CACV 158/2012

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO. 158 OF 2012

(ON APPEAL FROM HCCL 13 OF 2011)

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BETWEEN

廈門新景地集團有限公司 formerly known as 廈門市鑫新景地房地產有限公司	Plaintiff
and	
ETON PROPERTIES LIMITED (裕景興業有限公司)	1st Defendant
ETON PROPERTIES (HOLDINGS) LIMITED (裕景興業(集團)有限公司)	2nd Defendant
ETON PROPERTIES GROUP LIMITED formerly known as ETON PROPERTIES (INTERNATIONAL) LIMITED	3rd Defendant
LEGEND PROPERTIES (XIAMEN) COMPANY LIMITED (利景興業（廈門）有限公司)，a limited company incorporated in Hong Kong	4th Defendant
LEGEND PROPERTIES (XIAMEN) COMPANY LIMITED (利景興業（廈門）有限公司)，a foreign-owned enterprise incorporated in the People's Republic of China	5th Defendant

TAN LUCIO C（陳永栽）	6th Defendant
CHUA DOMINGO（蔡黎明）	7th Defendant
TAN ENG LIEN MARIANO（陳永年）	8th Defendant
KWAN KIE YIP（關基業）	9th Defendant
CHEUNG CHI MING（張志明）	10th Defendant
MOK PUI HONG（莫沛杭）	11th Defendant

Before: Hon Yuen, Barma and Poon JJA in Court

Dates of Hearing: 17, 18, 19, 20, 23, 24 & 25 June 2014

Date of Judgment: 15 April 2016

J U D G M E N T

Section	*Paragraph Numbers*
Background	2 - 11
The Agreement	12 - 20
Decision to renounce the Agreement	21 - 24
Notice to discontinue performance	25 - 28
Events after the notice to discontinue performance	29 - 33
Proposal to set up a real estate investment holding company in the PRC	34 - 42
Plaintiff's application for arbitration	43
Putting restructure proposal into action	44 - 47
Notice of arbitration hearing	48
Allotment of shares	49 - 52
The 1st Arbitration	53 - 55
Transfer of share and Declaration of Trust	56
Pre-sales of units	57
The Award	58 - 61
Plaintiff's efforts to enforce the Award	62 - 65
HCCT54/2007 - the Statutory Process	66 - 68
Judgment entered under the Statutory Process	69 - 71
HCA961/2008 - the Common Law action on the award	72
Application to set aside ex parte order in HCCT54/2007	73 - 74

The 2nd Arbitration	75 - 78
CACV197/2008	79 - 81
Application to arbitral tribunal for directions in the 1st arbitration	82 - 83
HCA961/2008 now HCCL13/2011	84
Applications by Ds for stay for arbitration and by P for amendment of claim	85
Amended Statement of Claim	86 - 87
Stay for arbitration and appeals from that order	88 - 91
Trial	92 - 94
Judgment of Dep HCJ Stone	95
Discussion	96
Section (1) Common Law Action on the award	
Methods of enforcing an arbitral award	97
(A) The Statutory Process	98 - 102
(B) Common Law action on the award	103
Nature of the cause of action	104 - 105
- Inception of a new "contract" or implied promise	106 - 109
- Breach of the implied promise and loss	110
Enforcement of rights under new cause of action	111
Discussion of new cause of action	112 - 114
Flexibility of remedies in Common Law action on the award	115 - 116
- *Dalmia Cement v National Bank of Pakistan*	117 - 126
- *Selby v Whitbread & Co.*	127 - 137
- *Birtley District Co-op Soc. v Windy Nook etc*	138 - 145
EP & EPH's arguments against Plaintiff's claim to damages	146
(1) Did P need to plead and prove	
(a) the implied promise to honour the award?	147 - 154
(b) the implied promise under PRC law?	155 - 160
(c) what EP & EPH were required to do?	161 - 162
(2) Does the court have jurisdiction to give damages when the award was not for damages?	163 - 177
- *Walker v Rome*	173
- *Gater Assets Ltd v Nak Naftogaz*	174
- *Sonatrach v Statoil*	175
(3) In any event, should the court grant a remedy which is within the arbitral regime or should it stay the matter for arbitration?	178 - 186
(4) Is the claim for damages inconsistent with the jmt in HCCT54/2007?	187 - 202
Section (2) Inducing breach of contract	203
The elements of the tort	204 - 206
Elements in this case	207 - 211
Renunciation	
- Mr Tan	212 - 243
- Double Actionability rule satisfied?	215 - 219
- The *Lenovo* case	220 - 234
- Exception to "double actionability" rule applicable?	235 - 237
- *Said v Butt* defence applicable?	238 - 243
- Corporate defendants	244
Restructure	245 - 254

Section (3) Unlawful means conspiracy	255 - 259
Elements of unlawful means conspiracy	260
Renunciation	261 - 262
Restructure	263 - 266
Section (4) Constructive Trust	267 - 277
Order	278 - 279
Concluding Remarks	280

Hon Yuen JA:

1. This is an appeal from a judgment of Deputy High Court Judge Stone QC given on 14 June 2012 (**"the Judgment"**) dismissing the plaintiff's claims against all eleven defendants. The plaintiff has appealed the dismissal of its claims against the 1st-2nd defendants, the 3rd-5th defendants, the 6th defendant, and the 10th defendant (**"the remaining defendants"**).

Background

2. The following background facts are clear from the documentary evidence and transcript.

3.1. On 29 April 1994, the 1st defendant Eton Properties Ltd ("**EP**"), a Hong Kong company, entered into an agreement with the Xiamen Municipal Government for the transfer of rights over a piece of state-owned land (**"the No.22 Land"**). The rights transferred by the municipal government, for a consideration of RMB84m, comprised a right to develop and use the land (**"the land use right"**). The land was to be developed for "commercial, office, residential comprehensive buildings", and construction was to commence within one year of delivery of the land.

3.2. It was stated in the agreement that the use of EP as a contracting party was "temporary" and that "the actual name [of the transferee] shall be the name of the company incorporated in Xiamen".

Xiamen Legend, Hong Kong Legend and some other companies in the Eton group

4. In due course, on 22 July 1994 the 5th defendant Legend Properties (Xiamen) Co Ltd (**"Xiamen Legend"**), was established in the PRC as a "foreign-owned enterprise" and became the transferee of the No.22 Land.

5. Starting with this company and working upwards, the relevant corporate structure was as follows.

5.1. Xiamen Legend was wholly owned by a Hong Kong company of the same name, the 4th defendant Legend Properties (Xiamen) Co Ltd ("**HK Legend**") which was incorporated in 1993.

5.2. Before the events in this action, HK Legend itself had issued only two shares: one to EP and the other to the 2nd defendant Eton Properties (Holdings) Ltd. ("**EP Holdings**"), also a Hong Kong company.

5.3. EP and EP Holdings each executed a declaration of trust on 25 June 1993 stating that it held its share in HK Legend on trust for a BVI company then called Betsan Investments Ltd and later called Eton Properties International (No.3) Ltd ("**Eton No.3**").

5.4. Eton No.3 was itself a wholly owned subsidiary of the 3rd defendant, a BVI company formerly called Eton Properties

(International) Ltd and now called Eton Properties Group Ltd ("**EP Group**").

6. The companies in the above sub-paragraphs were part of a group of companies involved in real property (in Xiamen and elsewhere). Eton also had a group of companies involved in the manufacture of beverages. References in this Judgment to "the group" are to the property group.

Individuals within the group

7. The founder and controller of the group was the 6th defendant Lucio Tan (**"Mr Tan"**) who lived in the Philippines. He was a director of HK Legend until 17 March 2008.

8. The 10th defendant Cheung Chi Ming (**"Mr Cheung"**) is Mr Tan's brother-in-law. Mr Cheung has been a director of HK Legend since its incorporation in 1993. Starting in September 2003, Mr Cheung participated in the business of the group in Xiamen. In May 2005 he also became a director of Xiamen Legend.

9. Mr Cheung described himself as one of "the key senior management personnel" of the group. He said the way the business was run was that "the senior management personnel of the groups [including the property group] are chiefly responsible for determining the strategic direction and important decisions of the groups", although "details of implementation are generally dealt with by subordinates and not personally by management" (para. 4, Witness Statement, 14.12.2011).

The No.22 Land

10. Returning to the events in this case, although EP had acquired the land use right and transferred it to Xiamen Legend in 1994, the site did not undergo development for some 9 years thereafter.

11.1. In 2003, the plaintiff, a PRC property development company, became aware that EP and EP Holdings were considering the possibility of returning the land use right to the municipal government for only a refund of the sum paid.

11.2. The plaintiff then started negotiations with EP and EP Holdings with a view to taking over the land use right.

11.3. However up to that stage, Xiamen Legend's injection of capital for developing the No.22 Land had not yet reached 25% of the investment agreed with the municipal government, a matter which was considered to be an impediment to a transfer of the land use right to the plaintiff.

The Agreement

12. An agreement ("**the Agreement**"), prepared by EP and EP Holdings' PRC lawyer, was executed on 4 July 2003 between EP and EP Holdings of the one part and the plaintiff of the other part. (The other parties to the Agreement, who are not involved in these proceedings, were guarantors of the plaintiff).

13. Neither Xiamen Legend (the company holding the land use right) nor HK Legend (its parent company) were parties to the Agreement.

14.1. Article Two (3) of the Agreement provided that

> "[EP and EP Holdings have] *absolute control* over HK Legend and Xiamen Legend". (Emphasis added).

There was no reference to the declarations of trust in favour of Eton (No.3) in respect of the shares in HK Legend.

14.2. Article Two (3) also stipulated that

> "*[EP and EP Holdings] will convene directors' meetings of HK Legend and directors' meetings of Xiamen Legend after entering into this agreement, to approve this agreement and cause the relevant parts in this agreement to have binding effect on HK Legend and Xiamen Legend*". (Emphasis added).

However it would appear that no such meetings were convened.

15.1. The Agreement provided in Article Three that the plaintiff would pay EP and EP Holdings a total sum of RMB120m (in instalments)

> "*for the purpose of obtaining the right to develop the No.22 Land in the name of Xiamen Legend and obtaining the rights to profits*, and ... for the purpose of compensating [EP and EP Holdings] the investment which it has put into … HK Legend and Xiamen Legend and the No.22 Land ...". (Emphasis added).

15.2. The total sum was to be paid in 5 instalments and was to be settled in full at the latest within 2 years of delivery of the land, subject to the time when the plaintiff obtained a "Permit of Commodity Building for Presale" (Article Four).

16. It was further agreed that EP and EP Holdings would have to demolish a building on the site, and would then deliver the land to the plaintiff within 6 months from the date of the Agreement (Article Five).

17. It is important to note the following provisions of the Agreement.

- The plaintiff required the consent of EP and EP Holdings for "design …, project finance index and change of land use area" (Article Six).
- EP and EP Holdings had the right to "supervise" development and operations, which right included (Article Seven)
  - the right to keep possession, and to control the use, of Xiamen Legend's official seal and special seal for financial matters;
  - the right to confirm the format of the subscription document and sale and purchase agreement for commodity building, and to supervise sales and to confirm the base price for sales;
  - the right to supervise the plaintiff's payment of the construction price, and the right to refuse to apply for the "Permit of Commodity Building for Presale" in certain circumstances; and
  - the right to terminate the sales activities of the plaintiff in certain circumstances.

18. Article Three provided that after the plaintiff had settled the payment in full,

> "*[EP and EP Holdings] agree to transfer all the shares in HK Legend for HK$2 to a legal entity … designated by [the plaintiff],* and to exempt repayment of all shareholders' loans

> advanced to HK Legend and Xiamen Legend". (Emphasis added).

19. Finally, Article Thirteen provided that either party had the right to submit disputes to China International Economic and Trade Arbitration Commission (**"CIETAC"**) for arbitration. It also provided that the Agreement was governed by the laws of the PRC although the procedure and validity relating to the transfer of the shares in HK Legend would be governed by Hong Kong law.

20.1. In accordance with the terms of the Agreement, the plaintiff paid a sum of RMB5m to EP and EP Holdings as deposit and the 1st instalment of the transfer price.

20.2. The plaintiff then began to obtain approvals from a number of local authorities for the development of the No.22 Land.

Decision to renounce the Agreement

21.1. However two months later, in September 2003 Mr Tan, Mr Cheung and other individuals involved in the group had a meeting in Xiamen, after which EP and EP Holdings had second thoughts about performing the Agreement.

21.2. According to Mr Cheung's Witness Statement (14.12.2011), at the meeting Xiamen Legend's general manager gave a report on the transaction, after which Mr Cheung raised a few questions about the form of the transfer.

22.1. The next day, while still in Xiamen, Mr Cheung read the Agreement himself. He said that after reading it, "based on my business

experience, I judged that it was not a normal agreement". The reasons he gave in his Witness Statement was that "land in Mainland China could not be transferred before development. In addition, transferring land through the transfer of company also involved risks". Mr Cheung immediately had a discussion with Mr Tan.

22.2. Although Mr Cheung claimed to have reservations about the legality of the Agreement, he is neither a lawyer nor an accountant. However no inquiries were made of any PRC lawyers about the transaction. When cross-examined whether "the real reason for termination was because Mr Lucio Tan wanted the development profits for the Eton group", Mr Cheung accepted that was "partly correct" (Transcript p.2703-4). He eventually acknowledged both in cross-examination and re-examination that termination of the Agreement "had nothing to do with any question of legality" (Transcript p.2704, p.2751).

23. Mr Tan there and then, while in Xiamen, made the decision to terminate the Agreement (Transcript p.2699-2670) and Mr Cheung was instructed to implement that decision. This is relevant to the issue, which will be discussed later in this Judgment, as to the jurisdiction where various alleged torts were committed.

24.1. In the meantime, for its part the plaintiff was continuing with preparatory work for development of the No.22 Land.

24.2. On 7 November 2003, the Xiamen Town Planning Department approved the construction project design and gave permission for development and land use.

Notice to discontinue performance

25. However on 14 November 2003, EP and EP Holdings sent the plaintiff in the PRC a "Notice to Discontinue Performance of the Agreement". It stated amongst other things:

> "The Agreement we made with you on 4 July 2003 provides that we shall transfer to you the right to develop the No.22 Land ... owned by [Xiamen Legend] and the shares in the Hong Kong-based [HK Legend]. After prudent review, we are of the view that the nature of the agreement is to use the form of share transfer to conceal a transfer of land use right, thereby evading the various obligations required to be performed by law in relation to lawful transfer of land use right. If performance of the Agreement is to be continued, there is a risk of violating the applicable laws of China. This will damage the corporate interests and goodwill of both parties and should be immediately rectified. Therefore, we hereby give you a notice of the following information:
>
> 1. The performance of the Agreement and the annexes thereto shall be discontinued upon your receipt of this notice".

26. This has been referred to as **"the renunciation"**. This, together with subsequent events, gave rise to a complex series of proceedings in the PRC and in Hong Kong culminating (so far) in this appeal.

27. Following the renunciation, EP and EP Holdings transferred back to the plaintiff's bank account in the PRC the sum of RMB5m (with interest) which the plaintiff had paid pursuant to the Agreement.

28. On 8 December 2003, the plaintiff replied setting out a list of the work it had done for the purpose of developing the land, and required EP and EP Holdings to "continue to perform" the Agreement. That was rejected.

Events after the notice to discontinue performance

29. As mentioned earlier, the Agreement provided in Article Five that EP and EP Holdings would, amongst other things, deliver the land to the plaintiff within 6 months from the date of the Agreement (ie by 4 January 2004).

30. When that was not done, on 17 January 2004 the plaintiff wrote to EP and EP Holdings requiring delivery of the land. That demand was not met.

31. From then until the end of March the following year (2005), the sum of RMB5m paid by the plaintiff to EP and EP Holdings (with interest) was transferred to and fro between the parties' bank accounts in the PRC a number of times, with neither side wanting to keep the funds. Eventually on 28 March 2005, the sum (with interest) was paid into an escrow account in the PRC.

32. During that period, there was correspondence between the parties. The plaintiff required continued performance of the Agreement, and EP and EP Holdings refused to do so, saying their boards had made a unanimous decision and there was "no room for any changes".

33. Meanwhile, Xiamen Legend carried out the development of the land according to a different plan. It obtained approval for a new design in November 2004 and town planning permission in January – February 2005.

Proposal to set up a real estate investment holding company in the PRC

34. About two months later, plans were made within the group which eventually concluded in a change in the shareholding of HK Legend.

35. Mr Cheung said in evidence that as early as sometime after September 2003 (which would have been around the time when the decision not to perform the Agreement was made), he had proposed to Mr Tan that a real estate investment holding company should be set up in the PRC. Mr Tan agreed, leaving the timing to be decided by Mr Cheung.

36. On 16 March 2005, Mr Cheung had a meeting with the group financial controller Mr Barry Mok Pui Hong (and some other staff members of the group) on setting up a real estate investment holding company in the PRC.

37. According to Mr Mok (para. 31, affirmation 2.1.2008), his understanding was that there were two prerequisites for establishing a holding company:

(1) the investor has invested in no fewer than 10 projects within the PRC; and

(2) the contributed registered capital exceeded USD30m.

38.1. On 22 March 2005, Mr Mok sent a memo entitled "Incorporation of Real Estate Holding Company" to the persons who had attended the meeting on 16 March including Mr Cheung. The memo set

out the application procedures for the incorporation of a real estate holding company.

38.2. In the memo, the "investor" was defined as the 3rd defendant, then called Eton Properties (International) Ltd.

38.3. The memo listed the investor's investments in 10 "enterprises" through various "owners", and a total paid registered capital of more than USD118.73m. According to Mr Mok, "the 10 enterprises were the only 10 PRC real estate project holding enterprises that the Group owned at the time" (para. 31, Witness Statement 14.12.2011).

38.4. Included in the list of 10 enterprises was Xiamen Legend, for which registered capital of USD5m had been paid, with HK Legend as its "owner". A note in the memo said that the "owners" were "all wholly owned companies of [EP Group]".

38.5. The memo contained a proposal that 20-25% of the shares in each enterprise (including Xiamen Legend) be transferred to EP Group so that EP Group would not need to inject fresh capital (presumably on the basis that USD118.73 x 25% = USD29.7m).

39. This eventually developed into an exercise (for which the word **"restructure"** has been used as shorthand) which involved:

- HK Legend making an allotment of shares to EP Group, making it HK Legend's largest shareholder;
- EP making a transfer of its 1 share in HK Legend to EP Group; and

- EP Holdings making a declaration of trust of its 1 share in HK Legend, also in favour of EP Group.

40. The upshot of the restructure was that control of HK Legend was thereby divested from EP and EP Holdings and vested in EP Group. The impact of the restructure on the rights and obligations of the parties will be discussed later in this Judgment.

41. Turning back to Mr Mok's memo, it would be noted that there was *no* reference to the Agreement (which had envisaged the shares in HK Legend being eventually transferred to the plaintiff). Mr Cheung knew about the Agreement (and the plaintiff's insistence on its continued performance) but he testified he had not paid attention to the matter, and that it had not occurred to him that the restructure, involving the transfer of HK Legend shares to EP Group, was to ensure that EP and EP Holdings could not perform their contract with the plaintiff (Transcript p.2725).

42.1. In this connection it is interesting to note that on 9 June 2005 (about 3 months after Mr Mok's memo), a Beijing law firm Jingtian & Gongcheng sent an advice to Beijing Longfast Property Development Co Ltd, another company in the Eton group, with answers to two inquiries. One of the inquiries was as follows:

> "B. If an investor has established 9 foreign-invested enterprises in the PRC, rather than 10 as required by law, is the investor eligible to establish a foreign investment company as those who have 10 foreign-invested enterprises?"

42.2. The answer given by the Beijing lawyers was that in that situation, the Ministry of Commerce would review the credit standing and

reputation of the investor, but they added that "judging from Eton's status, basically we think it could get the approval".

42.3. However it would appear that at trial, Mr Cheung was not cross-examined on this letter, and in the absence of cross-examination, the court cannot speculate whether Xiamen Legend was the enterprise being considered for omission from the list, and if so, why.

The plaintiff's application for arbitration

43.1. On 8 August 2005, more than one and a half years after the Notice to Discontinue Performance was received, the plaintiff lodged an application for arbitration. It claimed damages in the sum of RMB1,275,000 for late delivery of the land, and more importantly, continued performance of the Agreement, as well as fees and costs. The application expressly referred to the warranty given by EP and EP Holdings that they have absolute control over HK Legend and Xiamen Legend.

43.2. These arbitration proceedings (culminating in award [2006] No.0389) are referred to as "**the 1st arbitration**" because there was a subsequent, second application for arbitration, which will be discussed later in this Judgment.

Putting restructure proposal into action

44. Meanwhile around this time, the group's company secretarial manager Daisy Wong Siu Kan (**"Miss Wong"**) was approached by Mr Mok with a corporate chart of 31 December 2004. She was instructed to prepare information relating to the shareholding of

intermediate companies holding foreign-investment enterprises in the PRC.

45. On 24 August 2005 Miss Wong sent the chart with her handwritten revisions to Mr Mok. It showed (amongst other things) the No.22 Land, held by Xiamen Legend and the corporate structure set out in para. 5.1-5.4 above, with the additional information that EP Group was held by a Bermudan company called Dragon Holdings International Ltd.

46. In the course of discussions between Miss Wong and Mr Mok, she suggested that instead of transferring shares of the intermediate companies to EP Group, which would involve stamp duty and other requirements, an allotment of unissued shares in the intermediate companies (save EP Holdings) could be made to EP Group. As for EP Holdings, it would be necessary to increase the share capital first.

47.1. The next day (25 August 2005), Mr Mok sent a memo to Mr Cheung which enclosed another chart showing the corporate structure as at 31 July 2005 (**"the memo chart"**). The memo said amongst other things that evidence was needed that EP Group was the ultimate shareholder of the 10 projects and referred to Miss Wong's suggestion for allotment of unissued shares.

47.2. The memo chart showed the No.22 Land and the corporate holdings as set out above, together with:

> "Recommendations to make [EP Group] as the immediate holding company of all China property project
>
> 1. Allotment of 9,998 shares to [EP Group]" in respect of some companies highlighted in yellow.

47.3. Included in the highlighted companies was HK Legend. There was no reference to the Agreement with the plaintiff. Miss Wong had no knowledge or involvement with that agreement.

47.4. Of course that could not be said of Mr Cheung who approved the restructure the following day. In cross-examination he accepted that he had been told about the arbitration application (lodged 17 days previously) in which the plaintiff was claiming continued performance of the Agreement. When the plaintiff's counsel pointed out to him that the restructuring made it impossible for EP and EP Holdings to perform their agreement with the plaintiff, he said that he never took that into consideration. The judge accepted his evidence (para. 245, Judgment).

Notice of arbitration hearing

48. On 24 October 2005 the arbitral tribunal served a notice on the parties for the hearing to start on 23 November 2005.

Allotments of shares

49.1. On 15 November 2005, EP and EP Holdings as the then only shareholders of HK Legend resolved that

> "unconditional approval be given to the directors of the Company [HK Legend] to ... allot all the unissued shares in the authorized share capital of the Company to such persons or corporations as the directors shall deem fit ...".

49.2. The next day (16 November 2005), EP Group applied for the allotment of 9,998 shares in HK Legend. It was approved by Mr Cheung as director of HK Legend.

50. Thus, EP and EP Holdings (who at the time of the Agreement warranted that they had absolute control over HK Legend) each permitted its holding in the company to be reduced from 50% to 0.01%.

51.1. Mr Cheung was cross-examined as to the reason for the timing of the allotment. His answers were as follows (Transcript p.2737-8):

> "Q. I would suggest to you Mr Cheung that the reason why Mr Mok's restructuring plans were implemented on 15 and 16 November 2005 was to get them completed before the scheduled arbitration hearing.
>
> A. I disagree.
>
> Q. Do you know why the signing of all the documentation took place on 15 and 16 November 2005?
>
> A. I know.
>
> Q. What was the reason?
>
> A. Well, in relation to matters that I should do, then I will go about and do that. I have never made a fuss or made a point in relation to the timing.
>
> Q. But in mid-November 2005, nothing was being done in relation to a possible application in the name of the 3rd defendant [as a real estate investment holding company], correct?
>
> A. Right.
>
> Q. So why was it necessary to have these documents all executed in mid-November 2005?
>
> A. Well, whenever I want to sign it, then I will sign it. I do not need to play this game of time".

51.2. The judge, who of course had the advantage of seeing and hearing the witness at first hand, accepted Mr Cheung's evidence. There is no appeal that his finding of fact was wrong.

52. To complete this aspect, in fact no application for a real estate investment holding company was made until 12 November 2009 (some 4 years later) and it was submitted, not by EP Group, but by Eton Properties (China) Ltd.

The 1st arbitration

53. Coming back to the narrative of events, the 1st arbitration commenced about a week later on 23 November 2005. The plaintiff sought an order for "continued performance", but it is important to note that this relief under the contract law of the PRC is not equivalent to specific performance under Hong Kong law. This will be discussed later in this Judgment.

54. The defence of EP and EP Holdings was that the Agreement was invalid in law. They lodged a counterclaim for such a declaration. They did not advance any alternative arguments.

55. In answer to the plaintiff's claim for continued performance, EP and EP Holdings submitted that:

(1) *No. 22 Land* "in its current condition cannot continue to be delivered to the [plaintiff]" by reason of the new design with differences in gross floor area, number of storeys to be built above and below ground, etc, and therefore the Agreement could not be performed;

(2) *the share transfer* "cannot be effected, and it is also impossible to be actually performed or enforced". A number of grounds were put forward, but there was no mention of the allotment of shares in HK Legend (effected a

week before the commencement of the arbitration hearing) which had diluted the shareholding of EP and EP Holdings. When cross-examined on this issue, Mr Cheung said the arbitral tribunal was not told about it because "... I don't think the contract and the restructure are the same matter. In the arbitration court, it did not occur to me that this would have any bearing on the matter" (Transcript p.2740). As noted earlier, the judge accepted Mr Cheung's evidence.

Transfer of share and Declaration of Trust

56.1. During the arbitration proceedings, pursuant to a board resolution of 31 March 2006, EP transferred its 1 share in HK Legend (by now representing only 0.01% of the company) to EP Group on 6 April 2006.

56.2. On the same day, EP Holdings signed a declaration of trust of its 1 share in HK Legend in favour of EP Group.

56.3. The above transactions resulted in HK Legend's current shareholding position, ie

- EP no longer has any shares in HK Legend, having transferred it to EP Group;
- EP Holdings still has 1 share in HK Legend, but has made a declaration of trust in favour of EP Group;
- in any event, EP and EP Holdings' original control over HK Legend has been substantially diluted by the allotment of 9,998 shares to EP Group.

56.4. Neither the allotment of shares in HK Legend, nor the transfer of EP's share, nor EP Holdings' declaration of trust of its share, was disclosed to the plaintiff or the arbitral tribunal. On the contrary, in submissions dated 17 May 2006 from EP and EP Holdings to the arbitral tribunal, they said:

> "*Even though the Respondents [EP and EP Holdings] are the parent companies of Legend HK* and Legend Xiamen, they cannot force the directors (natural persons) of Legend HK and Legend Xiamen to pass the resolution which approves the Agreement at issue". (Emphasis added).

Pre-sales of units

57. Meanwhile on 30 June 2006, Xiamen Legend commenced pre-sales of units in the development.

The Award

58. On 27 October 2006, the arbitral tribunal issued its award (**"the Award"**).

59. In brief, the arbitral tribunal held the following in relation to the plaintiff's claims.

(1) The applicable law to resolve the dispute over the validity of the Agreement is PRC law: section IV(I).

(2) The nature of the Agreement was "a share transfer arrangement ... for the contractual purpose of assigning and obtaining the right to develop and obtain earnings from the development of the No.22 Land. ... The subject-matter of the Agreement is the contractual right to buy and sell the shares

in HK Legend that has an indirect effective control over the No.22 Land": section IV(II).

(3) The Agreement was valid in law (for reasons which are not repeated here): section IV(III).

(4) In dealing with the argument of EP and EP Holdings that it was now impossible to perform the agreement, the tribunal said (section IV(IV)1):

> "The Arbitral Tribunal notes the Respondents repeatedly emphasize ... that it is *impossible* to perform the Agreement in this case. The Arbitral Tribunal considers that an agreement shall be binding upon the parties thereto once the agreement is executed. Even though any change in circumstances makes it *difficult* to perform the agreement during its performance, the parties shall exert reasonable efforts in good faith to perform the Agreement completely and fully other than purely emphasize external causes. In this case, as stated by the Respondents, the Agreement is a framework agreement, whose performance may be *difficult* due to various uncertainties. *This needs close cooperation between the parties and reasonable efforts to seek alternative approaches to meet the purpose of the Agreement*. The Respondents' allegations cannot constitute justifiable reasons for *impossibility* to perform the Agreement and discontinuing performance of the Agreement without the consent of the Applicant". (Emphasis added).

It would be noted that the arbitral tribunal

- distinguished between "impossibility" and "difficulty" in performance due to "change in circumstances"; but
- acknowledged that as the Agreement was a framework agreement, close cooperation between the parties was required.

60. In relation to the counterclaim of EP and EP Holdings, in section IV (IV)2 the arbitral tribunal referred to their submission that the plaintiff's failure to apply to court or for arbitration after receiving the Notice to Discontinue Performance should be deemed as non-opposition to termination of the Agreement, and noted that the only counterclaim was for a declaration that the Agreement was invalid, which is different from termination. The counterclaim was rejected.

61. The Award was as follows:

(1) EP and EP Holdings should pay the plaintiff damages of RMB1,275,000 (in respect of the late delivery of the land);

(2) EP and EP Holdings "shall continue to perform the Agreement";

(3) other arbitration claims of the plaintiff were dismissed;

(4) all arbitration counterclaims of EP and EP Holdings were dismissed;

(5) EP and EP Holdings should pay the arbitration fees.

Plaintiff's efforts to enforce the Award

- In the PRC

62. On 10 March 2007, the plaintiff applied to the Xiamen courts to execute the Agreement, apparently by way of seizing units in the development which had not yet been sold. This was opposed by EP and EP Holdings. Xiamen Legend also joined the proceedings as a party to oppose the execution.

63. Additionally on 16 April 2007, EP and EP Holdings applied to the Beijing courts to set aside the Award. Subsequently however, on 19 June 2007 EP and EP Holdings applied to withdraw this application, for which permission was granted by the Beijing courts on 3 July 2007.

64. On 30 July 2007, the Xiamen Municipal Intermediate Court dismissed the plaintiff's application for execution on the grounds that:

- the owner of the No.22 Land was Xiamen Legend, an independent legal person which "shall not directly bear the civil responsibility" of EP and EP Holdings;
- EP and EP Holdings were Hong Kong companies whose assets were out of the jurisdiction.

- In Hong Kong

65. As will be discussed in detail later in this Judgment, a successful party in a mainland arbitration may enforce the award in Hong Kong either:

(1) under common law, by commencing an action based on an implied promise to perform the award (commonly called an "action on the award"); or

(2) under statute, by a summary process provided in the Arbitration Ordinance. This Ordinance has undergone a number of changes. The version applicable to these proceedings is the Arbitration Ordinance *Cap.341* (**"the AO"**) which has since been repealed.

HCCT54/2007 - the Statutory Process

66. On 21 September 2007, the plaintiff applied in HCCT54/2007 ex parte to enforce the Award pursuant to s.2GG and s.40B of the AO (**"the Statutory Process"**). The defendants were the parties to the arbitration, ie EP and EP Holdings.

67. Section 2GG provides (where material):

> "(1) An award ... made ... in … arbitration proceedings by an arbitral tribunal is enforceable in the same way as a judgment ... of the Court that has the same effect, but only with the leave of the Court or a judge of the Court. If that leave is given, the Court or judge may enter judgment in terms of the award ... .
>
> (2) Notwithstanding anything in this Ordinance, this section applies to an award ... made ... whether in or outside Hong Kong".

68. Section 40B provides:

> "(1) A Mainland award shall, subject to this Part, be enforceable in Hong Kong *either by action in the Court or* in the same manner as the award of an arbitrator is enforceable by virtue of *section 2GG*. (Emphasis added).
>
> (2) Any Mainland award which is enforceable under this Part shall be treated as binding for all purposes on the persons between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in Hong Kong, and any references in this Part to enforcing a Mainland award shall be construed as including references to relying on a Mainland award".

Judgment entered under the Statutory Process

69. On 31 October 2007 Andrew Cheung J (now Cheung CJHC) gave leave in the ex parte application to enforce the Award. He also entered judgment in terms of the Award.

70. A few months later, on 2 January 2008 EP and EP Holdings applied to set aside the order, on the ground that it would be "contrary to public policy to enforce the award" under s.40E(3) of the AO, contending that enforcement of the Award was now impossible by reason of (1) the change of shareholding in HK Legend and (2) the sale of more than 90% of the units in the development.

71. It was only at that stage (*after* judgment had been entered under the Statutory Process) that the plaintiff became aware that the shares of HK Legend were no longer controlled by EP and EP Holdings. This is relevant to the question whether the plaintiff has made an election between alternative remedies, which will be discussed later in this Judgment.

HCA961/2008 - the Common Law action on the award

72. On 27 May 2008, the plaintiff commenced HCA961/2008 **("the Common Law action on the award"**), which in time became HCCL13/2011 from which this is an appeal.

Application to set aside ex parte order in HCCT54/2007

73. Meanwhile on 24 June 2008, Reyes J dismissed the application to set aside the ex parte order in HCCT54/2007. He held amongst other things (paras.99, 109):

- the execution of the Agreement and the plaintiff's payment of the deposit gave rise to an equitable interest in the shares of HK Legend which EP and EP Holdings had contracted to transfer to the plaintiff (or its nominee);

- EP Group must have been aware of the Agreement and so must have received the shares in HK Legend with actual or constructive notice of the plaintiff's equitable rights in those shares, thereby giving rise to a constructive trust;

- consequently the HK Legend shares could become available to the plaintiff on payment of the agreed consideration and an accounting of construction cost. By obtaining control of HK Legend, the plaintiff would get control of Xiamen Legend and "conceivably lead to an enjoyment of the profits derived by Xiamen Legend from the development of the Property".

74. The hearing of the appeal by EP and EP Holdings from this decision of Reyes J (CACV197/2008) was delayed for some time.

The 2nd arbitration

75. In the meantime, EP and EP Holdings made a new application (**"the 2nd arbitration"**) to CIETAC culminating in [2009] No.144. In the application they sought orders for the termination of the Agreement and for the payment by the plaintiff to them of RMB6m as compensation for financial loss.

76.1. EP and EP Holdings had this to say about their position at the 1st arbitration (Section III, Facts and Grounds):

> "Maintaining that the Agreement was invalid due to violating mandatory requirements provided in relevant laws of China, [EP and EP Holdings] did not raise the counterclaim for cancellation of the Agreement during the arbitral proceedings ...".

76.2. No explanation was given why they had not raised that counterclaim in the alternative.

76.3. EP and EP Holdings asserted that as "substantial changes have occurred to the circumstances under which the Agreement was entered into", the conditions did not permit continuing performance of the Agreement in accordance with Article 110 of the Contract Law of the PRC, and the Agreement should be terminated in accordance with Article 94 of the same law as the purposes of the Agreement could not be met.

77. On 22 April 2009, the arbitral tribunal delivered its decision dismissing all the claims made by EP and EP Holdings.

78. Briefly, its opinion was as follows.

78.1. First, it held that the issues before it were not the same as those before the arbitral tribunal in the 1st arbitration, and therefore it had jurisdiction to adjudicate these proceedings.

78.2. Second, it held that PRC law applied.

78.3. Third, the arbitral tribunal considered the three grounds advanced by EP and EP Holdings for an order of termination of the Agreement.

(1) In relation to the ground of change of circumstances,

(a) the arbitral tribunal first considered the Agreement, Article 11(2) of which set out 5 conditions for its termination. The tribunal held that neither the completion of the development of the No.22 Land, nor the sale of more than 90% of the units, nor the change of shareholding of HK Legend satisfied any of the *contractual* conditions which would have entitled EP and EP Holdings to terminate the Agreement;

(b) the arbitral tribunal then considered the Contract Law of the PRC, which contained also 5 statutory conditions for termination of an agreement. The tribunal held that the change of circumstances advanced by EP and EP Holdings did not satisfy any of the *statutory* conditions for termination of an agreement either.

(2) In relation to the ground based on the Notice to Discontinue Performance, the arbitral tribunal held that it was not a valid notice of termination under Article 93(2) of the Contract Law, because there was no valid termination of the Agreement whether under contract or statute.

(3) In relation to the ground of impossibility of performance "as a matter of fact" and "as a matter of law", the arbitral tribunal held that these grounds did not satisfy either the contractual or statutory conditions for termination. The arbitral tribunal went on to note as follows:

> "The award of the arbitral tribunal in the earlier case [the 1st arbitration] and the judgment made by the Hong Kong Court [Reyes J's judgment of 24 June 2008] …

> have commented on how the Agreement in this case should be performed. The Arbitral Tribunal will not comment on the award made by the arbitral tribunal in the earlier case and the judgment made by the Hong Kong Court".

CACV197/2008

79. A month later, on 22 May 2009 the appeal from Reyes J's decision was dismissed by this court (Rogers VP, Le Pichon and Hartmann JJA) for reasons handed down on 11 June 2009.

80. At that hearing, Mr Chan Chi Hung SC leading counsel for EP and EP Holdings had repeated the argument that it was impossible to perform the Award and undertook to commence further arbitration to determine what alternative remedies (including damages) the plaintiff should have and for directions as to how the Award should be complied with.

81. In paras. 20 and 24 of the Reasons for Judgment, Le Pichon JA noted that EP and EP Holdings had not sought directions in the 2nd arbitration as to how the parties were to perform the Agreement. Her ladyship further held that so far as the shares in HK Legend were concerned, the impossibility argument was misguided. One share in HK Legend remained vested in EP Holdings. Nor was there any insuperable impediment to the transfer to the plaintiff of the shares registered in the name of EP Group. And in any event, "the impossibility (if any) is self-inflicted" (para. 31).

Application to arbitral tribunal for directions in the 1st arbitration

82.1. The following month on 19 June 2009, EP and EP Holdings applied to the arbitral tribunal in the 1st arbitration seeking:

- a "further ruling" on what they called "the 'alternative approaches' part", quoting segments of the opinion of the tribunal in Section IV(IV)(1) (see para. 59(4) above),
- directions on how it should be performed, and/or
- what relief (including damages or other appropriate reliefs) the plaintiff should have for meeting the purpose of the Agreement.

82.2. It would appear that the ground advanced for this application was that "the objective circumstances of this case have changed significantly, the two contracting parties are unable to continue to perform the Agreement according to the original provisions, to date there is still no agreement on any new alternative approach".

83. On 27 July 2009 however, the arbitral tribunal replied that it did not accept the application because:

- the Award was final,
- there was no mistake in relation to writing, typing or calculation which needed to be corrected, and
- the arbitral tribunal had not left out any matter which would need to be further determined according to the PRC Arbitration Law and the Arbitration Rules of the Arbitration Commission.

HCA961/2008 now HCCL13/2011

84.1. I have referred earlier to HCA961/2008 commenced by the plaintiff in May 2008 after EP and EP Holdings disclosed the restructure.

84.2. At that time, the defendants to this action, in addition to EP and EP Holdings (the parties to the arbitration), were EP Group, HK Legend and Xiamen Legend.

Applications by defendants for stay for arbitration and by plaintiff for amendment of claim

85.1. In 2010 various applications were made:

- by the defendants for strike-out, as well as an application by EP and EP Holdings to stay this action for arbitration;
- by the plaintiff, including one to amend the statement of claim and to add 5 individuals as the 6th to 11th defendants.

85.2. On 16 March 2010 Fok J (now Fok PJ) made various orders. I shall deal with the amendment first.

Amended Statement of Claim

86.1. Leave was given to amend the statement of claim. It is convenient to summarize here the parts of the plaintiff's claim (including the amendments) relevant to this appeal.

Under Section B (the Agreement)

- The plaintiff "insisted ... on the specific performance of the Agreement and was at all material times (and is still) ready willing and able to do so" (para. 10A).
- However it should be noted that "specific performance" is not sought in the relief.

Under Section C (Constructive Trust)

- EP and EP Holdings held their shares in HK Legend on constructive trust for the plaintiff pending their transfer pursuant to the Agreement, although EP and EP Holdings retained a lien on the shares for the price (para. 11).
- EP and EP Holdings had a fiduciary duty not to use their voting power as shareholders of HK Legend in such a way as to be contrary to the plaintiff's interests (para. 12).
- EP Group was aware of the above because it was an associate company of EP and EP Holdings, all 3 companies were under common management, and all were under Mr Tan's control (para. 19). Hence, EP Group holds 9,999 shares in HK Legend as constructive trustee for the plaintiff (para. 20).
- Similarly EP Holdings holds its 1 share in HK Legend as constructive trustee for the plaintiff (para. 23).

Under Section E (Enforcement of the Arbitration Award)

- The plaintiff pleaded the submission to arbitration and the Award (para. 25A-C).

- The plaintiff also pleaded the Statutory Process and said "in the premises, [EP and EP Holdings] are debarred from denying the plaintiff's right to call for the transfer" of all the shares in HK Legend upon fulfillment of the plaintiff's obligations under the Agreement (para. 26A-E).

Under Section G (Economic Torts)

- The plaintiff pleaded that all defendants conspired to use unlawful means to cause damage to the plaintiff (para.32). The overt acts of each defendant relate to either (a) renunciation of the Agreement or (b) the restructure, or both (para. 33).

- It is necessary to set out in detail the overt acts pleaded in respect of the personal respondents to this appeal.

- In respect of Mr Tan, his overt acts are said to be:

  (i) as the "mastermind of the Eton Group, procuring, causing or permitting the other defendants" to carry out their respective overt acts;

  (ii) as a director of HK Legend (until 17 March 2008), procuring, causing or permitting that company to carry out the overt acts pleaded against it (both renunciation and restructure).

- In respect of Mr Cheung, his overt acts are said to be:

  (i) approving the restructure on 25 August 2005;

  (ii) (presumably as a director of HK Legend), resolving to allot 9,998 shares of that company to EP Group;

  (iii) (again presumably as a director of HK Legend), resolving to register the transfer of EP's share in that company to EP Group;

  (iv) as a director of HK Legend and Xiamen Legend, procuring, causing or permitting these companies to carry out their respective overt acts (which in the case of HK Legend, related to both renunciation and restructure, and in the case of Xiamen Legend, related to renunciation only).

- Further, (of the respondents in this appeal), EP Group, HK Legend, Xiamen Legend, Mr Tan and Mr Cheung were also said to have induced EP and EP Holdings to breach their Agreement with the plaintiff (para. 34).

86.2. As far as the relief is concerned, as noted previously, there is no claim for "specific performance" of the Agreement. The plaintiff sought:

(1-3) declarations that EP Group holds 9,999 shares, and EP Holdings holds 1 share, in HK Legend on constructive trust for the plaintiff, and that the plaintiff would be entitled to the transfer of those shares on payment of RMB115m and HK$2;

(4-5) orders that upon payment by the plaintiff of the full consideration under the Agreement, EP Holdings and EP Group should transfer all the shares of HK Legend to it, and that HK Legend register such a transfer;

(6) an injunction to restrain the corporate defendants from dealing with the shares of HK Legend to the plaintiff's detriment;

(6A) "damages or equitable compensation".

87. The plaintiff has not challenged the assertion that EP and EPH are "good for the money", and that it was not financially necessary to complicate the proceedings by introducing the other causes of action against the other defendants. Be that as it may, it is the court's duty to adjudicate all material issues.

Stay for arbitration and appeals from that order

88. Coming back to the applications before Fok J, EP and EP Holdings succeeded in obtaining a stay of the action for arbitration.

89. However in CACV88/2010 and CACV89/2010, this court (Rogers VP, Le Pichon and Kwan JJA) allowed the plaintiff's appeal and set aside the judge's order. Kwan JA (with whom the other judges agreed) held (paras. 29-31):

(1) the nature of the claim in *HCA961/2008* against EP and EP Holdings was primarily an action on an arbitration award, as they were in breach of their implied promise to perform an

award. As such, this was within the enforcement jurisdiction of the court;

(2) it was immaterial that the plaintiff had obtained judgment in *HCCT54/2007* because "instead of seeking further relief in the registration proceedings, the plaintiff is at liberty to bring an action on the award against [EP and EP Holdings], combined with other claims against other entities and individuals".

90. EP and EP Holdings applied to the Court of Final Appeal for leave to appeal the Court of Appeal's judgment. It was refused by the Court of Final Appeal on 4 May 2011 in FAMV4/2011 and FAMV5/2011. In a brief Determination, Ma CJ held (paras. 4-5):

(1) the claims in HCA961/2008 did not fall within the arbitration clause. Rather, they were steps taken by the plaintiff by way of enforcement, the plaintiff seeking in the action to obtain the fruits of the Award in its favour;

(2) additionally, the arbitral tribunal had rejected the attempt by EP and EP Holdings to re-open the arbitration, and had treated the arbitration agreement as "spent and incapable of further performance".

91. HCA961/2008 (the Common Law action on the award) therefore proceeded against all the defendants, and was transferred to the Commercial List as HCCL13/2011.

Trial

92. After the CFA determination and about 3 months before the trial was due to start, the plaintiff re-amended its statement of claim to add two claims alternative to each other.

92.1. Paragraph 35(4) is a claim made on the basis that the plaintiff *obtains* an order enabling it to become the sole shareholder of HK Legend and "hence, the entire assets held directly or indirectly by [HK Legend]" (presumably meaning the proceeds of sale of the development by its subsidiary Xiamen Legend).

In this event it also claims interest which it would have made from such funds obtainable through HK Legend but for the delay in performance of the Agreement and the Award.

92.2. Para. 35(5) is a claim which is alternative to the claim in para. 35(4). It is made on the basis that the plaintiff does *not obtain* an order for it to become the sole shareholder of HK Legend.

In this event, it claims as loss and damage the difference between (1) the existing value of the shareholding in HK Legend (including the sale proceeds held by Xiamen Legend) and (2) the contract consideration of RMB120m.

93. This re-amendment was granted by Reyes J. On appeal by the defendants however, this court (Cheung CJHC and McWalters J, now McWalters JA) ordered that the claim in para. 35(5) should be "hived off" to a subsequent stage.

94. Accordingly the trial judge Deputy High Court Judge Stone described the hearing before him as one conducted on the basis of 'liability' only, with 'quantum' deferred to another day (para. 77).

Judgment of Dep HCJ Stone

95. On 14 June 2012, after a 22-day trial, the judge handed down judgment dismissing all the claims against all defendants. The judge's reasons are set out in his Judgment. I will not further lengthen this judgment with a summary of the reasons as they will be discussed where relevant in the later parts of this judgment.

Discussion

96. Essentially the judge dismissed all of the plaintiff's claims. I shall discuss each of the claims pursued by the plaintiff on appeal in the following order:

(1) Action on the award

(2) Inducing breach of contract

(3) Unlawful means conspiracy

(4) Constructive Trust.

Section (1) Common Law action on the award

Methods of enforcing an arbitral award

97. A successful party in an arbitration may find the losing party unwilling to honour the award. The successful party would then have to consider how to enforce the award. He can do so in either one of two

ways: (a) by way of a statutory process, or (b) by way of a Common Law action on the award. I shall discuss each in turn.

(A) *The Statutory Process*

98. As mentioned earlier, legislation has provided a "short cut" for enforcement of an arbitration award. Section 2GG of the AO (which is similar although not identical to s.26 Arbitration Act 1950 and s.66 Arbitration Act 1996) is a summary procedure which takes less time and costs than an ordinary action to enforce the award, but it is limited in application.

99. This process "dispenses with the full formalities of the action to enforce an award" (*National Ability SA v Tinna Oils & Chemicals Ltd* [2010] 1 Lloyds Rep 222). The successful party can simply apply ex parte (with a supporting affidavit) for leave of the court to enforce the arbitration award in the same way as if it were a judgment of the court. If he obtains leave, he may also enter a formal judgment, but this is not necessary. Although there is an obvious saving in time and costs for the successful party, the omission of procedures like pleadings and discovery may have other consequences which may not be beneficial to him. This will be discussed later in this Judgment when I deal with election of alternative remedies.

100. However after the successful party obtains leave (and judgement, if sought), the losing party in the arbitration may apply to set aside the leave if circumstances permit, and the statute further provides a number of defences. The Statutory Process is therefore limited in that it is confined to "reasonably clear" cases only. If the court does not

consider the case to be clear enough, it may give leave to the plaintiff to continue claiming under a Common Law action on the award.

101. Further, in the Statutory Process, the judgment entered must be "in terms of the award". So, where the awards were for "payment in India", in an application under the statutory process, an English court could not be asked to omit those words, even though they rendered the awards incapable of being enforced in England: *Dalmia Cement Ltd v National Bank of Pakistan* [1975] 1 QB 9 (*"Dalmia Cement"*).

102. The Statutory Process is also not appropriate where the successful party wishes to sue other parties who were not parties to the arbitration.

(B) *Common Law action on the award*

103. The alternatively method of enforcement is a Common Law action on the award.

Nature of the cause of action

104. As an alternative to using the Statutory Process, a successful party who obtains an award which the losing party does not honour may choose to sue in a Common Law action on the award. This is an *independent* cause of action, separate and distinct from the breach of the underlying "substantive" or "matrix" contract which led to the arbitration, even though the award "arises from" that substantive or matrix contract.

105. Mr Joseph QC, leading counsel for the plaintiff, made it clear on the first day of the appeal that the plaintiff is not seeking the transfer of shares under this cause of action. Its claim under para. 35(5)

of the Re-Amended Statement of Claim is only for damages (and the term "damages" in this Part of the Judgment should be understood to mean damages for breach of this independent cause of action).

- Inception of a new "contract" or implied promise:

106. In *SC Rolinay Sea Star Srl v Owners [etc] of The Bumbesti* [1999] 2 All ER (Comm) 187, Aikens J (as he then was) examined the nature of this cause of action. After considering various authorities, he held (at paras. 9-12) that a "contract" (separate from the substantive or matrix contract) is created when a *particular* dispute arises and the parties submit that dispute to arbitration.

107. It has been said that this is not a "real contract" in the strict sense of the word because it is only implied by law, and is a "quasi-contract" (see the discussion in *Kahn: "Arbitration in England and Germany"* JCL (1930) 228 which will be considered later in this judgment).

108. Be that as it may, what is crucial is the *implied mutual promise* that the award would be honoured. This promise is implied by law, and is not an implication of fact (see *Kahn*, *supra* p.244 and footnote 3).

> "(1) Under English law an English submission [to arbitration] imports, as we have seen, an implied promise to perform the award. This implied contract is one by implication of law, not by implication of fact, and is nothing else than law in the ordinary sense, but not a [real] contract".

109. To avoid confusion between this "implied contract" and the underlying "substantive" or "matrix" contract, I shall use the term "implied promise".

- Breach of the implied promise and loss:

110. If the losing party does not honour the award, there is a breach of the implied promise, which normally leads to loss suffered by the successful party. This creates a *new cause of action.*

Enforcement of rights under new cause of action:

111. It follows that the successful party is entitled to enforce his rights under this new cause of action. Remedies may include the recovery of damages for breach of the implied promise.

Discussion of new cause of action

112. As the new cause of action *replaces* the original cause of action under the substantive or matrix agreement (*The Bumbesti,* para. 9), a claim for damages under this new cause of action is not a claim for damages under that substantive or matrix agreement (ie the Agreement signed in 2003).

113. Nor should the new cause of action be confused with the award. The award is only *one of the ingredients* of the cause of action. Thus, time starts to run for this new cause of action from the time when the losing party *fails to honour* the award (*National Ability SA v Tinna Oils & Chemicals Ltd,* para. 4). Time does not run from the breach of the substantive or matrix agreement which gave rise to the arbitration, nor from the date of the award (*Agromet Motoimport v Maulden Engineering Co. (Beds) Ltd* [1985] 1 WLR 762, *Mustill and Boyd Commercial Arbitration 2nd ed* p.418).

114. The essential ingredients of this new cause of action are thus a valid submission of a dispute to arbitration, an award in favour of the plaintiff and the defendant's failure to honour it.

Flexibility of remedies in a Common Law action on the award

115. One of the benefits which a Common Law action provides to a plaintiff is that it gives him a range of remedies (including damages). As a matter of principle, I see no reason why this flexibility should not be enjoyed by a plaintiff in an action to enforce an arbitration award (whether or not the award was for damages).

116. This flexibility is illustrated in three cases that will be discussed below. In one, the court gave damages in England when the losing party in the arbitration failed to honour an award even though the award was for payment to be made in India. In two others, the court gave damages even though the awards were non-monetary.

Dalmia Cement v National Bank of Pakistan

117. In the first case, Dalmia Cement Ltd contracted to sell cement factories to a Pakistani company, with payment guaranteed by the National Bank of Pakistan. The guarantee contained an arbitration clause.

118. The Pakistani company defaulted, the Bank did not make payment, and Dalmia submitted the dispute to arbitration which took place in Switzerland.

119. The arbitrator made two awards in favour of Dalmia, one in 1971 and one in 1972. In each award, the Bank was ordered to pay

Dalmia a sum of money "in India". The arbitrator also made an award for interest: in the first award, he awarded interest at 6% pa from 1966, and in the second award, he awarded interest at 5% pa from 1968. Importantly, in both awards interest was awarded "until the date of actual payment". No time was fixed for payment.

120. Dalmia first sought to enforce the awards in England in 1973 using the statutory process *(Dalmia Cement)*. Kerr J (as he then was) refused the application as the awards were for payment "in India", holding that if Dalmia wished to benefit from the awards in England, they would have to bring an action for damages for failure to pay the sums awarded. There was no appeal.

121.1. Dalmia (by then renamed Dalmia Dairy Industries Ltd) then commenced a Common Law action on the awards in proceedings reported as *Dalmia Dairy Industries Ltd v National Bank of Pakistan* [1978] 2 Lloyds Rep 223 ("*Dalmia Dairy*"). The Bank again defended the claim. By this time, a number of years had passed during which commercial rates of interest had increased substantially. Dalmia added a claim for interest on the sums awarded at a rate *higher* than those awarded by the arbitrator.

121.2. In this Common Law action, Dalmia's claim was in debt, alternatively for damages. Dalmia's primary claim was for *damages,* because interest could then be payable under s.3(1) Law Reform (Miscellaneous Provisions) Act 1934 (which did not apply if the claim was in debt).

121.3. Kerr J held that "an action on an award can properly be pleaded as a claim for damages for failing to pay the sum awarded"

(p.274). Accordingly he gave Dalmia judgment in the sums of the arbitration awards.

121.4. As for Dalmia's claim for the higher rate of interest, the problem was that the arbitrator had awarded interest at those rates "until actual payment". Dalmia argued that there was an express or implied term that the awards would be honoured "without delay" (which it submitted was within 3 months of the awards), and so a higher interest rate should be ordered for the period thereafter. This argument was not accepted by Kerr J who held that as the awards were for payment of money at specified rates "until actual payment", the Bank could not be under two concurrent liabilities for different rates of interest at the same time. He said (p.275):

> "The position might be different if the plaintiffs had at some stage sought to treat the defendants' failure to honour the awards without delay as a wrongful repudiation of their obligations. In that event the damages could be at large and the contractual obligations would then disappear. ... But nothing of the kind happened here. No cause of action is founded on the defendants' failure to honour the awards without delay ...".

121.5. Accordingly Kerr J rejected the additional claim for a higher rate of interest. Put another way, the implied promise was to pay the sums awarded with interest at the rates specified by the arbitrator until actual payment (whenever that would be). Although that promise had been breached as nothing had been paid, the contractual measure of damages provides that the plaintiff should be put in the same position as if the contract had been performed, ie as if the promise had been honoured. If the promise had been honoured, Dalmia would be paid the sums with interest at the specified rate until actual payment. Therefore Dalmia should not be given anything more such as a higher rate of

interest, for it had not proved in the action that the Bank should have made payment at some particular point in time, that it had failed to do so and that Dalmia had treated that failure as a repudiatory breach of the promise.

122. When the Bank appealed, Dalmia cross-appealed in relation to the dismissal of its additional claim for higher interest.

123.1. The Court of Appeal assumed that the action was properly treated as a claim for damages, and upheld Kerr J's judgment ordering the Bank to pay Dalmia damages in the sums of the awards (p.302).

123.2. In relation to the interest issue, the court of appeal also upheld Kerr J's refusal of higher interest. It noted that Dalmia had acknowledged that (a) the arbitrator had jurisdiction to award interest as he did and (b) the Bank had not repudiated the awards (which included the interest at specified rates for the period until actual payment). The court rejected Dalmia's "express/implied term" argument that the awards of interest should be construed as if they included the words "provided the Bank paid promptly".

123.3. Further, the court held that as interest under the 1934 Act was discretionary, it would not in any event order higher interest as the parties had agreed to give jurisdiction to the arbitrator to decide the rates of interest "until actual payment". The court would not substitute its own decision for the arbitrator's decision on a matter within the arbitrator's jurisdiction as it would be altering the arbitrator's decision on a matter which the parties had left for him to decide, which the arbitrator had in fact decided (and which decision, the parties acknowledged, was extant).

124. It would be noted that Kerr J and the Court of Appeal had no concerns about their jurisdiction to make an order for damages to be paid in England even though the award was to pay sums "in India".

125. It would also be noted that the courts did not hold that the interest issue had arisen under the substantive or matrix contract of guarantee, or under the arbitration award, in which event the issue should have been submitted to the arbitrator for determination.

126. In my view, as will be discussed later, that was because the Common Law action on the award was an application of the law of remedies, and therefore was governed by the *lex fori* (in that case, the law of England).

127. I shall now come to two cases where *non*-monetary awards were enforced by an order for damages in a Common Law action on the award.

Selby v Whitbread & Co

128. In this case (reported at [1917] 1 KB 736), the plaintiffs and the defendants owned adjoining buildings in London which were dependent on each other for support. It is important to note that all common law rights of owners in that area had been repealed, and their rights and obligations had been replaced by the London Building Act 1894 (p.752).

129.1. The buildings were separated by a party wall. The defendants wanted to rebuild their building. The rebuilding works would affect the party wall and the defendants served a party wall notice

under the Act. Under s.91, a statutory tribunal of three surveyors was appointed to determine the dispute and their award "shall be conclusive".

129.2. As a result of the defendants' works, the plaintiffs' building was rendered unsafe.

130. The surveyors made an award ordering the defendants to erect a pier to the satisfaction of the surveyors to support the plaintiffs' building, as well as to undertake three other minor works. There was *no* award of damages.

131. The defendants refused to perform any of the works ordered in the award. The plaintiffs brought an action to enforce the award, and also made a claim for damages under their *original* common law rights for the withdrawal of support for their building.

132.1. The judge rejected the plaintiffs' claim for damages at common law for the withdrawal of support of their building because the Act had replaced the plaintiffs' original common law rights.

132.2. However he gave the plaintiffs damages for the defendants' failure to honour the surveyors' award. He held that a decree of specific performance could in some cases be appropriate to carry out terms of an award, but the circumstances of the case (including the fact that the pier would have to be erected on land which the defendants had dedicated to the London County Council) were such as to render a decree of specific performance undesirable. He then awarded a sum of damages to the plaintiffs, accepting that assessment was not easy but stating that difficulty of assessment should not deter the court.

133. It was argued by EP and EP Holdings that *Selby* was distinguishable because the surveyors had no power to award damages under the Act. Accordingly there would have been no point for the court to order that the plaintiff return to the surveyors to claim damages.

134.1. I am not sure the surveyors had no power to award damages at all, as there was damage to the wall or the structure of the plaintiffs' building.

134.2. In *Adams v Marylebone Borough Council* [1907] 2 KB 822, decided before *Selby*, there was a claim for compensation for alleged loss of trade suffered by a restaurant. The court of appeal discussed in detail whether compensation could be claimed under various provisions of the Act and at p844 Buckley LJ held that "the function of the statutory tribunal is to see whether the terms upon which the right to interfere with the wall given by the Act is to be exercised have been carried out or not, but those terms do not, in my opinion, include any *right of compensation for any injury which may have been done to the adjoining owner in respect of damage other than damage to the wall, or the structure or internal finishings and decorations of the adjoining premises*. It seems to me therefore that the arbitrators were right in excluding the claim for loss of business which was put forward by the appellant". (Emphasis added).

135. In *Selby* the plaintiffs' premises were weakened by the defendants' failure to erect the pier as per the surveyors' award, and damages were awarded on the basis that the value of the plaintiffs' premises had been lessened by the defendants' failure to honour the award by erecting the pier.

136. In any event, if the court in *Selby* was prepared to order damages when the surveyors had no jurisdiction to do so and when the Act had replaced the parties' Common Law rights and duties, that would demonstrate even more forcefully the principle that the court in a Common Law action on the award is not confined to the precise terms of award, but would grant an appropriate remedy in order to enforce the parties' rights under the independent cause of action.

137. *Selby v Whitbread* is an illustration that a non-monetary award could be enforced by the remedy of damages in a Common Law action on the award.

Birtley and District Co-op. Society v Windy Nook and District Industrial Co-op. Society (No.2)

138. In this case, the plaintiffs and the defendants were both co-operative societies and members of a union. A dispute arose in respect of their respective trading areas. Under the union rules, the dispute was subject to arbitration.

139. An award was made in favour of the plaintiffs declaring that they had the exclusive right to provide co-operative services in a specified trading area. There was *no* award for damages.

140. However before the final award was made, the defendants withdrew from the union, and refused to be bound by the award.

141. The plaintiffs then brought a Common Law action on the award for (1) a declaration that the defendants were bound by the award notwithstanding their withdrawal from the union, (2) an injunction

restraining the defendants from providing services in the area in question, and (3) damages and interest. The plaintiffs argued that as a successful party, they could apply to the court to have the award made an order of the court (ie under the statutory process) or to bring an action on the award, and they were entitled to the fruits of the award.

142. The defendants argued, amongst other things, that they were not bound by the award as they were no longer members of the trade union. It would appear from the judgment that leading counsel for the defendants (later the Lord Chancellor) did not dispute the range of remedies sought by plaintiffs, which included damages.

143. The judge held that the defendants were bound by the award notwithstanding their withdrawal from the union before the award, and gave the declaration and injunction. Significantly he also directed an inquiry as to damages.

144. About two years later, the House of Lords (Sc.) in *Bellshill and Mossend Co-operative Society Ltd v Dalziel Co-operative Society Ltd* [1960] AC 832 dealt with a similar case. It construed the union rules (the parties not having themselves agreed on a submission), and held that the rules contained no express words which suggested that a member of a union was to be restricted in its trading even after it has ceased to be a member. On the interpretation of the rules, it was unreasonable to suppose that a co-operative society intended to bind itself for all time whether or not it continued to be a member. For this reason, the judgment in *Birtley etc v Windy Nook* was disapproved. However there was no discussion of the remedies given in that case.

145. Despite this disapproval of *Birtley v Windy Nook,* the learned editors of *Mustill and Boyd* refer to it as authority that a court may give judgment for damages for failure to perform a (non-monetary) award (p.417).

EP & EPH's arguments against Plaintiff's claim to damages

146. In light of the principles discussed above, and the three cases which illustrated the flexibility of the common law in providing remedies in an action to enforce an arbitral award, I turn to discuss the arguments put forward by EP and EP Holdings to contest the plaintiff's claim to damages. As some of the arguments overlap, they may be grouped together as following:

(1) the plaintiff's claim for damages under para. 35(5) of the Re-Amended Statement of Claim has not been properly pleaded or proved in a number of respects;

(2) there is no jurisdiction to give such damages because the award was not for damages;

(3) in any event, the court should not grant a remedy which is within the arbitral regime and should stay the matter for arbitration;

(4) the claim for these damages is inconsistent with the judgment entered in HCCT54/2007.

(1)(a) Did the plaintiff need to plead and prove the implied promise to honour the award?

147. I have earlier summarized the essential ingredients of the cause of action as: a valid submission of a dispute to arbitration, an award in favour of the plaintiff and the defendants' failure to honour it.

148. In the Re-Amended Statement of Claim, the plaintiff had pleaded the submission to arbitration at paras. 25A-B, and the Award at para. 25C. These facts are not disputed. It would appear that there is no explicit pleading that EP and EP Holdings have not honoured the Award, but it is common ground that they have not done so.

149. EP and EP Holdings argued however that the plaintiff had not pleaded or proved the implied promise to honour the award. With respect I do not think it was necessary to do so. It is only necessary to plead fact, and the implied promise is not a fact. It is an implication of law.

150. I have referred earlier to the discussion by Kahn which analyzed the implied promise as an implication of law, not of fact. He also quoted Lindley LJ as follows (p.245):

> "Owing to the unfortunate terminology of our law ... the expression 'implied contract' has been used not only to denote a genuine contract established by inference, but also *an obligation which does not arise from any real contract, but which can be enforced as if it had a contractual origin*. Obligations of this class are called by the civilians obligations *quasi ex contractu*". (Emphasis added).

151. Further, in *Christopher Brown Ld v Genossenschaft Oesterreichischer Waldbesitzer etc* [1954] 1 QB 8, Devlin J (as he then was) listed five facts to be proved by the plaintiff in a Common Law

action on the award (the defendant being absent at the trial before him). The first three facts – 1st, the making of a contract which contains the submission to arbitration; 2nd, that the dispute arose within the terms of the submission; and 3rd, that the arbitrators were appointed in accordance with the arbitration clause – all relate to the validity of the submission. The fourth fact was the making of the award. And the fifth fact was that the award had not been honoured (in that case, it was an award to pay a sum of money).

152. There was no requirement to prove an implied promise to honour the award. And since it is not a fact that needs to be proved, it would not be necessary to plead it.

153. It would also be noted that the precedents in Atkin's Court Forms (both the UK and Hong Kong editions) for pleading a Common Law action on the award do not include a pleading of an implied promise to honour the award.

154. In any event, the trial judge was aware that the plaintiff was asserting an implied promise to honour the award. At para. 201, the judge referred to the "suggestions, albeit unpleaded as such, that the 1st and 2nd defendants are in breach of an implied agreement that it [they] would perform any arbitral award".

(1)(b) Did the plaintiff need to plead and prove an implied promise under PRC law?

155. This leads me to the argument by EP and EP Holdings that it was necessary to plead and prove an implied promise under PRC law.

156. With respect, I do not agree. Whilst the Agreement was of course governed by PRC law (save in relation to the transfer of the Hong Kong Legend shares), the plaintiff is not suing for breach of that substantive or matrix agreement. It is suing for breach of the independent cause of action which came into being when EP and EP Holdings breached the implied promise to honour the award. See the discussion of *The Bumbesti* and *Agromet* earlier in this judgment.

157. As the Common Law action is for *enforcement* of the implied promise, it is concerned with the law of remedies and is therefore governed by the law of procedure of the *lex fori*. Accordingly the law to be applied is Hong Kong law, not the governing law of the original substantive or matrix agreement. As summarized in *Kahn* (at p.239):

> "It seems that the agreement to refer is[,] in respect of questions relating to its validity, considered substantive law or *lex contractus*, whereas *the enforcement of an award deals with the law of remedy, and is, therefore, law of procedure*". (Emphasis added).

And at p.245:

> "I submit that this legal rule of an implied promise to perform an award is not, or at any rate not solely, an institute of the English substantive law, but one which is equally adjective law or law of procedure. In support of this view, I quote Odgers on the Common Law, 3rd ed., vol. ii, p.305: 'The law, therefore, in order to give the plaintiff a *remedy*, assimilates to contracts certain cases in which there clearly is no contractual relation whatever between the parties. These we may best describe as 'quasi-contracts', for that term in itself denotes that they are not contracts at all, but that the law will treat them as if they were. The remedy is analogous to, and in the form of, an action on a contract, because otherwise no remedy would exist'. ...
>
> *Therefore the right inference to be drawn is that in the case of a foreign judgment the implied quasi-contract is part of the law of remedies, and in the case of an implied contract to perform an award, the conclusion cannot be different for the above general reasons. The result is that an English court cannot in*

> *an action to enforce a foreign award, inquire whether a foreign submission has, by the foreign law, the effect of giving rise to an action on the award, but the English court has to apply its own law of procedure*". (Emphasis added).

158. Along the same lines, the learned editors of *Dicey, Morris and Collins on The Conflict of Laws* 15th ed. (at p.876, paras. 16-105 to 16-107) state that when determining the nature of a claim to *enforce* a foreign arbitral award, an English court would consider the matter exclusively as a matter of English law as the *lex fori*.

159. Consequently, I do not agree with the proposition advanced on behalf of EP and EP Holdings that it was necessary to plead and prove that under PRC law, there was such an implied promise to honour the award.

160. In any event, even if it had been necessary to do so, it is clear from Article 49 of the CIETAC rules that there could not have been any serious dispute by EP and EP Holdings that they had an obligation to honour the award.

(1)(c) Did Plaintiff need to plead what EP and EP Holdings were required to do?

161. Finally in this area, it was argued by EP and EP Holdings that the plaintiff did not plead specifically what it was that they were required to do.

162. As discussed above, the matters that need to be pleaded in a Common Law action on the award are: a valid submission to arbitration, an award in favour of the plaintiff and the defendant's failure to honour the award. In my view, it was not necessary for the plaintiff to

particularise what EP and EP Holdings had to do to honour the Award. It was common ground that they have throughout refused to transfer Hong Kong Legend to the plaintiff. It is not as if EP and EP Holdings had done an act in purported performance of the award, and a dispute has arisen as to whether that act was sufficient performance.

(2) Does the court have jurisdiction to give damages when the Award was not for damages?

163. EP and EP Holdings argued that the court has no jurisdiction to enforce the Award by giving damages because the Award itself did not order damages, but only ordered them to continue performance of the substantive or matrix contract. The learned trial judge agreed with this argument.

164. I will deal later with the argument arising from the entering of judgment in HCCT54/2007. For the moment, I will ignore that event in the following discussion of the "no-jurisdiction" argument.

165. In my view, a court enforcing an award by way of a Common Law action on the award is not hamstrung by the precise terms of the award in the same way that it would be if enforcing it by way of the Statutory Process. As discussed earlier, there is an implied promise to honour the award, which promise is akin to a "contract" or is a "quasi-contract". When the award is not honoured, there is a breach of that promise. As with all breaches of promise, an innocent party is entitled to the full range of remedies (as long as they are consistent, which issue will be discussed later).

166. Of course some remedies may be easier to obtain than others. For instance, it is well established that an order for a mandatory injunction is not normally available from the court because of the difficulty of supervision. The innocent party would have to consider what is the best remedy he can get. But when there is a breach of promise, I can see no reason why an innocent party cannot obtain damages for that breach just because, *had* the promise been honoured, the other party would have done an act rather than have paid a sum of money. The fact remains that the act has not been done. The promise has not been honoured and there is no reason why he should be excluded from the remedy of damages for the breach of promise.

167. As discussed earlier, in the context of an arbitral award, the flexibility of remedies available in a Common Law action provides an advantage over the Statutory Process. I have referred earlier to *Dalmia Dairy* where the action for damages to be paid in England succeeded even though the award was for payment in India. I have also referred to *Selby v Whitbread* and *Birtley v Windy Nook* where damages were given by the court in a Common Law action even though the awards were non-monetary. There were no concerns from the courts that they had no jurisdiction to give damages in enforcing awards which were *not* for damages.

168. In this respect, EP and EP Holdings sought to support the "no-jurisdiction" argument by reference to a series of cases where the court considered its power to order interest when arbitrators had already ordered (or refused) interest.

169. Mr Gee QC first relied on *Dalmia Dairy* and the refusal of the court there to order interest under s.3(1) Law Reform (Miscellaneous Provisions) Act 1934 , but as I explained earlier, that was because the award was for a specific rate of interest "until actual payment" and both parties accepted that the award had not been repudiated (Kerr J having noted that it might have been different if Dalmia had proved that the award had been repudiated by the Bank when it failed to pay by a particular time).

170. Mr Gee then relied on a series of three cases where "post-award" interest had not been awarded by arbitrators. They are, in chronological order:

- *Walker v Rome* [1999] 2 All ER (Comm) 961;
- *Gater Assets Ltd v Nak Naftogaz (No.2)* [2008] EWHC 1108 (Comm), [2009] 1 All ER (Comm) 667; and
- *La Société pour la Recherche, la Production, le Transport, la Transformation et la Commercialisation des Hydrocarbures SPA ("Sonatrach") v Statoil Natural Gas LLC ("Statoil")* [2014] EWHC 875.

171. The first point to note is that all these cases dealt with enforcement under the Statutory Process, in particular, different provisions regarding interest under the relevant statutory regime.

172. Under the original *1950* Arbitration Act, s.20 added "post-award" interest automatically once an award was made. However this section was *not* retained in the *1996* Act. Instead, s.49(4) of the

1996 Act left it *solely* to the arbitrators to decide whether there should be any "post-award" interest at all, and if so, at what rate.

173.1. In *Walker*, the arbitrators did not award any "post-award" interest. The successful party, applying for leave to enforce the award as a judgment under s.66 of the 1996 Act, also sought *post-award pre-judgment* interest under s.35A Supreme Court Act, 1981. Aikens J held (p.121):

> "*Under the 1996 Act if an award is entered as a judgment then it has to be entered 'in terms of the award': see s.66(2)*. Thus if an award has been made for a certain sum of money (with or without 'pre-award' interest) and there is no award of 'post-award' interest then *the judgment must be entered in those terms*. In my view any attempt, *when judgment is entered under s.66*, to add s.35A interest to an award which had not granted 'post-award' interest would amount to an alteration by the court of the arbitrators' award. *Section 1(c) of the 1996 Act makes it a 'principle' that the Court should not intervene in matters that are covered by Part 1 of the 1996 Act. That Part includes s.49(4)* and also s.66. Therefore I must conclude that Parliament intended that once arbitrators had decided on whether 'post-award' interest should be granted, that was the end of the matter". (Emphasis added).

173.2. The italicized passages show clearly that the rationale for Aikens J holding that the court had no power to order post-award pre-judgment interest was the restriction imposed by the legislation, in particular the effect of s.49(4) of the 1996 Act. With respect, I do not see how that assists EP and EP Holdings in our case which is *not* an action for enforcement of the award under the Statutory Process.

174.1. In *Gater*, a New York Convention award was made in 2000. The arbitrators had not awarded any post-award interest. In 2006 the successful party (or to be precise, its assignee) applied under s.101(2) of

the 1996 Act for enforcement of the award in England. On 23 May 2006 Colman J entered judgment in terms of the award.

174.2. In subsequent execution proceedings, a dispute arose as to whether the successful party was entitled to *post-judgment* interest under the Judgments Act 1838. The losing party argued that that Act was not applicable and that, as in *Walker*, no post-award interest was payable because no such award had been made by the arbitrators.

174.3. Beatson J noted that s.49 of the 1996 Act only applied to domestic arbitrations and there was no equivalent to s.49 for New York Convention awards. He gave judgment with interest under the Judgments Act on the judgment debt, not from the date of the award in 2000, but from the date when judgment was entered in 2006 (paras. 21-27).

174.4. Again, that case was concerned entirely with the relevant statutory regime and I see nothing that assists EP and EP Holdings in our case.

175.1. Finally, EP and EP Holdings referred to the *Sonatrach* case. The successful party Statoil had obtained leave to enforce an award from Cooke J under s.66 of the 1996 Act. Cooke J gave interest under the Judgments Act on outstanding amounts from the date of his Order. Sonatrach (apart from applying to set aside the Order under s.68 of the Act) challenged the order for interest.

175.2. Flaux J examined the judgments in *Walker* and *Gater* as discussed above, and dismissed Sonatrach's challenge to the order for interest under the Judgments Act. He explained that once judgment had

been entered under the Statutory Process, the award merged into a judgment debt and as such, post-judgment interest was payable under the Judgments Act (para. 55).

176. It is clear that all that these cases show is that where no "post-award" interest had been awarded by an arbitrator, an English court enforcing the award under the Arbitration Act 1996 could not order "post-award" interest by reason of the effect of s.49(4) of the 1996 Act, but it *could* order interest under the Judgments Act *after judgment* was entered. I do not see how they assist EP and EP Holdings, as our case is not concerned with enforcement via the Statutory Process at all, nor are we concerned with the provisions in respect of interest under the different statutory regimes. As mentioned, I will deal with the entry of judgment in HCCT54/2007 later in this Part of the Judgment.

177. In conclusion, I see no jurisdictional obstacles in the plaintiff's claim in a Common Law action for damages for breach of the implied promise just because the promise was to do an act and was not to pay damages.

(3) In any event, should the court grant a remedy which is within the arbitral regime or should it stay the matter for arbitration?

178. Although the argument under this head elided at times with the "no-jurisdiction" argument, it is clear that there is a separate argument by EP and EP Holdings that the plaintiff should seek damages from the arbitral tribunal and not from the court, that this action is seeking to circumvent the agreed arbitral scheme and accordingly the court should stay this action in favour of arbitration. There is a respondent's notice to this effect.

179. For the plaintiff, Mr Joseph QC says these arguments are no longer open to EP and EP Holdings on the ground of issue estoppel, relying on the decision of this court overturning Fok J's order for a stay of the action for arbitration, and the decision of the Court of Final Appeal refusing leave to appeal from the court of appeal.

180. For EP and EP Holdings, Mr Gee argued that issue estoppel did not apply. He pointed out that the claim for substantive loss and damage in para. 35(5) only came in via the green re-amendments, which were filed subsequent to those decisions, and he says it was only then that all the ingredients making up the present cause of action would have become apparent. However I note from Kwan JA's reference to *Birtley v Windy Nook* in her judgment that the court was well aware that the plaintiff was seeking substantive damages for the failure of EP and EP Holdings to honour a non-monetary award.

181. Be that as it may, I do not wish to lengthen this judgment further with an analysis of whether issue estoppel applies, save to record that the trial judge's view that issue estoppel did not apply because those decisions were interlocutory was not supported by Mr Gee.

182. But even if we were to assume (in favour of EP and EP Holdings) that issue estoppel does not apply, I take the view that in any event it would not be appropriate to stay the action to the arbitral tribunal for arbitration.

183. As discussed earlier, an independent cause of action for breach of the promise to honour the award has replaced the original cause of action on the original substantive or matrix Agreement. The claim for damages is for breach of the implied promise, not for damages for

breach of the Agreement. Statements in some cases (eg dealing with service out of the jurisdiction: *Bremer Oestransport GmbH v Drewry* [1933] 1 KB 753, or whether an award attracts contractual interest: *FJ Bloemen Pty Ltd v Council of the City of Gold Coast* [1973] 1 AC 115) saying that an award has "arisen" from the agreement containing the arbitration clause should be understood in their context. As for EP and EP Holdings' reliance on the statement in *National Ability* that "all measures of enforcement essentially rest upon the contract" (para.14), it is clear that the "contract" referred to is the "implied contract" or implied promise, and *not* the substantive or matrix Agreement.

184. An action on the award is for enforcement, a matter with which an arbitral tribunal is not concerned. As the Court of Final Appeal pointed out, the arbitral tribunal had in fact been asked for a "further ruling" on (amongst other things) what relief (including damages) the plaintiff should have. On 27 July 2009 the arbitral tribunal replied that it did not accept the application because in effect it was *functus*. It would be noted that this reply was *not* predicated on the fact that the application had been made by EP and EP Holdings and not by the plaintiff. As noted by the tribunal in the 2nd arbitration, enforcement was in the hands of the Hong Kong court. This response from the tribunal answers the "scope of arbitration" argument from EP and EP Holdings (see *Mantovani v Carapelli* [1980] 1 Ll. Rep 375 where the dispute was whether a party could apply for security before the final award; *CMA CGM SA v Hyundai Mipo Dockyard Co Ltd* [2008] EWHC 687 where the dispute was whether a company which had become a party to an agreement after novation was required to discontinue previous proceedings in favour of arbitration; and *Fiona Trust & Holding Corp v Privalov* [2008] 1 Ll. Rep 254 (where the dispute was whether alleged

bribery was a ground for invalidating the substantive or matrix agreement).

185.1. In respect of the tribunal's *functus* response, Mr Gee referred us to *Cukurova Holding AS v Sonera Holding BV* [2014] UKPC 15. In that case Cukurova had agreed to sell certain shares to Sonera but subsequently reneged. Sonera commenced arbitration proceedings.

185.2. In the 1st Partial Award in 2007, the arbitral tribunal made an award declaring that the agreement was binding and that Cukurova was obliged to bring about a closing under the final sale and purchase agreement.

185.3. However, closing did not occur. Sonera sought further relief from the arbitral tribunal, including (1) an award ordering Cukurova to deliver the shares against payment of the purchase price and (2) a determination of the value of the shares. It would be noted that Sonera had expressly reserved its claim for damages (para. 17).

185.4. In the 2nd Partial Award, the arbitral tribunal made an award (1) ordering Cukurova to deliver the shares and (2) determining the value of the shares.

185.5. Four months later however, Sonera informed the arbitral tribunal that it was waiving its claim for specific performance for delivery of the shares and instead would be pursuing a claim for damages against Cukurova for non-delivery of the shares.

185.6. Subsequently the arbitral tribunal issued its Final Award awarding Sonera substantial damages. This was upheld by the Privy Council.

185.7. Mr Gee's submission was that it was not suggested by anyone in that case that the tribunal was *functus* or that the damages claim was a matter for the court.

186. With respect, it is clear from the events set out above that Sonera had been pursuing parallel claims for two different awards (one being delivery of the shares and the other being damages) within the arbitration proceedings. As noted earlier, it had reserved its claim for damages and no doubt with that claim in mind, had asked the arbitral tribunal for a valuation of the shares. There was, on the facts of that case, no question of *functus* and the application to the court was for enforcement of the arbitral tribunal's Final Award of damages. I do not see how that case, given its course of events, impacts on ours.

(4) Is the claim for damages inconsistent with the judgment entered in HCCT54/2007?

187. As mentioned earlier, on 21 September 2007 the plaintiff made an ex parte application under the Statutory Process. On 31 October 2007 the court gave leave to enforce the award. More significantly, A. Cheung J also entered formal judgment in terms of the award ie for "continued performance" of the Agreement.

188. Under the Agreement, the plaintiff's performance obligations were to develop the No.22 Land and then to pay the consideration for the transfer of Hong Kong Legend shares. EP and EP

Holdings' performance obligations were through their control of Hong Kong Legend and Xiamen Legend to participate in the development, and then eventually transfer the Hong Kong Legend shares to the plaintiff.

189. However as events in this case transpired, by the time judgment was entered in October 2007, the development of the No.22 Land had taken place. Some or all of the original obligations of the parties under the Agreement may or may not be capable of performance.

190. The issue here is whether the plaintiff is entitled to claim damages in this Common Law action on the award when it has already entered judgment under the Statutory Process.

191.1. At the trial, it was apparently argued by the then leading counsel for the plaintiff that the Common Law action on the award was a consequence of the Statutory Process for which judgment had been entered and that this action was for "making that judgment efficacious" (para.159 Judgment). The argument was that the case of *West Tankers Inc v Allianz SpA and another* [2012] EWCA Civ 27 showed that "you can follow a registration action, a standard registration action, with an action on the award, because it is an action on the award you can in fact do things with the specific performance element of the arbitral tribunal decision which you couldn't do under a New York Convention situation" (para. 132 Judgment).

191.2. In that case, the award was that West Tankers were not liable in respect of a collision; in other words, the award took the form of a negative declaration. The issue before the English courts was whether *in an application under the Statutory Process*, the courts had power to make such a declaration as a means of "enforcing" the award. It was

held that "enforcement" was not restricted to one or more of the "normal forms of execution of a judgment" provided under the rules of court. It included other means of giving judicial force to an award on the same footing as a judgment. That included making a declaration of no liability.

191.3. It can thus be seen that *West Tankers* was a case entirely on the scope of the Statutory Process. There was no action on the award, and I do not see how that case supports the proposition that a judgment entered under the Statutory Process for one party to do an act can be "followed" or "made efficacious" by a Common Law action on the award in effect for damages for loss of bargain when that act has not been done.

192. It is established that the Statutory Process is an *alternative* form of proceeding to an action on the award (*National Ability*, para. 9). There is authority for the proposition that if a successful party in an arbitration has obtained an order for leave to enforce an award, he can still bring an action upon the award (*The China Steam Navigation Company (Ltd) v Van Laun* (1905) 22 TLR 26, but no judgment had been entered in that case under the Statutory Process.

193. In my view, the judgment entered in the Statutory Process cannot co-exist with a judgment for the damages which the plaintiff is seeking in these proceedings. EP and EP Holdings cannot be under two concurrent inconsistent liabilities:

- one (under the judgment in the Statutory Process) to perform the Agreement which the plaintiff says is reduced now to the transfer of Hong Kong Legend shares, and

- the other (sought as judgment in the Common Law action on the award) to pay damages for *non-transfer*.

194. In my view, the plaintiff has to elect between these two inconsistent remedies. The question then is this: whether, by asking the court to enter judgment under the Statutory Process, it has already elected the remedy of "continued performance" of transfer of shares, and so the court has no jurisdiction now to entertain these proceedings for damages.

195. In this respect, it is important to note the following:

(1) although the "restructure" occurred between November 2005 and March 2006 (the allotment being done in November 2005), EP and EP Holdings did not disclose it to the plaintiff;

(2) on the contrary, they positively asserted (in submissions to the arbitral tribunal as late as May 2006) that they "are the parent companies of Hong Kong Legend" - when on their case now, they held only 0.01% of the legal interest and none of the beneficial interest;

(3) when the plaintiff applied for leave to enter judgment under the Statutory Process, they did not have the benefit of pleadings or discovery which would (or should) have revealed the "restructure";

(4) accordingly, when the plaintiff applied for judgment to be entered, it was in ignorance of material facts;

(5) this ignorance of material facts continued until 2 January 2008 when for the first time, EP and EP Holdings disclosed that they had no shares of Hong Kong Legend to transfer;

(6) even now, nothing is known about Hong Kong Legend since it came under the control of EP Group.

196. In *Island Records Ltd v Tring International PLC* [1996] 1 WLR 1256, Lightman J considered the election of remedies in a summary judgment application where no discovery had taken place (similarly in an application to enter judgment under the Statutory Process). He held that a party ought not to be required to elect between remedies unless and until he was able to make an informed choice, provided that the election was not unreasonably delayed to the prejudice of the defendant. Accordingly he granted a declaration that the plaintiff was entitled at his election to judgment for either an assessment of damages or an account of profits, and gave directions requiring the defendant to provide the plaintiff with a schedule with details of the respective figures.

197. In our case the plaintiff, had it been aware of the "restructure", might not have chosen to enter judgment in terms of the award. But it was not put in a position of informed choice because of the non-disclosure and false information on the part of EP and EP Holdings mentioned above.

198. In my view, the plaintiff had not made an election on the basis of an informed choice. Consequently its act of entering judgment in terms of the award (for "continued performance", now in effect the transfer of Hong Kong Legend shares upon payment) is not irrevocable, because it was done in absence of knowledge of the relevant facts.

There is no evidence of any prejudice suffered by EP and EP Holdings as a result of the "election".

199. I can see no ground for the argument of EP and EP Holdings that the plaintiff had made an irrevocable election. As Lord Wilberforce said in *Johnson v Agnew (HL(E))* [1980] AC 367, 398, in a different, simpler context:

> "*Election, though the subject of much learning and refinement, is in the end a doctrine based on simple considerations of common sense and equity*. It is easy to see that a party who has chosen to put an end to a contract by accepting the other party's repudiation cannot afterwards seek specific performance. This is simply because the contract has gone – what is dead is dead. But it is no more difficult to agree that a party, who has chosen to seek specific performance, may quite well thereafter, if specific performance fails to be realised, say, 'Very well, then, the contract should be regarded as terminated'. It is quite consistent with a decision provisionally to keep alive, to say, 'Well, this is no use - let us now end the contract's life'. A vendor who seeks (and gets) specific performance is merely electing for a course which may or may not lead to implementation of the contract - *what he elects for is not eternal and unconditional affirmation*, but a continuance of the contract under control of the court which control involves the power, in certain events, to terminate it. If he makes an election at all, he does so when he decides not to proceed under the order for specific performance, but to ask the court to terminate the contract ... ".

200. Mr Joseph accepts that there may come a point in time when the plaintiff, in possession of the full material facts, may be required to elect between either obtaining a transfer of Hong Kong Legend or obtaining damages under para. 35(5) of the Re-Amended Statement of Claim, but he says the time has not yet come. In this regard, the order the plaintiff sought in the Re-Re Amended Notice of Appeal is:

> "(1) for a declaration that the Plaintiff is entitled to require [EP Holdings] to transfer to it the one share in [Hong Kong Legend] registered in the name of [EP Holdings] and that the Plaintiff is entitled to require [EP Group] to

transfer to it the 9,999 shares in [Hong Kong Legend]; and/or

(2) for damages for breach of paragraph 2 of the order of the CIETAC Arbitrators ("the Arbitrators") dated 27 October 2006 ("the Award") for the continued performance of [EP] and [EP Holdings]'s 4 July 2003 contract with the Plaintiff ("the Agreement"), to be assessed against each of [EP] and [EP Holdings]".

201. For reasons discussed above, I take the view that the court does have jurisdiction to and should, on the facts set out above, give judgment in favour of the plaintiff in this Common Law action on the award. However the judgment entered in HCCT54/2007 under the Statutory Process cannot stand together with a judgment in this action for damages under para. 35(5).

202. The plaintiff is entitled to make an informed choice between (1) maintaining the judgment for "continued performance" in HCCT54/2007 and (2) obtaining in its place a judgment for damages in this action. Should it choose the second alternative, the judgment entered in HCCT54/2007 should be set aside and this appeal allowed in relation to this claim. Should however it choose the first alternative, it would then be necessary to consider how this appeal should be disposed of. I would direct the parties to consult together and if possible agree directions for the court's consideration and approval on the procedure to be adopted for the making of this election. If no agreed directions are lodged with the court within 42 days, the parties are to be at liberty to apply.

Section (2) Inducing breach of contract

203. I now turn to the plaintiff's claims in the tort of inducing breach of contract. These claims were dismissed by the judge and are

pursued on appeal against EP Group, HK Legend, Xiamen Legend, Mr Tan and Mr Cheung.

The elements of the tort

204.1 The law in relation to this particular type of tort, first established in *Lumley v Gye* (1853) 2 E&B 216, was clarified by the House of Lords in three appeals heard together, generally cited as *OBG Ltd and another v Allan and others* [2008] 1 AC 1, although the pertinent appeal in relation to inducing breach of contract was *Mainstream Properties Ltd v Young*.

204.2. The House of Lords abandoned the approach called the "unified theory" which treated the tort of "causing loss by unlawful means" as an extension of the tort of "inducing breach of contract". It held these were two separate torts, each with different elements.

204.3. The elements of the tort of "inducing breach of contract" can now be broken down as follows:

(1) there is a contract between A and B;

(2) there is a third party C who has knowledge of that contract;

(3) C does an act which induces or persuades A to breach the contract;

(4) when C did that act, he did it with intent to cause A to breach the contract, the breach of that contract being an end in itself, or a means to an end, and not merely the foreseeable consequence of C's act;

(5) as a result, B suffered pecuniary loss.

204.4. In *Mainstream,* there were contracts of employment between two employees ("A") and a company ("B"). The defendant ("C") knew of those contracts. "A" wished to divert a business opportunity of "B" to themselves and said to "C" that their contracts permitted them to take up that business opportunity. Honestly (though not reasonably) believing that to be the case, "C" provided "A" with finance to acquire and develop the business opportunity. "B" sued "C" for inducing "A" to breach their contracts of employment.

204.5. The House of Lords held that "C" was not liable. In relation to element (4) above, the following passages on the need for "B" to prove "C's" intent to cause a breach of contract (para. 8) are instructive.

204.6. In relation to the mental element of a person in the position of "C", Lord Hoffmann said (para. 39):

> "To be liable for inducing breach of contract, you must know that you are inducing a breach of contract. It is not enough that you know that you are procuring an act which, as a matter of law or construction of the contract, is a breach. *You must actually realize that it will have this effect. Nor does it matter that you ought reasonably to have done so*". (Emphasis added).

For "C" to be liable, what he must have intended (sometimes referred to as "targeted" or "aimed at") is the breach of contract. Lord Hoffmann said (para. 43):

> " *... if the breach of contract is neither an end in itself nor a means to an end, but merely a foreseeable consequence, then ... it cannot for this purpose be said to have been intended*". (Emphasis added).

204.7. Lord Nicholls encapsulated elements (3) and (4) above in the phrase "intentional causative participation in [the] breach [of contract]" (para. 191). After saying that "causative participation is not enough", he said (para. 192):

> "The additional, necessary factor is the defendant's intent. He is liable if he intended to persuade the contracting party to breach the contract".

Only then would "C" be liable to "B" for this tort of accessory liability, the primary liability to "B" being "A's" breach of contract.

205. *OBG* is now recognised as the leading authority in this area, clarifying what had previously become a confusing state of the law. In some of the cases decided before *OBG,* it is apparent that the courts were struggling to apply "the unified theory". Although Mr Joseph for the plaintiff referred us to the judgment in *Lictor Anstalt v MIR Steel UK Ltd and another* [2012] 1 All ER (Comm) 592 which seemed to suggest that passages in some of those previous cases had survived *OBG*, it should be noted that the judgment in *Lictor* was an interlocutory judgment. The 1st defendant in that case was seeking summary judgment (under the English rules) for dismissal of the claimant's claims against it; hence the judgment was only concerned with whether submissions based on those passages were arguable.

206. In this appeal, I will confine my discussion to the law as stated in *OBG.*

Elements in this case

207. There is no doubt that EP and EPH had a contract (the Agreement) with the plaintiff which they breached, ie element (1).

208. Although EP Group has in its Defence denied that it had knowledge of the Agreement (element 2), the evidence at trial was (in the judge's words) that "the Eton Group was ... [a] personal fiefdom in corporate form" (para. 308), and it would be artificial to suggest that alone out of the defendants now remaining, EP Group was kept in an isolated state of ignorance. The judge did not so find.

209. It can also be assumed at this stage that the plaintiff suffered pecuniary damage as a result of the breach (element 5).

210. The only issue remaining is whether the plaintiff has proved elements 3 and 4 ("intentional causative participation") against EP Group, HK Legend, Xiamen Legend, Mr Tan and/or Mr Cheung.

211. With respect to the draftsman, I found the allegations of these elements in the Re-Amended Statement of Claim (para. 34) to be rather opaque. Mr Joseph has helpfully divided the allegations into 2 categories: relating to the renunciation and to the restructure respectively.

Renunciation

Mr Tan

212. I shall consider the case against the personal defendants first. Mr Joseph has more or less acknowledged that, as far as they are concerned, the allegation of inducement of breach of contract relating to the renunciation has only been made against Mr Tan.

213. It is clear that in September 2003, Mr Tan had a meeting with Mr Cheung in Xiamen. It was not disputed at trial that after

acquainting himself with the Agreement, he "made the decision to terminate the Agreement, or to influence the other *[sic]* directors of the 1st and 2nd defendants so to terminate" (para. 322). The word "other" in that sentence is not understood as the plaintiff's dramatis personae (which was not challenged) did not show Mr Tan as being a director of EP or EP Holdings.

214. Mr Cheung's evidence (set out in para. 22.2 above) is clear that Mr Tan made a purely commercial decision that EP and EP Holdings should withdraw from the Agreement and gave instructions to Mr Cheung to implement that decision. Mr Tan did not attend court to be cross-examined. Mr Tong SC his leading counsel made it clear that his defence was based solely on legal arguments (para.322) which are discussed below.

- *Double Actionability rule satisfied?*

215. The first argument concerns actionability in Hong Kong. The principles have been set out conveniently in *The Conflict of Laws in Hong Kong*, 2nd ed para. 5.077 as follows:

> "1. The general rule is that, in order for tortious liability to be established, the matter must be actionable both under the *lex fori* and under the *lex loci delicti*. This is often referred to as the rule of double actionability.
>
> 2. The exception is that a particular issue between the parties (or the entirety of the claim) may in some circumstances be governed by the law of the country which, with respect to that issue (or the claim as a whole), has the most significant relationship with the occurrence and with the parties".

216. Dealing first with the general rule, since Mr Tan made the decision and gave instructions for the Agreement to be terminated when

he was in Xiamen, it would be necessary for the plaintiff suing in Hong Kong to show that Mr Tan's act was also actionable in the PRC. So the first issue here is: even if it is assumed that what Mr Tan did was a tort actionable in Hong Kong, was it also a civil wrong in the PRC?

217. At the trial, the plaintiff called as its expert witness Mr Fei Ning, and the defendants (save Mr Tan), Professor Cui Jian Yuan. The judge, who had the benefit of assessing both witnesses' performances in the witness box, was clearly unimpressed with Mr Fei and his approach to his role as expert (paras. 89-90, Judgment). It has not been suggested on appeal that the judge was wrong in doing so. The judge was therefore left with the evidence of Professor Cui, whose opinion he preferred and accepted was that at the relevant time there was in the PRC no civil wrong of inducing breach of contract.

218. The plaintiff's submission on appeal was that the judge erred in accepting Prof Cui's opinion in light of a judgment of the Yixing Municipal People's Court of Jiangsu Province in *Yixing Zhongxing Network Development Co Ltd v Lenovo (Beijing) Co Ltd* (1999) Yi Min Chu Zi No.1108 dated 6 April 2000. Prof Cui was cross-examined at length on this judgment. It is therefore necessary to consider the judgment in some detail.

219. Before discussing the *Lenovo* case, it is important to bear in mind that the issue is not whether, had the facts in *Lenovo* occurred in Hong Kong, a court in Hong Kong might or might not have found Lenovo liable for inducing breach of contract. The issue is whether the Yixing court's judgment is sufficiently clear to discredit Prof Cui's

opinion that the PRC did not have a law making that an actionable civil wrong.

- *The Lenovo case*

220. The plaintiff's case is that inducing breach of contract is actionable in the PRC by reason of Article 5 of the General Principles of Civil Law. This states:

> "The legitimate civil rights and interests of citizens and legal persons shall be protected by law; no organization or individual may infringe upon them".

221.1. Prof Cui's opinion was that it "is merely a clause of basic principle" (para.9.8). In his opinion, it is a "declaratory provision", "not a provision to be used in determination or in delivering a judgment" (F5/3108).

221.2. Certainly it is obvious on the face of Article 5 that it does not set out

- the civil rights or interests which are protected, or
- the acts which constitute an infringement of the right involved (ie the elements or ingredients of liability), or
- the legal consequences.

221.3. This may be contrasted e.g. with the articles in the contract law which set out the elements or ingredients of liability and the consequences.

222. Coming then to the facts of the *Lenovo* case, Lenovo the computer manufacturer had (in a case of mistaken identity) thought that

ZX Network had, in a tender to the local government, offered its computers below a set price. Lenovo notified its distributors not to supply computers to ZX Network. Accordingly one of its distributors refused to deliver some computers which it had contracted to supply to ZX Network, and ZX Network had to acquire replacement computers for about RMB28,000 more. When Lenovo realised its mistake, it issued an apology to ZX Network and withdrew the notice.

223. ZX Network sued Lenovo but not the distributor. In its Statement of Complaint, ZX Network demanded damages of RMB500,000 (later reduced to RMB 160,800) based on "the cause of action that Lenovo has infringed its legitimate rights and interests and business reputation" (D/1251). There was clearly asserted a cause of action for breaching ZX Network's "right of reputation", but it would appear from the judgment that ZX Network had not sued specifically for "injury to obligatory right 侵害債權". Nevertheless the court considered that it was included in the claim, even though the actual obligatory right was not identified (D/1248, 1258). According to Prof Cui, "obligatory rights" can arise out of contract or elsewhere, such as "improper benefit", "management without reason", and "infringement of rights" (F5/3097-8). Prof Cui's opinion was that the obligatory right in that case was a "contractual obligatory right" (F5/3114).

224.1. Lenovo put forward a number of defences, of which the 2nd and 3rd are material.

224.2. The 2nd defence was that ZX Network's loss under the contract was only actionable against the distributor, whose decision to terminate the contract was not subject to another party's will. "Lenovo

was not a contracting party and currently there exists no law providing for a third party to assume contractual liabilities" (D/1255).

224.3. Its 3rd defence was that the issue of the notice to its distributors was "a legitimate business activity, and that is not prohibited by law. … There is no contractual relationship between Lenovo and ZX Network, so Lenovo is not in breach of any contract" (D/1253, 1255).

225. There were two issues before the court:

(1) "whether the circulation of the notice by Lenovo constitutes infringement of the legitimate rights and interests of ZX Network" (the liability issue) (D/1252);

(2) "determination and indemnification" of ZX Network's losses (the damages issue) (D/1254).

226. In relation to (1) the liability issue, the court decided that Lenovo had "harmed ZX Network's right of reputation". However there was no express finding that it was liable in respect of any other cause of action, and if so, what that cause of action was.

227. The court then addressed Lenovo's 3rd defence that it was free to pursue its business activities not expressly prohibited by law. The court held it was not a valid defence because civil entities were obliged to undertake civil activities "in good faith". "The good faith principle requires that all parties involved in civil activities shall perform obligations and exercise rights in a good faith manner, and shall not abuse the rights to harm other parties' rights and interests" (D/1257). In circulating the notice, Lenovo "indicate[d] a clear intention to cause the

winning bidder unable to perform the contract [with the government]. Such activity with the purpose of harming other party's rights and interests is not the legitimate activity of discretionally choosing the transactional party, but a tort activity that abuses its right [,] to harm other party's legitimate rights and interests" (D/1257).

228. It would appear that the court invoked a "good faith principle" (the source of which was not identified) to reject Lenovo's defence, rather than to establish a cause of action, or to set out its ingredients. Article 5 was not referred to.

229. In relation to (2) the damages issue, the court decided that Lenovo's issue of the "supply injunction" to the distributor "has the legal features of 'injury to obligatory right' " (D/1258), but as noted earlier, no specific "obligatory right" was identified. (Prof Cui's opinion was that the obligatory right was a "contractual obligatory right" (F5/3114) and as such, the right would be protected by the law of contract (F5/3115), and the award of RMB28,908 was made under Article 97 of the Contract Law (F5/3083).

230. The Yixing court then referred to *Article 10 of Interpretation on Several Issues in Dealing with Right of Reputation Cases* (Supreme People's Court Legal Interpretation (1998) No.26) which provided that:

> "the scope and amount of damages for losses in ... business operation and sales etc *because of injured right of reputation* may be determined appropriately according to the scale of losses arising from ... contract termination etc that is as a matter of fact caused by the tort activity". (Emphasis added)

The Yixing court said (D/1258-9) that although the interpretation applied to reputation cases,

> "its application is not restricted to dealing with [damages] arising from the reputation right, but also its implications lies in the fact that it grants the aggrieved party the right to choose a *remedy*. When an aggrieved party may at the same time claim for liabilities in contract against the breaching party and claim for liabilities in tort against the tortfeasor, it may choose claim for liabilities in tort against the tortfeasor to protect its rights and interests. As such, with regard to its losses arising from the contract termination caused by Lenovo's notice, ZX Network may claim for indemnification against Lenovo. Lenovo's submission that losses arising from the contract termination can only be recovered from the breaching party is without legal basis and is not accepted by this Court". (Emphasis added)

The court then said:

> "To summarize, Lenovo has injured the reputation right of ZX Network, and ZX Network has the legal ground to bring an action to require that Lenovo cease tort activities, eliminate impact and extend an apology ... For the property and non-property losses incurred by ZX Network arising from the tort activities of Lenovo, Lenovo should be responsible for indemnification. According to Article 5, Article 101, Section 2 of Article 106 and Article 120 of Civil General Principle of the People's Republic of China, it is ordered as follows:
>
> (1) Lenovo ... should indemnify the property losses of [ZX Network] in the amount of RMB28,908.
>
> (2) Lenovo ... should pay damages for injured reputation of [ZX Network] in the amount of RMB20,000".

231. Professor Cui explained that the Yixing court could not have found Lenovo liable for a civil wrong of inducing breach of contract based on Article 5, as it was a merely declaratory provision, no ingredients of such a civil wrong having been identified in the article. That opinion is supported by the following:

(1) in the section of the judgment on the liability issue, the basis of liability was the "good faith principle", the source of which was not identified and which has not been relied upon by the plaintiff in this appeal in support of its case;

(2) in the same section, neither Article 5, nor its substance, was referred to at all;

(3) the reference to "injury to obligatory right" came in only in the damages section, not in the liability section;

(4) in the summary, the injury was identified as injury to the reputation right only and the property loss of RMB28,908 was awarded as a remedy alternative to a claim in contract against the distributor. It does not seem to have been awarded as damages for breach of a separate cause of action of inducing breach of contract.

232. Having considered the *Lenovo* judgment in detail and Prof Cui's evidence (both written and *viva voce*), I agree with the judge that the plaintiff has failed to prove, on the basis of that case, that contrary to Prof Cui's opinion, there was a civil wrong of inducing breach of contract in the PRC. The judge found the following (para. 278):

> " ... I was impressed with, and accept, Professor Cui's answers in cross-examination as to Articles 5, 101, 106 and 120 within the General Provisions of Civil Law as cited in the *Lenovo* judgment (which in fact was decided on the basis of Article 97 of the Contract Law), namely that Articles 5 and 10 are 'not complete' or 'liability creating' legal provisions and thus do not form the basis for making a claim to a legal right ...".

233. Article 97 was not in the materials before this court, but it had been referred to by Prof Cui (F5/3083). Be that as it may, the essential point is that Article 5 by itself did not establish a cause of action of inducing breach of contract.

234. Since Mr Tan's act was not actionable in the PRC, the plaintiff has failed to satisfy the "double actionability" rule. However that is not the end of the matter.

- *Exception to "double actionability" rule applicable?*

235. As for the exception set out in para. 215 above, the plaintiff would have to show that Hong Kong is the country which has the most significant relationship with the occurrence and with the parties.

236. The tort, committed by Mr Tan (a Philippine national) is inducing EP and EP Holdings (Hong Kong companies) to break a contract with the plaintiff (a PRC company). The decision was made, and instructions given, in the PRC. The implementation of that decision, eg the despatch of the notice to discontinue performance, the refusal to deliver possession of the land, and the return of the deposits, occurred in the PRC. As far as the contract itself was concerned, most of the connections were with the PRC as it was for the joint venture development of a piece of land in the PRC and the taking of profits by Xiamen Legend (as PRC Company). Although the transfer of shares of its Hong Kong parent was the transfer mechanism at the end of the joint venture, I do not think it can be said that Hong Kong is the country which has the most significant relationship with the occurrence and with the parties.

237. With the above conclusions, it is not necessary for me to consider other defences advanced by Mr Tan, but in deference to counsel's arguments, I shall briefly set out my views on the argument set out in *Said v Butt* [1920] 3 KB 497 should it be found on appeal that I am wrong on the "double-actionability and exception" rules.

- *Said v Butt defence applicable?*

238.1. The facts of that case (where the plaintiff was refused entrance to a theatre by the managing director) are well-known. The plaintiff sued the managing director for inducing the theatre to breach the contract comprised in the ticket purchased by the plaintiff (albeit through deception).

238.2. McCardie J held that as the plaintiff had acquired his ticket through deception, there was no contract on which he could have sued the theatre. However, in any event, he could not sue the managing director because only "a stranger, that is a third person, who stood wholly outside the area of the bargain made between the two contracting parties" could be sued for the tort of inducing breach of contract, and the managing director was not a stranger to the bargain, but the servant of one party to it.

238.3. McCardie J held (p.505):

> " ... the servant who causes a breach of his master's contract with a third person seems to stand in a wholly different position. He is not a stranger. He is the alter ego of his master. His acts are in law the acts of his employer. In such a case, it is the master himself, by his agent, breaking the contract he has made, and in my view an action against the agent under the *Lumley v Gye* principle must therefore fail, just as it would fail if brought against the master himself for wrongfully procuring a breach of his own contract".

(Of course for this defence to apply, the servant must be acting bona fide within the scope of his authority: see p.506, but nothing turns on that in our case).

239. It would be noted for the purposes of this tort, the identity of the contracting parties (and where the defendant stands in relation to them) is essential to the consideration whether a defendant would be liable for inducing breach of the contract.

240. Even though Mr Tan ultimately controlled the group of companies, he was not an employee or director of the contracting parties EP or EP Holdings. His act was not in law the act of the contracting parties (p.506). As he was "outside the area of the bargain made between the ... contracting parties" (p.505), he cannot rely on the defence in *Said v Butt.*

241. The argument based on *Tesco v Nattrass* does not assist Mr Tan. For the purpose of the criminal legislation in that case, it was necessary to consider who was an "alter ego" of the company as the legislation had provided a defence for a responsible company which had devised a reasonable system for its operations. The question was when can a person (eg a manager) be identified with the company, so that he acts *as* the company as its alter ego (rather than *for* the company as its employee) for the purpose of the *mens rea* consideration in the criminal law.

242. In the present case Mr Tan ultimately controls the group, but his acts are not those of EP and EP Holdings. He is not the natural person who those companies have appointed, under their corporate constitutions, to exercise their corporate powers. Similarly to Mr McPherson in *Thames Valley Housing Association Ltd & anr v Elegant (Guernsey) Ltd & ors* [2011] EWHC 1288, he had no formal role

in the corporate governance of the contracting parties and "pulled the strings from the shadows" (paras.107-8).

243. For the reasons briefly set out above, I do not think Mr Tan would have had a defence based on the *Said v Butt* line had the plaintiff satisfied the double-actionability rule or the exception.

The corporate defendants

244. Insofar as there was a case advanced against the corporate defendants based on the renunciation, there was no evidence that EP Group, HK Legend or Xiamen Legend had anything to do with EP and EP Holdings' renunciation. The evidence was clear that it was Mr Tan's commercial decision which the directors of EP and EP Holdings implemented.

Restructure

245. I then come to the restructure which the plaintiff submits was another act of inducing EP and EP Holdings to breach their Agreement with the plaintiff. Mr Joseph contended that even though EP and EP Holdings had sent a notice to discontinue performance, the plaintiff had never accepted that the Agreement was at an end. He submitted that the restructure which resulted in the transfer of HK Legend shares out of the plaintiff's reach were acts inconsistent with the Agreement and were therefore tortious acts of inducing breach of contract.

246. I accept that if a third party enters into a transaction with a contracting party which is inconsistent with the contract, that *may* amount

to an act of inducement but all the circumstances have to be considered before liability can be imposed. Was there "intentional causative participation"?

247. In my view, the evidence indicated no causation. It is clear that once Mr Tan had decided that EP and EP Holdings should not proceed with the Agreement followed by the implementation of that decision by the despatch of the notice to discontinue performance, that was the end of the deal as far as these contracting parties were concerned. As noted in para. 32 above, when the plaintiff required continued performance of the Agreement, EP and EP Holdings' reply was that their boards had made a unanimous decision and there was "no room for any changes".

248. Meanwhile, Xiamen Legend carried out the development of the land according to a different plan. It obtained approval for a new design in November 2004 and town planning permission in January 2005. This was well before the restructure took place. Although the inquiry made to lawyers in June 2005 about omitting one company from the requisite number of ten is interesting, in the absence of cross-examination of Mr Cheung on the point, it would be speculative to treat it as evidence of a "locus penitentiae" on the part of EP and EP Holdings.

249. All the evidence therefore points to EP and EP Holdings treating the Agreement as an entirely and permanently terminated contract from the time of the notice to discontinue performance, with the result that there was no "causative" element. Indeed the position was the other way around. Instead of EP Group, HK Legend and Xiamen Legend causing these contracting parties to breach the contract, it was

they who, following upon these contracting parties' declared irreversible renunciation, adopted the positions of the contracting parties and participated in the restructure. This may be contrasted with the situation in *British Motor Trade Association v Salvadori and others* [1949] 1 Ch 556 (even assuming the court there had applied the same elements of the tort as expounded in *OBG*) where the agents decided whether or not to sell the cars to the defendant, depending on the price offered (p.566).

250. Mr Joseph contended that the restructure prevented or made it more difficult for the plaintiff to pursue the shares in HK Legend. However prevention is not the same as inducement, as explained in *OBG* (para. 178):

> "In inducement cases the very act of joining with the contracting party and inducing him to break his contract is sufficient to found liability as an accessory. In prevention cases the defendant does not join with the contracting party in a wrong (breach of contract) committed by the latter. There is no question of accessory liability. In prevention cases the defendant acts independently of the contracting party. The defendant's liability is a 'stand-alone' liability. Consistently with this, tortious liability does not arise in prevention cases unless, as was the position in [*GWK Ltd v Dunlop Rubber Co Ltd* (1926) 42 TLR 376], the preventative means used were independently unlawful".

251. There was no evidence of independently unlawful means in the present case. As far as EP Group and HK Legend were concerned, they took part in an allotment and transfer of shares. Xiamen Legend had nothing to do with the restructure.

252. As far as the personal defendants were concerned, the judge accepted Mr Cheung's evidence that Mr Tan was not involved with the details of the restructure. In any event, the acts pleaded as Mr Tan's and Mr Cheung's tortious acts (passing resolutions for the allotment and

transfer of HK Legend shares) were done in their capacity as directors of HK Legend. The evidence did not show anything other than that they passed those resolutions carrying out their constitutional role in the governance of that company. As such, they would not attract individual liability as joint tortfeasors with the company (*MCA Records Inc v Charly Records Ltd* [2002] BCC 650, para. 49).

253. Further, the judge's acceptance of Mr Cheung's evidence that he did not connect the restructure with the breach of the Agreement is fatal to the plaintiff's case. The judge also accepted the evidence of Mr Mok who testifed that (1) Mr Cheung had not told him to make the transfer of HK Legend shares impossible and (2) they had thought that under article 11(3) of the Agreement, they would just have to pay damages to the plaintiff. These findings of fact are not challenged on appeal.

254. The upshot is that in my view, the judge was entitled to dismiss the claims of inducement of breach of contract against all the remaining defendants.

Section (3) Unlawful means conspiracy

255. This claim was made against all the remaining defendants. The pleaded overt acts of each defendant have been set out in para. 86.1 of this Judgment. The judge dismissed the claim against all of them.

256. It is well-established that "unlawful means conspiracy" does not demand proof of a predominant purpose to injure, whereas "conspiracy to injure" does. Mr Joseph argued that even though the plaintiff was asserting unlawful means conspiracy, the judge nevertheless

referred to the need for the plaintiff to prove predominant purpose to injure. Consequently, Mr Joseph submitted, the judge applied the wrong (and more stringent) test.

257. With respect, I do not think that criticism is well-founded. Although the only conspiracy pleaded was indeed unlawful means conspiracy, it would appear that what happened at trial was that the then leading counsel for the plaintiff argued that the defendants were liable for conspiracy to injure as well. Hence the position was as follows (para. 238, Judgment):

> "The plaintiff alleges both conspiracy to injure and conspiracy to use unlawful means, albeit conspiracy to injure has not been pleaded. Nevertheless I attempt to deal with both".

258. Hence, references to predominant purpose to injure appeared from time to time in the Judgment. However it is clear that the judge was well aware of the differences in the elements of the two conspiracies (para.253, Judgment):

> "However even were Hong Kong law to be the relevant system of law governing the conspiracy alleged (which in my view it is not), in my judgment the plaintiff also would fail, both on the available evidence and on the legal principle, since I cannot identify the presence of the relevant legal requirements: namely, in conspiracy to use unlawful means, the existence of unlawful means/intention to injure on the part of the 1st and 2nd defendants; or *alternatively, in terms of conspiracy to injure, an intention amounting to a 'predominant purpose' to injure*". (Emphasis added).

259. Consequently the judge was aware that the plaintiff was making allegations of both types of conspiracies, and he was aware that he should apply different tests relating to intent.

Elements of unlawful means conspiracy

260. The elements of unlawful means conspiracy as established in *Kuwait Oil Tanker Co SAK and another v Al Bader and others* [2000] 2 All ER (Comm) 271 may be summarized as follows (para. 108):

(1) a combination

(2) of persons including the defendant

(3) to do something which is unlawful in itself (which may be tortious, criminal or a breach of contract: para. 130)

(4) with a common intent to injure (although there is no need for there to be a predominant purpose to injure)

(5) causing loss to the plaintiff.

Renunciation

261. As far as the renunciation was concerned, the evidence set out above makes it clear that Mr Tan's decision that EP and EP Holdings should renege on the Agreement with the plaintiff was made during the meeting with Mr Cheung in Xiamen. The decision was then implemented by those companies which sent a notice to discontinue performance to the plaintiff in Xiamen.

262. It is therefore clear that the plaintiff again has to satisfy the "double-actionability" test discussed in the earlier section of this Judgment relating to inducing breach of contract. Prof Cui's evidence was that there was no liability for conspiracy in PRC law (para. 345,

Judgment). This has not been challenged on appeal. Therefore, any conspiracy relating to the renunciation is not actionable in Hong Kong.

Restructure

263. As far as the restructure was concerned, there is no doubt that the allotment of shares by HK Legend to EP Group, EP's transfer of its share in HK Legend to EP Group and EP Holdings' declaration of trust of its share in HK Legend to EP Group were all effected in Hong Kong.

264. However what was fatal to the plaintiff's case was that the judge found that there was no common intent to injure. The judge focused on the fact that it was Miss Wong who had proposed the allotment. With respect, that is not a defence in itself, for what Miss Wong proposed was merely a mechanism (allotment as opposed to transfer), whereas the intention of making EP Group the controlling shareholder of HK Legend came from Mr Mok and Mr Cheung.

265. In this respect, the judge accepted their evidence (discussed in para. 253 above) that an intention to injure the plaintiff was never in their mind, for they had thought that the Agreement was, to put it colloquially, "dead and buried". The judge accepted Mr Mok's evidence that he thought EP and EP Holdings would simply be liable to the plaintiff for damages, and that the restructure had nothing to do with the Agreement. Notwithstanding the proximity of timing and the apparently unsatisfactory manner of Mr Cheung's answers in cross-examination, the trial judge accepted his evidence that he did not connect the restructure with the Agreement at all. That is the hard fact the plaintiff faces.

266. In those circumstances, the judge was right to dismiss the claims in unlawful means conspiracy as well.

Section (4) Constructive Trust

267. Finally I come to the plaintiff's claim for constructive trust against EP Group, which is the controlling shareholder of HK Legend. The pleaded case was as follows (paras.11-19 Re-Amended Statement of Claim):

(1) By reason of the Agreement, EP and EP Holdings each held its 1 share in HK Legend as constructive trustee for the plaintiff.

(2) Accordingly they owed a fiduciary duty to the plaintiff not to act in such a way as to injure the plaintiff.

(3) In breach of that fiduciary duty, EP and EP Holdings permitted 9,998 shares in HK Legend to be allotted to EP Group.

(4) Further in breach of that fiduciary duty, EP transferred its share in HK Legend to EP Group, and EP Holdings made a declaration of trust of its share in favour of EP Group.

(5) EP Group was aware of the Agreement as an associate of EP and EP Holdings and all these companies were under Mr Tan's control. Accordingly EP Group held the shares of HK Legend in constructive trust for the plaintiff.

268. The judge found that the plaintiff failed to establish the existence of any constructive trust at the first step. With respect I take the view that he was entitled to make this finding.

269. The Agreement was expressly to be governed by PRC law. Only the procedure and validity relating to the transfer of shares in HK Legend was to be governed by Hong Kong law. It is perfectly understandable that matters such as transfer formalities and stamping would obviously have to be governed by Hong Kong law.

270. Professor Cui's opinion which the judge accepted was that there was no concept of constructive trust in the PRC (paras. 195-200, Judgment). There is nothing in the materials which shows that under PRC law, EP and EP Holdings were under some obligation which a Hong Kong court would regard as being of a fiduciary nature.

271. Although the arbitral tribunal made an order for continued performance, Prof Cui's opinion was that that was not to be equated with an order for specific performance. His opinion was (D/1324-5, paras.7.3-7.4):

> "The common law specific performance is an Anglo-American concept in equity. As mentioned above, there is no Anglo-American concept of equity in China, the order to continue to perform is devised according to the principles of PRC contract law. ...
>
> The 'continual performance' order is not premised upon the presupposition that damages cannot fully compensate for the loss of the injured party or the unique nature of the subject matter under the contract".

272. Once it is clear that the Agreement did not give rise to a constructive trust over the HK Legend shares under PRC law, that in my view is the end of the matter.

273. However even if one were to assume that Hong Kong law applied, the issue whether EP and EP Holdings each held its share in HK Legend as constructive trustee for the plaintiff depends on whether the Agreement is amenable to specific performance. And whether the Agreement is so amenable depends, not so much on whether the arbitral tribunal has made an order for continued performance, but on the nature of the Agreement as a matter of construction.

274. It is clear from a reading of the Agreement that it was not a simple agreement for the sale and purchase of land. It was for the joint venture development of land, which in by very nature demands constant supervision. Not only that, but the Agreement recognised a number of situations where it was necessary to have co-operation from both sides, eg for design, project finance index, and change in land use area.

275. The plaintiff was also subject to the supervision of EP and EP Holdings in development and operations. The fact that this was not a nominal right can be seen from the plaintiff's right to keep possession of, and control the use, of Xiamen Legend's official seal and seal for financial matters. This tied in with the plaintiff's right to supervise payment of construction works and the plaintiff's confirmation of sub-sale prices.

276. Therefore, notwithstanding Andrew Cheung J's order for "continued performance" made in the Statutory Process which was in terms of the arbitral award, it is difficult to see a Hong Kong court, applying Hong Kong law, making the Agreement the subject of an order for specific performance. Under the Agreement, the plaintiff would only be able to acquire the shares of HK Legend as a "consummating act"

at the end of a long and complex joint venture development of land, for which the arbitral tribunal found the Agreement was only a framework agreement.

277. In the circumstances, I would agree with the judge that the claim under constructive trust should be dismissed.

Order

278. By reason of the matters set out in para. 202 of Section (1) above, no order can be made at this time in respect of this appeal so far as it relates to the claim for damages under the Common Law action on the award, but for the reasons discussed in Sections (2)-(4) above, the appeal should be dismissed in respect of the grounds based on the economic tort claims. I would direct that counsel should consult together and if possible agree an order for the court's consideration and approval. If no agreed order is lodged with the court within 42 days, the parties are to be at liberty to apply.

279. I would direct the parties to send written submissions on costs (limited to a maximum of 7 pages) within 56 days of the date of this Judgment.

Concluding Remarks

280. In conclusion I would like to apologize for the length of this Judgment and the length of time taken to deliver it, and to thank counsel for their assistance.

Hon Barma JA:

281. I agree.

Hon Poon JA:

282. I agree.

(Maria YUEN)	(Aarif BARMA)	(Jeremy POON)
Justice of Appeal	Justice of Appeal	Justice of Appeal

David Joseph QC, Edward Chan SC, Anson Wong SC, Lee Tung Ming, Bernard Man, Keith Lam and Justin Ho, instructed by Clyde & Co., for the Plaintiff

Steven Gee QC, Benjamin Yu SC, Chan Chi Hung SC and Richard Khaw, instructed by Mayer Brown JSM, for the 1st & 2nd Defendants

Paul Shieh SC and Elizabeth Cheung, instructed by Wilkinson & Grist, for the 3rd to 5th Defendants

Ronny Tong SC and Kate Poon, instructed by Baker & McKenzie, for the 6th Defendant

Warren Chan SC and Law Man Chung, instructed by Woo, Kwan, Lee & Lo, for the 10th Defendant