that they were entitled to deal with the shares.

71 The plaintiffs submitted that the taped conversations obtained from Crédit Agricole also showed that the transfer of 225m NexGen shares from TPG's account to Yuanta's subsidiary account (the Fullerton account) in October 2011 was planned and deliberate and certainly not in accordance with any of the excuses subsequently given to the plaintiffs or to the Court.

72 The defendants submitted that there was no impropriety or abuse of the judicial process such as to warrant a departure from the usual order that costs

should be paid on an ordinary rather than an indemnity basis. They submitted that the "flurry" of discovery requests from the plaintiffs for documents from Crédit Agricole only arose late in the day in December 2015 and the defendants complied with the request to the best of their ability. The defendants had issued a subpoena to Crédit Agricole without delay when they were directed to do so by the Court after applying for leave to call Mr Goh as a witness. The defendants submitted that more importantly, all relevant documents were ultimately disclosed and both parties had full opportunity to cross-examine on such documents during the trial. The defendants submitted that in those circumstances there was no prejudice to the plaintiffs.

73 The defendants also submitted that although the Counterclaim was dismissed, there was no finding that it was brought in bad faith or for improper purposes or that the defendants had acted in bad faith in the conduct of the proceedings. This was so notwithstanding that there were findings that the defendant had breached his contractual obligations of good faith (see the Judgment at [395]-[396]). It was submitted that the plaintiffs had put forward a case of fraud at the trial of the action despite not pleading it. It was submitted that the plaintiffs refused to withdraw their claim on fraud despite repeated reminders from the Court that it was not pleaded.

74 The defendants also submitted that although the plaintiffs have alleged that the "untruthful evidence" of the defendant is a reason for costs to be awarded on an indemnity basis, findings were also made in respect of the deficiencies of the plaintiff's evidence (see the Judgment at [276]). In any event, I am not satisfied that the rejection of parts of the defendant's evidence and parts of the plaintiff's evidence in the circumstances of this case is a proper basis for an indemnity costs order.

75 It is true that the plaintiffs were put to the trouble of preparing material urgently after the defendants were granted leave to call Mr Goh as a witness. There was no real explanation given for the lateness of this notification and it was a very important aspect of the case with which the plaintiffs had to deal. I am satisfied that the costs expended by the plaintiffs in obtaining the documents from Crédit Agricole, in dealing with Mr Goh's late evidence and for the time spent in cross-examining Mr Goh should be awarded on an indemnity basis. I am not satisfied however that the balance of the costs should be awarded on an indemnity basis. In doing the best I can to sensibly apportion the costs, I regard it as appropriate to fix a percentage of the plaintiffs' costs to be paid on an indemnity basis rather than making an order for indemnity costs attributable to some aspects of the case. I regard the percentage appropriate for an award of indemnity costs as 10%.

76 An order will be made that the defendants pay 10% of the plaintiffs' costs of the proceedings on an indemnity basis.

Alternative claim

77 The plaintiffs also sought an account in respect of the proceeds from the unauthorised sales that were diverted by the defendant to third parties. This is an alternative claim made by the plaintiffs if the defendants failed to pay the judgment debts. It is appropriate to grant leave to the plaintiffs to relist the matter in respect of this application and, if necessary, give notice to the parties into whose hands the plaintiffs seek to trace the funds.

Orders

78 I make the following orders:

(a) The defendants are to pay S$1,848,723.75 into a joint trust account held by the solicitors for the respective parties pending the finalisation of the joint venture accounting exercise between the parties.

(b) The defendants are to pay the plaintiffs S$6,464,839.37 in respect of the unauthorised sales.

(c) The defendants are to pay 75% of the plaintiffs' costs of the proceedings (excluding any costs incurred by the plaintiffs in respect of the Portfolio Claim). The defendants are to pay 10% of those costs on an indemnity basis.

(d) The plaintiffs are to pay the defendants' costs of retaining their expert in respect of the Portfolio Claim and the defendants' costs incurred in defending the Portfolio Claim.

(e) Leave is granted to the plaintiffs to relist the matter in respect of any application for an account.

(f) Leave is granted to the parties to relist the matter on seven days' written notice for the purpose of making any Consent Orders finalising the parties' relationship.

Patricia Bergin
International Judge

Paul Tan, Yam Wern-Jhien and Josephine Chee (Rajah & Tann Singapore LLP) for the plaintiffs;
Hee Theng Fong, Toh Wei Yi, Nicklaus Tan and Jaclyn Leong (Harry Elias Partnership LLP) for the defendants.
