HCCL 13/2011

**IN THE HIGH COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**COURT OF FIRST INSTANCE**

COMMERCIAL ACTION NOS. 13 OF 2011
(TRANSFERRED FROM HCA NO. 961 OF 2008)

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BETWEEN

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| 廈門新景地集團有限公司<br>formerly known as<br>廈門市鑫新景地房地產有限公司 | Plaintiff |
| and | |
| ETON PROPERTIES LIMITED<br>（裕景興業有限公司） | 1st Defendant |
| ETON PROPERTIES (HOLDINGS) LIMITED<br>（裕景興業(集團)有限公司） | 2nd Defendant |
| ETON PROPERTIES GROUP LIMITED<br>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 |

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|---|---|
| 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: Deputy High Court Judge William Stone QC in Court

Dates of Hearing: 8, 9, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 26, 27, 29 March 2012 (Openings and Evidence); 16, 17, 18, 19, 20, 23, 24 April 2012 (Final Submissions).

Date of Judgment: 14 June 2012

J U D G M E N T

*THIS CASE*

1. This is an unusual case.

2. It has as its primary focus the relationship between the jurisdiction and powers of the Hong Kong Court and the enforcement of a foreign arbitral award, in the instant case a CIETAC arbitral award ('the 1st Arbitral Award'); issues of constructive trust and economic torts leaven the substantive legal pot.

3. Procedurally, the sequence and form of the present action may be unique.

4. This case has as its provenance an earlier action in Hong Kong which came into being as a standard Convention enforcement proceeding of the 1st Arbitral Award ('the 1st action'), thereafter becoming transposed within an entirely separate action ('the 2nd action'), which named not only the 1st and 2nd defendants originally party to the 1st action, but ultimately was amended to include an additional 9 defendants, and contains within it two distinct juridical strands:

(1) the 'derivative' enforcement element of the Arbitral Award as between the plaintiff and the 1st and 2nd defendants; and

(2) 'original' actions founded upon economic torts alleged by the plaintiff against all 11 defendants – comprising the 1st to 2nd defendants of the 1st action, in addition to the 3rd to 5th defendants (each of which are corporate entities related to the 1st and 2nd defendants), and further, the 6th to 11th individual defendants, whom variously are directors/employees of these corporate entities.

5. Add to this procedural mix a series of interlocutory appeals in both actions, the last of which resulted in the order for a 'split' trial upon liability and quantum, and the ingredients thus were in place for a forensic exercise of some complexity.

6. It follows that any judgment must begin by tracing the background to, and the idiosyncratic development of, a case which has

taken 22 days to try, and which variously has occupied the attentions of no less than 6 leading and 7 junior counsel.

*THE STORY IN OUTLINE*

*(i) The Agreement*

7. This dispute has a relatively unexceptional factual origin: at bottom it amounts to no more than a breach of contract case, albeit one of egregious dimension, which arose between the plaintiff and the 1st and 2nd defendants almost a decade ago.

8. In July 2003 an Agreement ('the Agreement') was entered into between the plaintiff, Xiamen Xinjingdi Group Ltd ('Xiamen Xinjingdi') and the 1st and 2nd defendants, Eton Properties Ltd ('EPL') and Eton Properties (Holdings) Ltd ('EPHL'), sister companies incorporated in Hong Kong within that which cumulatively has been referred to in this case as the 'Eton Group' of companies.

9. Both sides of the fence were, and are, property developers, and the subject-matter of the Agreement was the development of a valuable piece of land in Xiamen, PRC.

10. At the time of the Agreement the land in question – known as 'Lot 22' – was owned by the 5th defendant, a PRC company named Legend Properties (Xiamen) Company Ltd ('Xiamen Legend'), which in turn was held by the 4th defendant, a Hong Kong company of identical title ('Hong Kong Legend'), the shareholding in which in turn was held by EPL and EPHL.

11. For immediate narrative purposes further detail is unnecessary, but at any rate this represented the broad corporate structure then in place albeit, as will become evident, this structure subsequently was subject to significant alteration, wherein the shareholding in the 4th defendant, Hong Kong Legend, was changed by virtue of the 3rd defendant replacing the 1st and 2nd defendants as sole shareholder of the 4th defendant – and hence of the holder of the land, the 5th defendant, Xiamen Legend.

12. The Agreement is wide-ranging in its provisions, but in broad terms it provided that the plaintiff, Xiamen Xinjingdi, would make payments of up to 120 million RMB to the 1st and 2nd defendants, EPL and EPHL, which were to deliver the land to the plaintiff, which thereafter was to carry out construction and development of the land under the supervision of the 1st and 2nd defendants prior to the transfer to the plaintiff of the shares in the 4th defendant holding company.

13. Apartment units were to be constructed thereon, and it was envisaged in the Agreement that the sales of completed units would be carried out in the name of the 5th defendant, Xiamen Legend, once more under the supervision of the 1st and 2nd defendants.

14. The Agreement specifically contemplated that upon completion of all necessary steps in terms of the prospective development, that the 1st and 2nd defendants would transfer the shares of the 4th defendant (which then held the 5th defendant) for a consideration of HK$2 to a party nominated by the plaintiff.

15. The Agreement expressly provided that it was to be governed by the laws of the PRC – *Article 12(1)* of the Agreement provided that a party in breach "shall bear the liability for breach of contract according to the provisions of the Contract Law of the PRC" – whilst *Article 13(2)* stipulated:

> "The Agreement is governed by the laws of the People's Republic of China, but the procedure and validity related to the transfer of shares of Hong Kong Legend is governed by the laws of Hong Kong Special Administrative Region."

16. Regrettably for the plaintiff, all did not proceed according to plan.

17. In November 2003, the 1st and 2nd defendants had a change of heart about the bargain which they had struck some months earlier, and, after prior informal advice to the plaintiff of what was to be forthcoming, formal written notice of termination duly was give to the plaintiff.

18. The practical upshot was that the Xiamen land was *not* delivered to the plaintiff developer, and instead the 5th defendant, Legend Properties Xiamen, itself began to develop the land, and in fact later sold all, or virtually all, of the completed units thus built within this development on Lot 22.

19. The plaintiff was unhappy at its loss of bargain. However, for reasons still unexplained, it was not until some 21 months later, in August 2005, that the plaintiff proceeded in accordance with the arbitration clause within the Agreement, and commenced a China International Economic and Trade Arbitration Commission ('CIETAC') arbitration in Beijing, which

took place over a period of 4 years and held a total of 3 hearings involving this case.

*(ii) The 1st Arbitral Award*

20. The first arbitral hearing of the dispute between the plaintiff and the 1st and 2nd defendants took place on 23 November 2005 and 18 May 2006.

21. On 27 October 2006 the Arbitral Tribunal delivered its 27 page Award ('the 1st Award').

22. Under the heading '*Nature of the Agreement in this Case*' the Tribunal considered "that, in a strict sense, the Agreement in this case is neither an agreement of share transfer nor an agreement of transfer of land use right. It is a complicated arrangement of rights and obligations closely related to the transfer of shares."

23. The Tribunal agreed with the 1st and 2nd defendants/Respondents that the Agreement was a "framework agreement" and that performance "may be difficult due to various uncertainties" which in turn required "close cooperation between the parties and reasonable efforts to seek alternative approaches to meet the purpose of the Agreement."

24. In the event, the salient terms of the Award were that:

(1) the 1st and 2nd defendants/Respondents were to pay to the plaintiff/Applicant damages in breach of contract of RMB1.275 million;

(2) that "the Respondents shall continue to perform the Agreement made on July 4, 2003 between the Applicant, the Respondents and the third parties to the case";

(3) that other arbitration claims mounted by the Applicant were dismissed; and

(4) all the arbitration counterclaims of the Respondents were dismissed.

As will become apparent, it is holding (2) within the Award which has stimulated both the form and content of the present case.

25. This Award was made by the arbitral tribunal in ignorance of the fact that by that time of that Award the Eton Group had undergone a restructuring, the effect of which had been to render it no longer possible (even if performance otherwise had remained factually possible in light of the development of Lot 22 by the 5th defendant and the onsale of the units erected thereon) for the 1st and 2nd defendants to perform the Agreement with the plaintiff by reason of their replacement by the 3rd defendant as the sole shareholder of the 4th defendant, which in turn was the holding company of the 5th defendant – the effect of which was to preclude the transfer by the 1st and 2nd defendants of the shares of the 4th defendant as ultimately anticipated/required under the Agreement.

26. This was a matter which did not come to the attention of the arbitral tribunal until later in the day when the 1st and 2nd defendants made two further attempts to argue/clarify its case before the arbitral tribunal.

*(iii) Further arbitral activity: the 2nd Award*

27. The first such attempt was on 19 August 2008, when the 1st and 2nd defendants filed an application for arbitration with CIETAC ('the second arbitration') seeking an order declaring that the Agreement be terminated on the basis that the terms of Agreement had violated certain mandatory requirements of PRC law and, further, that there had been a change of shareholding in Hong Kong Legend, and that as a consequence the Agreement no longer could be performed.

28. By its 47 page 2nd Award dated 22 April 2009, the Tribunal dismissed the arguments of the 1st and 2nd defendants/applicants, holding that whilst the Tribunal had jurisdiction to hear the case – "the key facts are different from those of the earlier case, some of which were not disclosed by the 2 applicants when the earlier case was heard" (referring to the change of shareholding in Hong Kong Legend, a fact but recently discovered by the plaintiff during the action for registration in Hong Kong of the 1st arbitral Award) – nevertheless the changes of circumstances now prayed in aid by the 1st and 2nd defendants did not suffice to terminate the Agreement within Article 11 thereof, observing [*Translation*, internal page 46/47]:

> "The Arbitral Tribunal notes that, in respect of the 2 Applicants' defence of impossibility to perform, the arbitral tribunal of the earlier case had made an order for continued performance of the Agreement. The Arbitral Tribunal also notes that the recognition and enforcement of the earlier arbitral award of the arbitral tribunal are carrying out in the Hong Kong court in accordance

> with the Hong Kong legal procedures. The Arbitral Tribunal considers that agreements made in accordance with the law shall be legally binding between the parties. The parties should perform their own obligations in accordance with the agreements, and shall not unilaterally vary or terminate the agreement. The Arbitral Tribunal considers that the 2 Applicants' claim to terminate the Agreement lacks factual, contractual and legal bases, and the Arbitral Tribunal does not support this."

*(iv) Yet further CIETAC activity: 'Clarification sought'*

29. Having failed before the arbitral tribunal on the first two occasions, on 19 August 2008 the 1st and 2nd defendants filed a yet further application with CIETAC seeking clarification from the tribunal on the meaning of the words "alternative approaches" as contained in the 1st Award within the sentence "within the framework of the Agreement use reasonable efforts to seek alternative approaches in order to meet the purpose of the Agreement", and requested further directions on how the Award should be performed and/or what relief (including damages or other appropriate relief) the Respondent/plaintiff should have for meeting the purpose of the Agreement.

30. This further application, however, was not entertained, and was dismissed in short order.

31. On 27 July 2009 CIETAC noted that the secretariat of the arbitration commission had liaised with the original arbitral tribunal for this case, and had responded as follows:

> "The arbitral tribunal adjudicated the case fully based on arbitration request of the Applicant and made ruling based on the Applicant's arbitration request. After investigation, the Award issued by the arbitral tribunal on 27 October 2006 is final, there is no mistake in relation to writing, typing or calculation which needs to be corrected. Also the arbitral tribunal in the Award did

> not leave out any matter which would need to be further determined according to PRC Arbitration Law and the Arbitration Rules of the Arbitration Commission. Accordingly the arbitral tribunal does not accept the abovementioned application of the Respondents."

32. From a chronological viewpoint, only the 1st Arbitral Award of 27 October 2006 antedated judicial proceedings taken out both by the plaintiff and also by the 1st and 2nd defendants in the PRC and in Hong Kong.

*(v) PRC judicial proceedings*

33. So far as PRC judicial proceedings are concerned, these are mentioned merely to record their occurrence, and in the present context amount to no more than forensic by-play.

34. In March 2007 the plaintiff sought to enforce the 1st Award before the Intermediate People's Court of Xiamen, only for these proceedings to be dismissed on the basis that the 1st and 2nd defendants, and their assets, were not within Xiamen.

35. On 16 April 2007 the 1st and 2nd defendants had applied to the Second Intermediate People's Court in Beijing to set aside the 1st Award, only to withdraw the application on 19 June 2007.

*(vi) Hong Kong judicial proceedings*

36. In contrast to the PRC judicial proceedings, the 1st Award precipitated extensive litigation in Hong Kong, with the subsequent 2nd and 3rd applications to CIETAC interfacing with what by that stage were

ongoing proceedings before the Hong Kong Courts – to the diverse progress of which I now turn.

*1. HCCT 54 OF 2007*

*(a) First instance proceedings*

37. In October 2007 the plaintiff applied in Hong Kong for enforcement of the 1st Award pursuant to the provisions of section 2GG and section 40B of the then Arbitration Ordinance, Cap 341.

38. The parties to this action were the plaintiff, *qua* Applicant, and the 1st and 2nd defendants, *qua* 1st and 2nd Respondents.

39. Upon the plaintiff's *ex parte* application, by Order dated 31 October 2007 Mr Justice A Cheung (as he then was) granted judgment in favour of the plaintiff to the effect, *inter alia*, that the Respondents [1st and 2nd defendants] "shall continue to perform its *(sic)* obligations under the agreement" (at paragraph 2(b) of the Order).

40. The 1st and 2nd defendants then moved to set aside this *ex parte* Order. It was contended on their behalf that in the circumstances prevailing it was impossible to perform the Agreement according to its terms and therefore it would be contrary to fundamental notions of justice and public policy specifically to perform the Award.

41. Pursuant to this contention affidavit evidence was placed before the court to the effect that the plaintiff/Applicant fully was aware of the construction work then taking place on the Xiamen land, and that as at the date of this evidence (January 2008) 99% of the residential units already

had been sold to third party purchasers, and that in any event the 'Eton Group' shareholdings had been restructured.

42. The motion to set aside the *ex parte* order of Mr Justice Cheung, as argued by the team of counsel now appearing in this action on behalf of the 1st and 2nd defendants, was heard by Mr Justice Reyes on 19 June 2008.

43. On 24 June 2008 the learned judge rendered an erudite 37 page judgment.

44. The result was that Reyes J dismissed with costs the 1st and 2nd defendants' application to set aside the judgment of A Cheung J, the judge observing that whilst further directions might be required either from the Arbitral Tribunal or the Beijing Court for the purpose of "working out the order to make it work", he nevertheless emphasized that all he was concerned with at the setting aside stage was whether the plaintiff's claim was "at least arguable", and that what was sought by the action before him was for the Award to be converted into a judgment of the Hong Kong court: this meant essentially an order by the Hong Kong court that "the Respondents shall continue to perform the Agreement".

*(b) Appellate proceedings*

45. Having thus failed in their bid to set aside the *ex parte* Order of Mr Justice A Cheung, the 1st and 2nd defendants sought relief by appealing to the Court of Appeal against the decision of Reyes J refusing to set aside the Order.

46. The Court of Appeal (Rogers VP., Le Pichon and Hartmann JJA) heard the appeal, CACV 106/2008 and CACV 197/2008, on 22 May 2009, and at the conclusion of the hearing on that day dismissed the appeal, the Reasons therefor subsequently being handed down on 11 June 2009.

47. Madam Justice Le Pichon wrote the Reasons for Judgment of the Court. Her ladyship specifically rejected the principal argument put forward on behalf of the 1st and 2nd defendants that as the development in Xiamen had been completed and 99% of the units sold, thus it would be contrary to the notion of justice to enforce something no longer possible to perform, and therefore that the Order of the Hong Kong court was tantamount to a decree of specific performance.

48. At the same time Le Pichon JA rejected the contention that the plaintiff really was looking for "further stage" remedies such as damages in lieu or an account of profits rather than the right to develop the land, and that it thus would be a matter for CIETAC, from which directions now should be sought, and to which body the appellants undertook to revert for a determination of what alternative remedies the Respondent/plaintiff now should have. In this context her Ladyship clearly was influenced in her observations and approach by the fact that the restructuring of the shareholding of the Eton Group – which restructuring earlier had taken place by the time of the first arbitration but as yet had not been disclosed – could not in itself constitute to a valid argument for the 1st and 2nd defendants, observing:

> "…the impossibility (if any) is self-inflicted…the Eton Group went ahead with the restructuring notwithstanding that the

> arbitration had commenced. It took a calculated risk and must bear the consequences."

49. This judgment of the Court of Appeal appears, on the papers at least, to have been the final act in the brief history of the designated statutory recognition and enforcement action regarding the 1st Arbitral Award, namely HCCT 54 of 2007.

50. Nothing further was done to enforce the Order of A Cheung J in HCCT 54 of 2007, *which still stands*; nor for that matter was any application made by the plaintiff to the CIETAC tribunal in Beijing when it became (or by this stage must have become) abundantly clear that there could be no question of the 1st and 2nd defendants "performing the Agreement made on July 4, 2003", which had been the central element within the 1st Award.

51. For all practical purposes this action, and the Order granted therein, remains on the record, albeit it appears now to languish in 'procedural limbo'.

52. This was because the plaintiff then commenced a second action consequent upon the Arbitral Award of 27 October 2006 – and it is *this action*, and the relief variously sought by the plaintiff therein, which forms the subject-matter of this judgment.

*2. HCA 961 OF 2008 [SUBSEQUENTLY INTITULED HCCL 13 OF 2011]*

*(a) Commencement of action*

53. By its Writ and Statement of Claim attached thereto, dated 27 May 2008 the plaintiff, Xiamen Xinjingdi, filed suit against not only the 1st and 2nd defendants from the first Hong Kong action, but also against 3 additional corporate defendants – all associate companies within the Eton Group – asserting proprietary rights over the shares in the 4th defendant and seeking declarations that the 3rd defendant held the 9,999 shares in the 4th defendant then registered in its name on constructive trust for the plaintiff, and likewise that the 2nd defendant held the one share then registered in its name on constructive trust for the plaintiff.

*(b) Interlocutory disputes*

54. It was after the issue of this new action that Mr Justice Fok (as he then was) found himself seized with a raft of interlocutory applications from each side of the fence: the 1st and 2nd defendants mounted an application for a stay of the action against them on the basis that it should go to arbitration, alternatively that it be struck out, the 3rd, 4th and 5th defendants also sought to stay or strike out the action, whilst the plaintiff resisted these applications and in turn itself sought leave to amend the Statement of Claim by adding 6 additional defendants to the 5 originally named and to add various new claims, in addition to mounting an application for discovery in aid of an interlocutory injunction; this latter relief had been granted by Saunders J on 27 May 2008 upon the application of the plaintiff, and had restrained the defendants from further changing the shareholding structure of the 4th defendant and the 5th defendant from disposing of or diminishing the value of its assets, injunctive relief which

was continued on 6 June 2008 by Burrell J "until final disposal of this action or until further order".

55. These various interlocutory applications were heard by the learned judge over four days on 22 to 25 February 2010, and he handed down his analytical and detailed 55 page judgment on 16 March 2010.

56. The acumen of this judgment speaks for itself, and I confine myself to recounting the upshot of these applications.

57. Upon the plaintiff's application to amend, Fok J granted leave to amend in red the Statement of Claim (in terms of the second version as was placed before the court, which bore the signature of the plaintiff's new leading counsel, Mr Barlow SC), which in substance not only permitted the addition to the existing 5 corporate defendants of an additional 6 personal defendants, but also refined the existing constructive trust plea – by identifying two alternative forms of remedy which would facilitate the removal of the corporate restructuring of the 4th defendant – and permitted the bringing of alternative claims in damages against the 6th to 11th individuals asserted to be responsible for the alleged dishonest conduct of the 1st to 5th defendants, and further added causes of action in conspiracy to defraud and/or for the tort of inducement of breach of contract.

58. In addition, Mr Justice Fok *granted* the application by the 1st and 2nd defendants for a stay to arbitration, but rejected their application to strike out the action, he dismissed the application by the 3rd to 5th defendants to strike out or stay the action against them, and granted the

plaintiff's application for discovery against the 5th defendant and dismissed the plaintiff's further discovery application against the 3rd defendant.

59. So far, so clear, but the matter did not end with Fok J's cogent disposition of these interlocutory issues, and the issue of the stay of proceedings he had granted in favour of the 1st and 2nd defendants (which, had such order for stay remained extant, in retrospect would have had a profound effect upon the development of this case) was to be the subject of not one, but two, appeal hearings.

*(c) Interlocutory appeal*

60. Dissatisfied with the stay decision, the plaintiff took the matter on appeal to the Court of Appeal in CACV 88 and 89 of 2010.

61. On 15 December 2010 Court of Appeal (Rogers VP, Le Pichon and Kwan JJA) handed down judgment, now reported at [2011] 1 HKLRD 781.

62. The plaintiff's appeal was allowed, and the stay order as granted by Fok J was set aside.

63. The appellate court noted that whilst it might be that the distinction between what should form part of the arbitral award and what should be considered part of the enforcement proceedings had been "blurred", the Arbitral Tribunal had approved in clear terms the enforcement of the Award underway in Hong Kong notwithstanding the "difficulties which had been created by the defendants, and their

machinations, in this case", and that now it was for the Hong Kong Courts to enforce this Award.

64. Madam Justice Kwan, with whom Rogers VP and Le Pichon JA agreed, opined that there was a distinction between the determinative jurisdiction and powers and the enforcement jurisdiction and powers of the Court, and that the present action was concerned with the latter, given that the nature of the claim in the action was primarily an action on the 1st arbitration award, not an action on the performance and obligations of the Agreement.

65. The Court also observed that the plaintiff's action against the 1st and 2nd defendants was brought on the basis that the defendants were in breach of their implied promise to perform the arbitral award, and that this fell within the enforcement jurisdiction of the court, which had not been ousted by Article 8 of the UNCITRAL Model Law.

66. Rejected as "immaterial" was the argument that under the registration proceedings [in HCCT 54 of 2007] that the plaintiff had obtained judgment against the 1st and 2nd defendants, and that accordingly there was no need for the plaintiff to sue in a separate action for breach of the defendants' implied promise to perform the Award – and that the plaintiff was at liberty to bring this action as against the 1st and 2nd defendants.

67. The court also rejected as "misplaced" the defendants' submission that this action should not be regarded as an action for the enforcement of the Award by reason of the fact that it was not

"mechanistic", Madam Justice Kwan JA observing (at paragraph 32) that "this is not to say that an action on the arbitral award must be mechanistic" and that "it all depended on the scope of the issues that might be raised in the dispute in that action." With respect, it might be thought that these latter observations, which I take as *obiter dicta* within the context of this interlocutory appeal, stretch the envelope of established authority.

*(d) Court of Final Appeal : refusal of leave to appeal*

68. On 25 January 2011 the Court of Appeal declined to give grant the 1st and 2nd defendants leave to appeal to the Court of Final Appeal, and on 4 May 2011 the Appeal Committee of the CFA dismissed the defendants' further application for leave to appeal.

69. In delivering the Determination of the Appeal Committee (Chief Justice Ma, Mr Justice Bokhary PJ and Mr Justice Ribeiro PJ) the Chief Justice briefly reviewed the background and principal arguments in the case, and rejected the argument mounted by the defendant applicants that the current action went well beyond anything decided by CIETAC, and therefore not merely was concerned with enforcement of the Award, commenting "it is plainly true that the pleaded claims go beyond what CIETAC decided, but it is a *non sequitur* to say that they are therefore not concerned with enforcement."

70. The Chief Justice prayed in aid a passage from *Mustill and Boyd on Commercial Arbitration,* 2nd ed., at page 417, relating to the implied promise on the part of parties to an arbitration agreement to perform a valid Award, and that "if the award is not performed the successful claimant can proceed by action in the ordinary courts for breach

of this implied promise and obtain a judgment giving effect to the award", and further noted that the steps now taken by the plaintiff "clearly represent steps taken by way of enforcement". He also observed that CIETAC already had rejected an attempt by the 1st and 2nd defendants to reopen the arbitration "and that there was nothing left for the tribunal to do".

71. Thus the application for leave to appeal was held not to be reasonably arguable, and hence was refused.

72. The deliberations both of the Court of Appeal and of the Appeal Committee of the Court of Final Appeal took place on the basis, and against the backdrop of, the pleading as it then stood in terms of the Amended Statement of Claim; what was not before these courts were the subsequent green re-amendments to the claim as were to be made by the plaintiff – and it was such *re*-amendment which was to stimulate yet further appellate activity.

*(e) Late pleading re-amendment*

73. On 21 December 2011 this case again crossed the desk of Mr Justice Reyes who, pursuant to its application taken out on 14 December 2011, granted leave to the plaintiff to file a Re-Amended Statement of Claim.

74. At the same time the learned judge also gave directions for the filing of expert evidence on the issue of quantum, in particular upon the valuation of the 4th defendant.

*(f) Further interlocutory appeal*

75. The defendants were aggrieved by these rulings, and appealed against both of these Orders – for, it was said, in an earlier case-management conference the plaintiff had told Reyes J that it intended neither to amend the pleadings nor to adduce expert evidence, and that this had remained the position in early November 2011 when the March 2012 dates for the trial of this action had been fixed. Hence, it was argued, in these circumstances such re-amendment and expert evidence ought not to be permitted.

76. Successful interlocutory appeals on case management issues are rare birds, but on 3 February 2012 the Court of Appeal (Hon Cheung CJHC and McWalters J) reviewed the case and allowed the appeal in part to the extent of adjourning trial of the matters as now were pleaded in the new paragraph 35(5) of the Re-Amended Statement of Claim [substantively relating to the calculation of the loss and damage alleged by the plaintiff] for further directions to be given after the outcome of this trial. In this connection, in his Reasons for Judgment handed down on 14 February 2012 the learned Chief Judge observed:

> "the plaintiff's new paragraph 35(5) is a more or less self-contained claim. Depending on how the other issues already raised are to be determined at trial, a viable though not 100% satisfactory alternative to refusing the amendment is to hive off paragraph 35(5) from the trial to a subsequent stage certainly a split trial direction could have its own fair share of problems in terms of duplication of issues, evidence and efforts. However, looking at the matter in the round, the hiving off of paragraph 35(5) would seem to be much more preferable to either refusing the amendments altogether or squeezing the case into the existing trial dates which were fixed for trying the plaintiff's claim as originally framed only".

77. Certainly the latter observation as to time was prescient: as matters transpired, notwithstanding that the present case has been conducted on the basis of 'liability' only, with 'quantum' deferred to another day, it still massively overran the original 12 day estimate and despite best efforts has taken virtually double that period to try.

*THE 'SHAPE' OF THE CASE*

78. It has not always been straightforward accurately to characterize the 'shape' of this case and to identify with precision the various causes of action maintained by the plaintiff against each of the 11 defendants: hence the profusion of paper to which the court was subjected both during (and after) Mr Barlow SC's final submissions from defendants' counsel, who wished to respond to allegations of which they maintained hitherto they had been unaware.

79. This is particularly striking when one comes to consider the action as now mounted against the 1st and 2nd defendants whom, it will be recalled, were the sole parties to the Agreement with the plaintiff and the sole parties to the arbitration proceedings before the CIETAC tribunal in Beijing.

80. For the purposes of the present judgment, however, I propose to categorize the case along the following broad lines (gleaned, in part at least, from paragraph 12.1 of the plaintiff's outline final submissions):

(a) the *derivative* action against the 1st and 2nd defendants consequent upon the 1st Arbitral Award, that is, as Mr Barlow

SC expressed it, "the enforcement of the enforcement order" emanating from the 1st action, HCCT 54 of 2007;

(b) the *original* actions against the 11 defendants. In turn this breaks down thus (for descriptive purposes adopting the 4'blocs' of defendants separately represented by leading counsel):

(i) As against the 1st and 2nd defendants, liability in constructive trust and in conspiracy;

(ii) As against the 3rd, 4th and 5th defendants, liability in constructive trust/knowing receipt, and in conspiracy;

(iii) As against the 6th defendant, liability in breach of trust, procurement of breach of contract and conspiracy;

(iv) As against the 7th to 11th defendants, liability in procuring breach of contract and conspiracy.

*THE EVIDENCE*

*Factual*

81. In terms of *viva voce* evidence of fact, a total of 9 witnesses gave evidence over the period encompassed by the 3rd to the 15th day of this trial.

82. For the plaintiff, Xiamen Xinjingdi, 2 persons were called:

*Mr Zhong Jiang-Bo*, the Chairman of the Board of Directors of the plaintiff, who had more than 15 years of experience in real estate development in the PRC; and *Mr Xu Kui-Nan*, the

General Manager of the plaintiff, with some 20 years of PRC real estate experience.

83. Mr Zhong gave 2 witness statements, dated 9 December 2011 and 17 February 2012, whilst Mr Xu's witness 2 statements were of like dates; neither witness did a great deal more than to recite the basic story and objective facts underpinning the current action.

84. For the defendants, a total of 7 witnesses gave evidence from the witness box. I specify them in order of appearance:

(i) *Barry Mok Pui Hong* [D11]: Mr Mok is the Group Financial Controller of the 1st defendant, EPL, who since 1993 has been generally responsible for overseeing tax and accounting matters, including those arising from activity in the PRC; he is a Certified Public Accountant who gave 3 witness statements, respectively dated 14 December 2011, 17 February 2012 and 9 March 2012.

(ii) *Daisy Wong Siu Kan*, not herself a party to these proceedings, and whose 2 witness statements are dated 14 December 2011 and 9 March 2012 respectively, is the senior manager within the Company Secretarial Department of EPL, the 1st defendant; her evidence is of particular importance in terms of one of the few issues of fact requiring decision in this case, namely the provenance and genesis of the Eton Group corporate restructuring.

(iii) *Cheung Chi Ming*, [D10], a director of the 4th and 5th defendant companies, was heavily involved in the Mainland China

business affairs of the companies in the Eton Group established by Mr Lucio Tan, the 6th defendant, and in 1993 he was appointed as the principal representative of the 1st defendant's Beijing office; his participation in the affairs of the business operations of the Group in Xiamen post-dated September 2003, and included the development of the Xiamen lot the underlying subject of this case, as well as the decision to terminate the Agreement. His 2 witness statements are dated 14 December 2011 and17 February 2012.

(iv) *Mariano Tan Eng Lien*, [D8], whose single witness statement is dated 13 December 2011, was a director of the 1st and 2nd defendants until 28 July 2009, and thereafter held no office within the Eton Group; he now is retired. He is the elder brother of Mr Lucio Tan, the 6th defendant, and mainly was concerned with overseeing fund mobilization and investment management of the Group's investment activities in Hong Kong, which he visited from his Philippines residence on a quarterly basis during the years of his involvement in the Group. Mr Tan's single witness statement is dated 14 December 2012.

(v) *Domingo Chua*, [D7], is a director of the 1st, 2nd, 4th and 5th defendants, and until 6 December 2010 he was the legal representative and Chairman of the Board of Xiamen Legend, the 5th defendant; as from 16 November 2005 he has been a director of the 3rd defendant. He was responsible for supervising the property business of the companies in Xiamen as well as other cities in Mainland China, reporting at all times to his brother-in-law, Lucio Tan, the 6th defendant. After the

signing of the Agreement between the plaintiff and the 1st and 2nd defendants, for which he was responsible, at Mr Lucio Tan's request he stepped aside from all dealings with Lot 22, the Xiamen plot the development of which was the subject of the Agreement, in order to permit Mr Cheung Chi Ming, the 10th defendant (and also his brother-in-law) to take over the relevant responsibility. His single witness statement is dated 14 December 2012.

(vi) *Kwan Kie Yip*, [D9], whose witness statement is of like date, is a qualified accountant. Mr Kwan is a director and Chief Executive Officer of EPL, the 1st defendant, and is also a director of the 2nd, 4th defendants and, until 27 June 2011, a director of Xiamen Legend, the 5th defendant. Save for the periods from August 2002 to September 2003, and July 2003 to May 2005, in which he was directly involved in the Group property business in Shanghai and Dalian respectively, he has not taken part in the Mainland China business of the 1st defendant and its associated companies, and has remained, in operational terms, 'Hong Kong-centric'.

(vii) *Benito Chua* was the final *viva voce* witness of fact, who gave evidence on the 15th day of this trial; his witness statements are dated 15 February 2012 and 27 March 2012. Mr Chua is not an individual defendants, his evidence being but belatedly called by Mr Yu SC, leading for the 1st and 2nd defendants, out of an abundance of caution arising from the fact that this is a 'split' trial, and that in certain instances it is not always easy to delimit the precise line of demarcation between 'liability' and 'quantum'. In the event Mr Chua's evidence was that he had

first become involved with the development of Lot 22 in around January 2004, at a time when certain approvals and permits had been obtained from the Xiamen local government authorities; he spoke primarily to matters relating to the construction of the development on site after "substantial changes and improvements to the design of the development" made by the 5th defendant after termination of the Agreement with the plaintiff (for example, 32 above ground floors per block were built by the 5th defendant as against the plaintiff's earlier design of 23 floors, whilst the design of the blocks themselves were in a different configuration), and latterly (in a supplemental statement produced during the trial) as to the pre-sale arrangements and profitability of the project as sold, and was but briefly cross-examined by Mr Barlow SC. In the overall scheme of things it is probably fair to say that his evidence, whilst informative, did not add a great deal to the issues the immediate subject of this trial.

85. Only *Mr Lucio Tan*, the 6th defendant and acknowledged head of the Eton Group, and the so-called "puppet-master" central to Mr Barlow's submissions, did not attend court and give evidence.

*Expert*

86. In his Opening Statement, Mr Barlow SC, leading for the plaintiff, went so far as to express the optimistic view (at paragraph 4.4) that the plaintiff's "primary position is that PRC law is irrelevant" and further (at paragraph 10.3) that it was envisaged that a ruling of the court

"might be sought as to whether or not the expert evidence is reasonably required to resolve the proceedings".

87. In the event such a ruling was not sought, I assume because it became abundantly clear to all counsel that expert evidence as to PRC law was to prove highly significant in the disposition of this case.

88. The court thus had to confront the learning of the two gentlemen who appeared to give such expert evidence at this trial:

> *Mr Fei Ning*, a practicing attorney in China and a partner in Jun He Law Offices, a Chinese law firm, who was engaged by Messrs Clyde & Co, the solicitors for the plaintiff, to express his opinion on certain Chinese law issues. Mr Fei's final Expert Report is dated 23 February 2012.
>
> On the other side of the fence, the PRC law expert called on behalf of all the defendants (save for the 6th defendant) was *Professor Cui Jian Yuan*, a law professor at Tsinghua University, whose research area is civil law and whom, amongst other positions, holds the title of Director of the Civil Law Research Centre of the School of Law of Tsinghua University. Professor Cui's final Expert Report is dated 29 February 2012, and during the trial he produced a Supplemental Opinion dated 20 March 2012.

89. In the course of this judgment I shall be referring to the contentions of these two experts. For immediate purposes, however, suffice it to say that in so far as these experts disagree, I have no hesitation

whatever in preferring, and in accepting, the opinion(s) offered by Professor Cui.

90. I mean no disrespect, but although Mr Fei pronounced himself *au fait* with the obligations of an expert witness under the Hong Kong system, my strong feeling was that his instincts as a practising attorney were still much to the fore, and, again if I may say so with respect, his desire to argue the plaintiff's case clearly was discernible within many of his responses to questions variously addressed to him. I was also underwhelmed that he did not inform the court that the particular PRC tort law upon which he based some of his responses in fact was *not* in place as part of the law of the PRC at the time of the matters the subject of this case – and thus was inapplicable to the present issues with which this court had to deal.

91. One final matter remains to be dealt with under the 'expert evidence' rubric. In his final submission Mr Shieh SC for the 3rd to 5th defendants moved from the Bar table that a Report of Mr Anthony Dicks QC should be regarded as part of the expert evidence and be referred to by the court.

92. If I may say so, I have much time for Mr Dicks' expertise in this area, but to accede to this application would not, I think, be fair, given that at the time of the making of the relevant directions for expert evidence on PRC law Mr Dicks' Expert Report of 12 January 2010 upon the issue of 'constructive trust' under PRC law – which Report predated such directions – was *not* canvassed as being part and parcel of the expert evidence to be used at this trial.

93. Accordingly Mr Shieh's *ad hoc* motion is denied, and for the purposes of Chinese law I shall refer solely to the evidence of Mr Fei and of Professor Cui, each of whom appeared in the witness box and was extensively cross-examined.

*FINDINGS OF FACT*

94. In origin this is a simple case, and viewed in that light it beggars belief how long it has taken to try; regrettably no acceptable judicial means were available to shorten its progress once it was set down and forensic inertia had set in.

95. As Mr Tong SC pointed out in his Opening, one of the peculiar aspects of the present action is how few disputes of relevant primary fact require judicial resolution.

96. There is no dispute that there was the Agreement between the plaintiff and the 1st and 2nd defendants, there is no dispute that the 1st and 2nd defendants were in contractual breach, there is no dispute that there was a CIETAC arbitration, which yielded the 1st and 2nd Arbitral Awards, there is no dispute that there was a restructuring within the Eton Group (so that the prospective share transfer between the plaintiff and the 1st and 2nd defendants as ultimately envisaged under the Agreement [*vide* Article 8] could not be accomplished), there is no dispute that the individual 6th to 11th defendants are or were working in official capacities within the Eton Group of companies, and in particular variously within the 1st to 5th corporate defendants, and there is no dispute as to the circumstances in which the 1st Arbitral Award formally came to be registered with the Hong Kong court in the 1st action, that is, HCCT 54 of 2007.

97. Looking at the matter in the round, it strikes me that the only issues which demand findings of primary fact are but two:

(1) the provenance of, and motive for, the restructuring within the Eton Group – which event, if I may say so, has disproportionately influenced/coloured the conduct of this case and has resulted, *inter alia*, in its procedural complication by the addition of causes of action in conspiracy, procuring breach of contract and breach of trust and by, in particular, the addition to this action of the 6 additional individual defendants; and

(2) the validity or otherwise of the reason propounded by the 1st and 2nd defendants for terminating the Agreement with the plaintiff in the first place.

*Reason for Termination*

98. As to the assertion in the papers (but, I note, neither repeated nor adopted by leading counsel at this trial) that termination by the 1st and 2nd defendants arose by virtue of a concern that the Agreement in its form would contravene Chinese law, I find it difficult to take this assertion – which Mr Barlow SC neatly characterized as the Eton Group "party line" – seriously.

99. Whilst the 'potential infraction of Chinese law' no doubt served to endow a patina of respectability upon what struck me as an hard-nosed and entirely calculated breach by the 1st and 2nd defendants of their contractual commitment with the plaintiff, there is no doubt in my mind that the reason was old-fashioned greed, pure and simple, and the

realization that to lose this development on Xiamen Lot 22 would have been been a bad bargain in terms of potential loss of a significant level of profit. To pretend otherwise strikes me as far-fetched, and if it is not clear already, I reject this excuse for the breaking of the Agreement as firmly as I may.

*The Group Restructuring*

100. This then leaves the reason and predominant motive for the share restructuring which undoubtedly took place, and perhaps, since it has assumed such profile in this case – absent this restructuring, this case, in its present form at least, would not have seen the light of day –I should say a little more about it.

101. Under the Agreement between the plaintiff and the 1st and 2nd defendants, Article 6 refers to the plaintiff's rights and obligations to develop the land, Article 7 contains detailed provisions about the right to supervise of the 1st and 2nd defendants, and Article 8 – which is the most immediately relevant for the purpose of the present discussion – stipulates:

> "When Party B [the plaintiff] has settled the total transfer price and fulfilled the obligations according to the Agreement, Party A [the 1st and 2nd defendants] will agree to transfer all the shares of Hong Kong Legend [the 4th defendant] to an approved individual or an approved legal entity outside the territory of China designated by Party B."

102. The manner it then was envisaged that this was to work *if* the arrangements in the Agreement had proceeded according to plan was that the 4th defendant, which in turn held the 5th defendant developer/owner of Lot 22, at the designated time would transfer its 2 issued shares (one each *then* being held by the 1st and 2nd defendants) to the plaintiff, a sample Sale

and Purchase Agreement for the Transfer of Shares and Debts being appended to the Agreement.

103. What actually happened, however, subsequent to the breach of the Agreement, was that the Group was restructured, a process which commenced in or around August 2005, with the result that the 4th defendant was taken out of the hands of the vendors under the Agreement, the 1st and 2nd defendants, in favour of the 3rd defendant and ultimate holding company of the Eton Group, Eton Properties Group Limited, as the consequence of (a) the issuance by the 4th defendant of 9,998 new shares on 16 November 2005, which were allotted to the 3rd defendant; (b) the transfer on 6 April 2006 by the 1st defendant to the 3rd defendant of its single share in the 4th defendant; and (c) the execution by the 2nd defendant on 6 April 2006 of a declaration of trust declaring that the 2nd defendant held its single share in the 4th defendant on trust for the 3rd defendant.

104. Throughout his argument Mr Barlow SC labelled these measures as the "Impugned Dealings", and in understanding the detailed sequence of these events I have been assisted by the provision of diagrammatic representations of the relationship between the 1st to 5th defendants prior to, and after, this restructuring (at Annex 3 of the plaintiff's submissions), and by a useful Chronology of Events comprising the Restructuring (at Annex 6).

105. Mr Barlow emphasised that the first that the plaintiff had known of the fact of this restructuring was as the result of the information contained in the 1st Affirmation of Mr Barry Mok [D11] dated 2 January 2008 and filed in the 1st action, HCCT 54 of 2007, in support of

the 1st and 2nd defendants application to set aside the *ex parte* Order of Mr Justice A Cheung dated 31 October 2007. At Section B of this affirmation, the deponent states as follows:

> "**Restructure of the Eton Group in 2005/2006**
>
> …
>
> 30. As a result of a restructure of the Eton Group between 2005 and 2006, the 1st Respondent transferred its shareholding in Hong Kong Legend to Eton Properties Group Ltd '(EPGL'…a company incorporated in the British Virgin Islands) and is no longer interested in any share of Hong Kong Legend since 6th April 2006.
>
> 31. In or around 22nd March 2005, the management of the Eton Group decided to establish a holding company in the PRC ('Holding Company'). At the time, it was understood by the management that the followings were the prerequisites for establishing the Holding Company:
>
> (i) the investor has invested in no fewer than 10 projects within the PRC; and
>
> (ii) the contributed registered capital exceeded USD30 million.
>
> The restructuring was therefore devised to enable EPGL to meet the prerequisites. Prior to the restructuring of the Eton Group, each of the Respondents held 1 share in Hong Kong Legend in trust for Eton Properties International (No 3) Limited…a BVI company [and] a wholly owned subsidiary of EPGL. There were also other property holding companies within the Eton Group which were subject to similar trust arrangements with shares holding in trust for EPGL or its wholly owned subsidiaries. The aim of the restructuring exercise was to eliminate the trust arrangements, so that EPGL would become the legal owner of the property holding companies within the Eton Group and thus allowing EPGL to satisfy the prerequisites for a Holding Company. New shares of these property holding companies were allotted to EPGL and the existing shares, save 1 share, were also transferred to EPGL, which became the legal owner of the entire shareholdings, save 1 share which was also held in trust for EPGL or its wholly owned subsidiaries…[Mr Mok then goes on to recount that which had occurred in the case of Hong Kong Legend].
>
> 2. As a result of the restructuring set out above, the 1st and 2nd Respondents [1st and 2nd defendants] no longer hold any share in Hong Kong Legend.

> 33. By reason of the matters set out above, it is impossible for the Respondents to perform the Order and the Arbitration Award which require them to continue to perform their obligations under the Agreement."

106. The essence of Mr Barlow's contention, which substantially underpins the factual construct for his conspiracy pleas in this case, is that this restructuring primarily was motivated by the obvious desire of the 1st and 2nd defendants, *qua* contracting parties, to avoid their clear obligations under the Agreement, and that these 'Impugned Transactions' were in no sense a *bona fide* restructuring; to the contrary specifically they were aimed at defrauding the plaintiff of its just desserts under its erstwhile contractual bargain.

107. In his opening submission (at paragraph 3.22) Mr Barlow expressed the situation thus:

> "In order to enforce the Award by removing the Defendants' self-induced 'impossibility', created by the Purported Restructuring, P commenced this Action against D1-D5 inter alia to assert its proprietary claims over the shares in D4 and for the purpose of enforcing the Award..."

whilst in his closing submissions (at paragraph 17.63) the like theme forcefully was pursued:

> "...the timing [a week before the scheduled hearing of the 1st Arbitration on 23 November 2005] and manner of the purported restructuring give rise to the irresistible inference that it was implemented for the purpose of frustrating P's attempt to continue to perform the Agreement, rather than for the alleged purpose of setting up D3 to be the applicant for setting up a real estate company in the PRC (which the Eton Group never actually attempted to do anyway)."

108. The main difficulty with this highly selective approach, it seems to me, is that it does not 'gel' with other available, and perhaps rather more objective, evidence.

109. In this regard the evidence of Daisy Wong, the 2nd witness to testify on behalf of the defendants, is of particular significance. Whilst Miss Wong remains an employee of the Eton Group, she is not a party to these proceedings, and accordingly what she had to say must be evaluated in this light.

110. On the basis of Miss Wong's evidence, as reinforced by a slew of contemporaneous documents, which I see no reason to disbelieve and am minded to accept, it is evident that it was *she* who was the architect of the type of restructuring as ultimately took place, and that to this end she had worked closely with Barry Mok, the 11th defendant, upon various options to establish a holding company on the Mainland. In this regard quoted below are various passages from her witness statement which Miss Wong adopted as her evidence to this court:

> "In about August 2005, Mok Pui Hong ('Barry') the group financial controller of EPL approached me, with a corporate chart as of 31st December 2004. Barry indicated to me that as the management had decided to set up a holding company in Mainland China and use Eton Properties (International) Limited (subsequently renamed as Eton Properties Group Limited)('EPGL') as the applicant, he asked me to supply the information of the registered shareholders of the intermediate companies holding the foreign investment enterprises in Mainland China.
>
> Having retrieved the relevant corporate records, I inserted in manuscript on the corporate chart the details of the registered shareholders of the various companies on or about 24th August 2005 I sent Barry a copy of the corporate chart marked with the information as requested by Barry.

> Thereafter Barry approached me again, and there were probably a number of conversations between Barry and me. He told me that as he observed, the various properties in Mainland China were held through various foreign investment enterprises in Mainland China, which were in turn held by a number of intermediate companies and nominees with declarations of trust. He said, in order to facilitate the application by EPGL to set up a holding company in Mainland China, it was desirable to make EPGL as the direct majority shareholder of the said intermediate companies.
>
> I remembered, one option we had explored was to transfer the shares in the said intermediate companies to EPGL direct. However this method was not quite desirable.
>
> [Miss Wong gives 4 reasons why such was not desirable, and continued:]
>
> Then I suggested to Barry a possible alternative, namely, making allotment of shares in the intermediate companies to EPG direct. As compared with direct transfer of shares, this method was relatively straightforward because at the relevant time, except Eton Properties (Holdings) Limited (ie. EPHL), there were unissued share capital in these intermediate companies readily (sic) for allotment. Concerning EPHL, share capital had to be increased by HK$90,000 (ie from HK$10,000 to HK$100,000), but nominal capital duty (at the rate of 0.1%) of HK$90 would need to be paid. Comparing with the direct transfer of shares…allotment of shares to EPGL would be a more convenient and cheaper alternative option.
>
> After the discussions, on or about 25th August 2005, Barry sent a memorandum to Mr Cheung Chi Ming (the 10th defendant), which was copied to me."

111. In her evidence Miss Wong further noted that in that memorandum Mr Mok had referred to their discussions, and the suggestion that allotment at par value of shares to EPGL in order to make it the majority shareholder would be a simpler approach than by share transfer, which in turn would have required the valuation of shares and the underlying assets; a revised corporate chart as at 31 July 2005 accompanied this memorandum. Later, she said, Mr Cheung Chi Ming, the 10th defendant, and Mr Mariano Tan, the 8th defendant, respectively had

approved the proposal contained within the internal memorandum, and thereafter, with the assistance of her colleagues in the Company Secretarial Department, in around late October or early November 2005 Miss Wong had begun to prepare the relevant documentation to implement the corporate restructuring of the type as then had been agreed and approved by senior management; in fact, Miss Wong details in her witness statement some 10 intermediate companies for which appropriate restructuring documents were executed during the period from November 2005 to April 2006.

112. In light of this evidence I am unable to accept the hypothesis persuasively advanced by Mr Barlow as to the 'predominant purpose' of the restructuring as effected. If I may say so, the plaintiff's obvious enthusiasm for this line of argument betrays a lack of factual perspective, given that the history of the Eton Group restructuring tends to demonstrate that it had as its main focus far wider implications relating to the manner in which the Eton Group carried out its commercial property activities on the Mainland.

113. Accordingly it is clear, and I so find, that the provenance of the Eton Group restructuring *antedated* the 1st Arbitral Award by a considerable period. Whilst it remains factually the case that the restructuring had an *incidental* (and perhaps to Mr Lucio Tan, who is likely to have been well aware of it, a not unwelcome) effect of impinging directly upon the provision of Article 8 of the Agreement between the plaintiff and the 1st and 2nd defendants – thus enabling Mr Mok to mount the unmeritorious forensic 'impossibility' argument in his affirmation in HCCT 54 of 2007, which in turn served to fan the 'conspiracy' flames which weighed upon the interlocutory deliberations of the Court of Appeal

in *CACV 106 of 2008* and *CACV 197 of 2008*) – I decline to attribute to this restructuring the wholly adverse implication/inference the plaintiff now wishes this court to draw at this trial.

114. Moreover, and as will become apparent, I am unwilling to characterize such restructuring as 'unlawful' or 'illegal' or 'fraudulent'. It certainly was not a contractual breach, which breach itself had taken place some two years earlier with the tearing up of the Agreement by the 1st and 2nd defendants. Nor am I willing to accept the beguiling premise that upon the signing of the Agreement, or at the time of its breach, or at the time of the development of the site by the 5th defendant, that the plaintiff should be considered to have had some form of proprietary interest in the shares as were transferred, or that at the time of the restructuring such shares legitimately should be regarded as being subject to a constructive trust in favour of the plaintiff, or, for that matter, that the restructuring constituted a breach of some form of fiduciary duty toward the plaintiff.

115. In no sense was the restructuring a violation of the plaintiff's existing rights – as may possibly have been the case, for example, if some form of injunctive relief had been in place *prior to* the restructuring in order to restrain such restructuring from occurring – and it seems to me that the highest that it fairly can be put is that the restructuring served to make one form of remedy, that is, specific performance, more difficult, if not impossible, for the plaintiff to obtain.

116. However there is a yet further – and in my judgment more compelling – reason why the 'conspiracy theory' as now advanced by the plaintiff cannot stand upon the totality of the evidence before the court.

117. This is because it is beyond doubt that, as at the date of the actual restructuring, and the transfers whereby the 1st and 2nd defendants had divested themselves of their single shares in the 4th defendant in favour of the 3rd defendant, the Agreement as entered into had been rendered *physically incapable* of continued performance by reason of the plain fact that site at Lot 22 by then had been fully developed by the 5th defendant – which, as earlier noted, had been built in a configuration strikingly different from the development plan as earlier proposed by the plaintiff – and in turn the vast majority of the units as erected had been on-sold to third party purchasers.

118. How therefore, an objective observe rhetorically might ask, could the situation have been any different *with or without* the restructuring, given that fully 21 months was to elapse before the plaintiff invoked the arbitration clause in the Agreement, and hence the jurisdiction of the CIETAC Arbitral Tribunal?

119. In this connection the indisputable facts speak for themselves. On the plaintiff's own evidence, it knew of the intention on the part of the 1st and 2nd defendants to terminate even before the service of the termination notice in November 2003, the Land Use Permit was obtained on 6 January 2005, with approval to carry out preliminary construction work on the land on 8 May 2005, and the construction on Lot 22 by the 5th defendant openly was undertaken in Xiamen, the evidence being that this site actually is on the same road as the plaintiff's office – and yet, no arbitration was commenced until August 2005, by which time, in light of the situation 'on the ground', any order for 'continuous performance' of the Agreement was doomed to be nugatory, the 1st and 2nd defendants by then

making no secret to the Tribunal of what had happened in terms of the physical development of the Lot.

120. It thus remains a matter of conjecture as to why there was such a 21 month delay by the disgruntled plaintiff to the broken Agreement, although (and whilst it does not much matter) the thought which naturally comes to mind is that the plaintiff was waiting to see how things developed commercially on site before commencing its arbitration claim.

121. But whatever the reason for the delay, that which is curious is that both in the CIETAC arbitration, and indeed on the face of the Re-Amended Statement of Claim in this case (*vide* paragraph 10A thereof ), a damages remedy for contractual breach is and was *not* advanced, and yet a plea for specific performance of the Agreement is and was maintained; in fact, and again somewhat curiously, in cross-examination in this trial Mr Xu on behalf of the plaintiff went so far as to reiterate his desire that even now the remedy of specific performance should be granted to the plaintiff.

122. It follows from the foregoing analysis, therefore, that I find as a fact that the restructuring of the Eton Group, which was put in place before the CIETAC arbitration even had commenced, was *not* a direct consequence of the arbitration, nor was stimulated by the 1st Arbitral Award, although, as I have observed, the form of restructuring as ultimately chosen may well have been regarded (by Mr Lucio Tan at least) as incidentally advantageous in light of the prospect of arbitration consequent upon the contractual breach. Nor should it be forgotten that the evidence shows clearly that the Eton Group took advice on the manner/merits of the

potential restructuring from no less than 4 different Mainland law firms in the period between April and July 2005 – all of which occurred *prior to* the issue of the arbitration notice which was received by Mr Barry Mok on 23 August 2005.

123. Given the cumulative state of the evidence it would, in my view, be perverse to find otherwise – although, as earlier I have indicated, the timing of the restructuring served to buttress what clearly was a poor (and wholly self-serving) 'impossibility' argument by the 1st and 2nd defendants which, absent access to the evidence and the full context, unsurprisingly was regarded as 'self induced', and thus manifestly failed to appeal to the members of the Court of Appeal in CACV 106 and 197 of 2008.

*THE CASE(S) VARIOUSLY ADVANCED AGAINST THE DEFENDANTS*

124. Earlier in this judgment (at paragraph 69) I attempt to characterize the manner in which the plaintiff has chosen to frame its causes of action against the 11 defendants to this action. Objection has been taken at various times by counsel for certain defendants, or *blocs* of defendants, that a particular cause of action remains unpleaded, even at this late stage, and in those instances in which I consider that a pleading objection has merit I indicate appropriately, although it is, of course, rare in the Commercial Court for 'pleading points' to be sustained.

125. As now will be evident, I take the view that this case conveniently may be divided into a 'derivative' action (against the 1st and 2nd defendants) and a series of 'original' actions (against all 11 defendants). I continue with this classification, and take these aspects in turn.

*THE DERIVATIVE ACTION*

*Nature of the action*

126. From the outset of this trial there was extensive debate between leading counsel and the court as to the juridical nature of the action between the plaintiff and the 1st and 2nd defendants derivative upon the 1st Arbitral Award.

127. In his Opening Mr Yu SC for the 1st and 2nd defendants complained that despite strenuous efforts on his part in argument earlier hearings, the precise basis of the plaintiff's case against him continued to be unclear.

128. In this vein Mr Yu suggested [*Transcript, Day 1, page 127 et seq.*] that in answer to this rhetorical question there were 3 possibilities:

(1) that in fact the present action is an action on the Agreement of July 2003, and that the plaintiff wished to have specific performance thereof, alternatively damages *in lieu*;

(2) that this action was "purely and simply" about enforcement in the Hong Kong court of the 1st Arbitral Award; and

(3) that this is simply an action on the implied promise – by reason of the fact that the parties had entered into an Agreement containing an arbitration clause – to honour whatever Award is made in any Arbitration.

129. This was a refrain/complaint that was to be a constant on the part of Mr Yu SC during the hearing of this case, and mirrored the initial concern of the court (voiced at the outset of the trial) as to the basis of this

element of the case, given that the '1st action' already had produced an *extant and ongoing* Order – which the appellate court pointedly had declined to set aside – for enforcement of the CIETAC Award; thus so far as this '2nd action' was concerned, this earlier Order rather assumed the status of the 'elephant in the courtroom': should it be recognized, how did it fit in with what was happening now, and how did it affect the arguments which were to be made by the plaintiff in its attempt to bring home liability against the 1st and 2nd defendants?

130. When pressed at an early stage on this aspect Mr Barlow SC had two primary responses: *first*, he cited (and continued to invoke) paragraph 4.3 of his Opening, which in essential part reads:

> "…all of P's claims are claims made within the enforcement of the Award/Enforcement Order, since they either seek the specific performance of the Agreement or compensatory remedies in lieu, which P is entitled to seek from the Court by way of enforcement, by invoking against D1/D2 plus the other relevant defendants the Court's statutory, common law and equitable jurisdiction to grant effective enforcement remedies or other remedies to compensate P for any unlawful deprivation from obtaining that specific performance…";

and *second*, leading counsel indicated that the 2nd action really had been commenced by reason of potential complications caused by the addition of a further 9 defendants to the plaintiff's case, and thus it had been far easier procedurally simply to issue new proceedings:

> "Court: Mr Barlow…[what is] the relationship between this case, which now bears the title 13/2011, formerly 961/2008, and the enforcement action, which is 54/2008…[that] is basically a New York Convention enforcement, isn't it?
>
> Mr Barlow: That's our case, my Lord, yes…
>
> Court: I'm reaching a little bit, and I'd be grateful if you would help, between the relationship between that case and this case.

> Mr Barlow: My Lord, in the enforcement proceedings we say it was theoretically possible for us to do everything we're doing in these proceedings…
>
> And we say that these are enforcement proceedings, and indeed we say that with reinforcement of views expressed in the Court of Appeal and indeed the Committee of the Court of Final Appeal. Procedurally…it's complicated…
>
> Once you have registered an award against the contractual parties, if you want to bring in parties who are not in contract and then if you want to plead your case, which, if the nature of the case will require a pleading, then procedurally it might be considered more straightforward to issue a new action.
>
> Court: I see.
>
> Mr Barlow: But, my Lord, it is a matter, we contend, of simple procedure. Nothing turns upon it, and we respectfully agree with your Lordship's original observation that these are really enforcement proceedings."
>
> *[Transcript: Day 1, pages 6-7]*

131. As to Mr Yu's "3 possibilities", as they came to be known, Mr Barlow's firm reaction was as follows:

> "Mr Barlow: It's an incorrect characterization, my Lord, and I can tell you very briefly why we say that…it's an incorrect characterization because you will remember [the Court] asked Mr Yu how he characterized the action, and he said there were three possibilities. He said, the first possibility is to sue on the contract and seek specific performance or damages. The second is to sue on the award, and the third is to sue on the implied agreement. We say two and three are actually the same…the reason we say that is because you can sue on an award without expressly invoking the implied promise to honour the award. You cannot sue on the implied promise without the award.
>
> Court: Thank you.
>
> Mr Barlow: My Lord, in respect of one, as you know, it's our case that we have sued on the contract. We have obtained a remedy which is equivalent to specific performance, and we have registered that award as a judgment of the court. And later…I will be taking you to an abundance of authority to demonstrate that as the Chief Justice said, once you have done that, the law and procedures of the court of enforcement take over…"

[*Transcript, Day 2, pages 89-90]*

132. So far, so good; however, the position subsequently was amplified/re-clarified by Mr Barlow SC in the course of his closing submissions when he stated that he wished to rebut the "misconception" encouraged by Mr Yu that "these proceedings somehow had involved procedural short-cuts", and stated in terms that this action was, is and always had been *a common law action on the Arbitral Award*:

> "Mr Barlow: There are two ways in which a litigant in the position of my client can obtain the assistance of the court to enforce an award such as the ones that have been made here. The first is by the registration route, and that was, of course, taken.
>
> The second is by suing on the award, and that is what is happening in this action, and it's always been what is happening in this action. And it would have been possible for the plaintiff to apply for summary judgment under Order 14, but a decision was made not to do so because we were going to trial against the other defendants anyway.
>
> Court: I thought what was happening was that this was effectively a continuation/amplification of the original court judgment, specific performance being impossible to attain or, as you would put it, 'inefficacious'.
>
> …Have I got it right that…this is suing *de novo* on an award you've already registered and made a judgment of the court?
>
> Mr Barlow: Correct my Lord, because of what we characterize as the fraudulent conduct which only came to light after the registration proceedings…"
>
> *[Transcript, Day 18, pages 120-121]*
>
> and thereafter:
>
> "Court: The ramification of what you say…is that although all the established authorities in the New York Convention talk about a mechanistic application, if this authority be right [*West Tankers Inc v Allianz Spa & anr*, [2012] EWCA Civ 27] and 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?
>
> Mr Barlow: My lord, that has always been the case…"
>
> *[Transcript, Day 18, page 127]*

133. The court was and is obliged to Mr Barlow for putting beyond doubt the nature of this action in this derivative element of the proceedings – 'derivative' precisely because this part of the action against the 1st and 2nd defendants is consequent upon the 1st Arbitral Award, which in turn reflects the detailed consideration given by the CIETAC arbitrators to the case as presented to them by the plaintiff. Moreover, in the course of submission Mr Barlow was at pains to stress that it was *not* open to the 1st and 2nd defendants themselves to go behind and/or to relitigate the arbitrators' Award: as he neatly put it: in terms of liability "the arbitrators have done the heavy lifting" [*Transcript, Day 18, page 147*].

134. Allied with this argument appears to be a concomitant (and belated) contention to the effect that, in the context of the 'split trial' and the liability/quantum dichotomy, the remit of this court solely is to pronounce upon the *prima facie* entitlement of the plaintiff to specific performance or equitable compensation, as to which latter remedy Mr Barlow has indicated that "at the next phase [ie the quantum stage] we shall be electing for equitable compensation in lieu" *[Transcript, Day 18, page 133]*.

135. This two-pronged approach raises issues as to (a) the jurisdiction of this court to do that which the plaintiff now wishes it to do; and (b) as to the issues this court is empowered to decide in this case, now

of course designated by the Court of Appeal, by its judgment of 14 February 2012, as a 'split' trial. I take each of these points in turn.

*(1) Is there jurisdiction?*

136. I regret that the plaintiff's arguments have fallen on stony ground, and that as a matter of analysis I remain unconvinced by Mr Barlow's submissions, although if I may say so they were advanced with courage and commitment.

137. As to the precise nature of this action, an issue which Mr Yu aptly described as "bubbling" throughout this hearing – for my part I would classify it as a constant irritant – it seems to me that that which the plaintiff now is attempting to achieve, consequent upon the 1st Arbitral Award, is to gain *carte blanche* to recharacterise the remedy as earlier granted by the CIETAC arbitrators under an wholly different system of law, namely the Chinese legal system.

138. Mr Yu SC objects that this matter goes to jurisdiction *per se*, and with respect I think that he is correct to take this as a primary and fundamental contention.

139. I do *not* accept that this court has the jurisdiction to perform this function, however much I might wish the contrary to be the case, and thus in the process to effect some form of 'palm tree justice' which at this late stage might serve belatedly to remedy the contractual breach which the 1st and 2nd defendants visited upon the plaintiff when in November 2003 the Agreement metaphorically and literally was torn up and the Eton Group, I have no doubt at the instigation of the 'boss', Mr Lucio Tan, boldly and

egregiously moved to grab the potential development profits arising from Lot 22 for itself.

140. Nor do I accept the contention as advanced by Mr Barlow that a common law action on the arbitral award permits greater latitude in terms of remedy than is the case with the standard New York Convention summary enforcement procedure – which of course initially was employed by the plaintiff in the 1st action, only to be "left" hanging in the ether whilst this 2nd (and in substance far more ambitious) action was commenced.

141. It is trite law that the New York Convention procedure (identical in concept to the particular statutory enforcement of Chinese arbitral awards under the old Arbitration Ordinance, Cap 341) of registering and enforcing foreign arbitral awards is "mechanistic" – to use the oft-quoted term – and that which the registering/enforcing court is *not* to do is to examine the substantive merits of the dispute nor to subvert nor otherwise intrude upon the thought-processes of the arbitrators who have handed down the arbitral award in question.

142. There is a wealth of authority on the point, but perhaps the most oft-quoted passage comes from the judgment of Gross J in *Norsk Hydro ASA v State Property Fund of Ukraine* [2002] EWHC 2121 (Comm) at paragraphs 17-18 wherein, on the facts of that case, the learned judge observed:

> "…There is an important policy interest, reflected in the country's treaty obligations, in ensuring the effective and speedy enforcement of such international arbitration awards; the corollary, however, is that the task of the enforcing court should be as 'mechanistic' as possible. Save in connection with the threshold requirements for enforcement and the exhaustive grounds on which enforcement of a New York Convention award

> may be refused…,the enforcing court is neither entitled nor bound to go behind the award in question, explore the reasoning of the arbitration tribunal or second-guess its intentions…
>
> Viewed in this light, as a matter of principle and instinct, an order providing for enforcement of an award must follow the award. No doubt 'slips' and changes of name can be accommodated; suffice to say, that this is not the case. Here it is sought to enforce an award made against a single party, against two separate and distinct parties. To proceed in such a fashion, necessarily requires the enforcing court to stray into the arena of the substantive reasoning and intentions of the arbitration tribunal. Further, enforcement backed by sanctions, is sought in terms other than those of the award."

143. These observations have been approved in Hong Kong jurisprudence: see, for example, *PetroChina International (Hong Kong) Ltd* [2011] 4 HKLR 604, at 611, paragraphs 12 & 13 (CA); also per Ribeiro PJ in *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* (2009) 12 HKCFAR 84, at 100:

> "It is of course well-established that the Hong Kong court, sitting as an enforcing court, does not review the merits of the Tribunal's award…"

144. In my view a common law action on a foreign arbitral award, which was the procedure in use prior to the introduction, by international Convention, of the summary registration and enforcement procedure for foreign awards, fundamentally is no different *in specie*, and contains the like conceptual limitation. In an action on the award, which nowadays is relatively uncommon (as opposed to the summary form of *ex parte* application to register/enforce, which now represents the almost universal practice in countries signatories to the New York Convention) the procedure was that, absent the convenience of such summary registration and enforcement Convention provisions, the Award formally had to be proved by evidence, and hence in that extended procedural manner became

a judgment of the enforcing court; if and in so far as a juristic basis had to be discerned for this process, opinion seemed to be that this satisfactorily could be characterized as an action based on an implied promise to perform an arbitral award to which the parties contractually had agreed as an appropriate method of dispute resolution.

145. But in my view what such an 'action on the award' does *not* achieve, nor seek to achieve, is to subvert the integrity of the arbitral process, which contractually has been chosen by the parties as the desired means of dispute resolution. When viewed in this light, it seems remarkable that the plaintiff in this case now goes so far as to request this court to substitute for the 'continuous performance' award of the CIETAC tribunal a new claim for damages/equitable compensation, which not only goes beyond the scope of the award as it now exists, but never was contemplated by the tribunal, which was not asked even to consider/countenance such a remedy.

146. To the contrary. The tribunal's order to continue performance of the Agreement was made on the footing that the Agreement remained alive to be performed, the tribunal *never* having been asked by the plaintiff to determine this dispute on the basis that the Agreement had come to an end, and thus to rule upon the issue of damages for termination of the Agreement; hence it is not clear how there is jurisdictional basis for this court to usurp the designated dispute resolution body and impose its own remedy under the purported guise of 'enforcement'.

147. One might go further. Not only was this CIETAC arbitral tribunal never asked to rule on monetary compensation – however it may

have been characterized under PRC law – but equally it is not clear how, if asked, the tribunal could have ordered the share transfer as now requested by the plaintiff as an alternative enforcement remedy in this action. In any event, and putting that consideration to one side, in asking the Hong Kong court to act in the manner now sought the plaintiff not only is purporting to usurp the function of the tribunal but – and in the circumstances it strikes me as a big 'but' – to rule upon an issue relating to breach of the Agreement which must lie *solely* within the jurisdiction of the Beijing arbitral tribunal (or, if ultimately became necessary, in the Beijing court of supervisory jurisdiction).

148. The case of *Dalmia v National Bank* [1978] 2 Lloyd's Rep 223, which has been referred to in argument by both sides in this case, demonstrates that an enforcing court should not do anything, in the words of Kerr J (as he then was), "to alter the nature of the obligations created by the award" (at 274), nor, per Megaw LJ (at 302) "to substitute its own decision for the arbitrator's decision on a matter within the arbitrator's jurisdiction": in fact, in *Dalmia* the argument was put on the basis that the action was founded on the contract containing the arbitration agreement, because it carried with it a promise to pay the amount of any award that might ensue. As Megaw LJ summed up the position in that case (at 302):

> "No sophistry nor subtlety of phrasing can alter the reality. If the English court were to do what Dalmia asks it to do [to increase interest over and above the rate stipulated in the award], it would be altering the arbitrator's decision on a matter which, for good or ill, the parties by their arbitral agreement have left for him to decide."

149. The considerably later case of *Walker v Rome* [1999] 2 All ER (Comm) 961 is to like effect, wherein Aiken J held that the court had no

power to grant interest under the Supreme Court Act on the sum awarded by the arbitrators in that case, but which remained unpaid after the award. The reasoning of the learned judge (at 968 g-j) was that section 49(4) of the Arbitration Act 1996 left it entirely to the discretion of the arbitrators whether to award interest, and once the arbitrators had decided upon whether post-award interest should be granted, that was an end of the matter: once again, consistent with the premise that an enforcing court will not, in the name of enforcement, substitute its own decision for the arbitrator's decision on a matter within the arbitrator's jurisdiction, for to do so, or to attempt to do so, would be contrary to the clear policy of the court within the context of international arbitration.

150. I recognize that during this argument Mr Barlow for the plaintiff placed significant weight upon the following passage in *Mustill and Boyd, 2nd ed*, at 417 (a passage which I have noted also was prayed in aid by the learned Chief Justice in his Determination dated 4 May 2011 declining leave to appeal to the CFA):

> "Parties to an arbitration agreement impliedly promise to perform a valid award. It the award is not performed the successful claimant can proceed by action in the ordinary courts for breach of the implied promise and obtain judgment giving effect to the award. The court may give judgment for the amount of the award, or damages for failure to perform the award. It may also, in appropriate cases, decree specific performance of the award, grant in injunction preventing the losing party from disobeying the award, or make a declaration that the award is valid, or as to its construction or effect.
>
> The action is commonly described as an 'action on the award', and indeed it has been suggested that an action may lie on an implied promise contained in the award itself without the necessity of pleading an arbitration agreement. We submit that the better view is that the plaintiff must plead and prove both the arbitration agreement and the award: both are essential elements of this cause of action. It has sometimes been necessary to decide whether the action is 'grounded upon a contract' or is brought to

> 'enforce a contract'. These problems of classification necessarily give greater weight to one or other element of the cause of action, depending on the circumstances, but they should not be allowed to obscure the fact that both elements must be present before the plaintiff can sue…"

151. With respect, I do not think that this passage assists Mr Barlow in the manner that he wishes, and in my view it does not permit the 'recharacterisation' of the arbitral award the plaintiff clearly now seeks. Perhaps, as Mr Yu SC suggested, the passage in question is somewhat broadly-phrased (I also confidently surmise that it certainly cannot have been written with the current peculiar procedural situation in mind), and I further accept the contention that when the authorities cited in the footnotes accompanying this passage are analysed, it is clear that the propositions as thus put forward should not be over-generalised.

152. As Mr Yu SC pointed out, the cases cited (*vide* footnotes 9 and 10) of *Bremer Oeltransport GmbH v Drewery* [1933] 1 KB 753, *Bloeman v Gold Coast City Council* [1973] AC 115 and *Coastal States Trading (UK) Ltd v Mebro Mineraloelhandels GmbH* [1986] 1 Lloyd's Rep 465 all deal with situations where a sum specific was awarded as debt or damages and the successful party subsequently brought an action to enforce the sum specific or the outstanding interest thereon, whilst in *Birtley District Coooperative Society v Windy Nook and District Industrial Cooperative Society (No 2),* [1960] 2 QB 1, at 19, it is evident that the plaintiff claimed declaratory and injunctive relief in aid of (and ancillary to) the arbitral awards in question, orders which, as Mr Yu submitted, would lie *outwith* the relevant arbitral jurisdiction.

153. It remains true that in *Birtley, op cit.,* Streatfield J acceded to the plaintiff's claim for damages, albeit there appears to have been no argument against the court's jurisdiction to assess and award such damages on the basis that it was within the exclusive jurisdiction of the arbitral tribunal; however the judge did express the view (*op cit.,* at 14) that he was "not entitled to look behind the award and become in effect an appellant tribunal from the arbitrators", and in any event this decision was disapproved by the House of Lords in *Bellshill and Mossend Co-Operative Society Ltd v Dalziel Co-Operative Society Ltd* [1960] AC 832 on the basis that the arbitral award no longer was binding on the defendant once it had ceased to be a member of the society.

154. The editors of *Russell on Arbitration, 23rd ed.*, at paragraph 8-015, comment:

> "If the arbitration agreement pursuant to which the award is made falls *outside* the broad statutory definition [within the Arbitration Act 1996], the action will have an implied obligation to perform the resulting award and failure to do so is a breach of that arbitration agreement. The successful party would be entitled to bring an action in respect of such breach and to obtain a judgment in terms of the award. The essential elements of the plaintiff's cause of action are that he must plead and prove:
>
> - An arbitration agreement;
> - That a dispute has arisen which falls within that arbitration agreement'
> - The appointment of a tribunal in accordance with the arbitration agreement;
> - The making of an award pursuant to the arbitration agreement;
> - Failure to perform the award."
>
> *[Emphasis added]*

155. Once again, it is difficult to see how this commentary can justify the proposition that an enforcing court is permitted to take over the exclusive jurisdiction of the arbitral tribunal to award damages when the arbitral tribunal has never ruled on, or been asked to rule on, such a remedy and instead – as in the present case – has ordered 'continuous performance' of the Agreement. Nor for that matter does this passage countenance or envisage a situation wherein, as here, the current action 'on the arbitral award' is commenced *subsequent to* a prior order of the court of enforcement already having registered that award as a judgment of the enforcing court, with that judgment remaining extant albeit now apparently languishing in 'procedural limbo'.

156. For present purposes, this is as far as this court needs to go on the main issue; however, Mr Yu asks rhetorically, even on *the assumption* that the plaintiff is entitled to bring a common law action on the award, what is the relevant breach? If truly this is the juridical basis of the present action – as now appears to have been placed beyond doubt in Mr Barlow's closing submission – given that the Award did not spell out any specific act which the parties should do or when any such act should be performed, what have the 1st and 2nd defendants not done? In this context he submitted that any claim as to failure of performance is undermined by the indisputable fact that the 1st and 2nd defendants (unlike the plaintiff) actually had returned to the tribunal and had applied (unsuccessfully as it turned out) for a ruling on how the Agreement could be performed and what was the relief (including damages) to which the plaintiff was entitled.

157. There is merit in this further submission, although it seems to me to be merely another way of expressing the primary point, namely, that

this court now is being asked by the plaintiff to substitute its own remedies, according to its own system of law, for that which the arbitral tribunal otherwise could/should have done, and could/should have been asked by the plaintiff so to do.

158. Although an incidental point in the context of the jurisdiction debate, I should indicate at this stage that I do *not* accept that 'fraud' (which issue I return to later in this judgment) is established in the present case against the 1st and 2nd defendants as the result of the restructuring, albeit Mr Barlow asserted that it was this which had contributed to this form of 'action on the award':

> "…There are two ways in which a litigant in the position of my client can obtain the assistance of the court to enforce an award such as the ones that have been made here. The first is by the registration route, and that was, of course, taken.
>
> The second is by suing on the Award, and that is what is happening in this action, and it's always been what has been happening in this action. And it would have been possible for the plaintiff to apply for summary judgment under Order 14, but a decision was made not to do so because we were going to trial against the other defendants anyway.
>
> What had changed, my Lord, was after the registration of the Award, for the first time the 1st and 2nd defendants disclosed [in the affirmation of Mr Mok dated…] what we characterize as their fraudulent conduct which had been undertaken immediately prior to the arbitration proceedings for the purpose of ensuring that the agreement could never been performed. So far as the registration of the original award was concerned, well, that was overtaken firstly by that disclosure and the practical difficulties that it gave rise to; secondly' by the necessity to bring in the other parties who were involved."
>
> *[Transcript, Day 18, page 121]*

159. At the end of the day, therefore, the short point remains that *if* this be a common law action on the arbitral Award it did not, and does not,

endow Hong Kong *qua* enforcing court with such additional powers as now are suggested to exist by Mr Barlow, who beguilingly expressed the position thus (at paragraph 19.5 of his final address):

> "All that this Court is asked to do is to make the judgment contained in the Enforcement Order [the Order of Cheung J in HCCT 54 of 2007] (which required D1/D2 to continue to perform the Agreement *inter alia* by transferring all the shares in D4 to P) efficacious. Similarly to Reyes J both of our appellate courts have ruled that there is no jurisdictional bar…"

160. I cannot agree with this characterization of the position, not least the fact that the Order of Mr Justice Cheung made no reference to any transfer of shares. At bottom this case involves taking a CIETAC Award couched in terms of "continuous performance" of the Agreement and seeking to reconstitute that Award (already summarily judicially recognized and entered as an Order of the Hong Kong court) *as if it* had come into existence consequent upon an original breach of contract dispute within the Hong Kong jurisdiction, during which the *lex fori* relating to the equitable remedies of specific performance (or election of equitable compensation *in lieu*) would have come into play *qua* substantive law of Hong Kong.

161. In my judgment the contention that the enforcing court thus is at liberty to import into the 1st Arbitral Award its own rules of substantive law as to specific performance in addition to enforcing the Award according to the procedural law of the *lex fori* is a step too far; notwithstanding leading counsel's contention that this "has always been the case" [*Transcript, Day 18, page 127*], in my view this submission finds no justification on the authorities.

162. Nor does the very recent case of *West Tankers Inc v Allianz Spa & anr*, [2011] EWHC 829 (Comm), [2011] EWCA Civ 27, a decision of the English Court of Appeal, assist Mr Barlow in the manner he suggests that it does. The particular issue in *West Tankers*, *op cit*., was whether there was statutory power [under section 66 of the Arbitration Act 1996] to order judgment to be entered in terms of an arbitral award in a case wherein the award was in declaratory form, and more particularly, where the award took the form of a negative declaration (that is, a declaration that the successful party has no legal liability to the other party in respect of the subject-matter of the arbitration).

163. Mr Justice Field, sitting in the English Commercial Court, decided that such power existed, and his view was upheld by the Court of Appeal; in his judgment Thomas LJ (with which Lloyd and Carnwath LJJ agreed) stated:

> "…Judges may give force to an arbitral award by a number of means, including by applying the doctrine of issue estoppels. The argument that in such cases the court is not enforcing an award but only the rights determined by an award is an over subtle and unconvincing distinction and sits on a shaky foundation. For the enforcement of any judgment or award is the enforcement of the rights which the judgment or award has established. As with any judgment or award, so in the case of a monetary judgment or award its enforcement is the enforcement of a right (a right to payment) which the award has established.
>
> At common law a party to an arbitration who has obtained a declaratory award in his favour could bring an action on the award and the court, if thought appropriate, could itself make a declaration in the same terms. The purpose of section 66 is to provide a simpler alternative route to bringing an action on the award, although the latter possibility is expressly preserved by section 66(4**).** I cannot see why in any appropriate case the court may not give leave for an arbitral award to be enforced in the same manner as might be achieved by an action on the award and so give leave for judgment to be entered in terms of the award.

> I use the words "in an appropriate case" because the language of the section is permissive. It does not involve an administrative rubber stamping exercise. The court has to make a judicial determination whether it is appropriate to enter a judgment in terms of the award. There might be some serious question raised as to the validity of the award or for some other reason the court might not be persuaded that the interests of justice favoured the order being made…"

164. These observations provide a useful reference point but do not, establish the sweeping proposition relied upon by Mr Barlow, which appears to be that an action on the arbitral award is free from conceptual limitation in terms of the relationship between the enforcing court and the particular award sought to be enforced.

165. To the contrary. The observations of Thomas LJ in *West Tankers, op cit*., seems to me to re-emphasise the fact that in light of the availability of the summary form of registration and enforcement procedure, the court's power in a common law claim on an arbitral award is no wider than the court's power in a Convention registration and enforcement action.

166. To hold otherwise in my view would be to fly in the face of established doctrine, which is that the court will *not* encroach upon the exclusive jurisdiction of the arbitral tribunal which the parties, by virtue of their contractual agreement to arbitrate, exclusively have conferred upon that tribunal, and thereby for this court to infuse the award with its own domestic legal notions/precepts.

167. During the course of his submissions Mr Barlow referred on more than one occasion to his contention that this court was merely being asked to build on the back of the process so ably commenced by the

arbitrators who had, in his colourful phrase, "done the heavy lifting". In the circumstances as have arisen, perhaps it is not unfair to suggest that that which Mr Barlow himself now seeks to achieve is for this court to undertake its own share of "heavy lifting" in light of the plaintiff's application for an entirely new remedy and *absent recourse* to the arbitral tribunal – a bold proposition which, as I have said, I am unable to accept.

168. As a final reflection on the 'jurisdictional aspect' of this case, I also consider – and this is a point which I do not think expressly was mooted, perhaps because it arises by necessary implication from the existing argument – that in any event it is difficult to appreciate how at this stage an independent cause of action on the 1st Arbitral Award may be invoked (the position finally adopted by the plaintiff) since any cause of action, however characterized, must now be regarded as having merged within the earlier Order of Mr Justice Cheung in HCCT 54 of 2007; which consideration may provide a reason why, so far as I am aware, no comparable case exists in the authorities.

169. In thus suggesting this to be the position, I am uncomfortably aware that in an earlier interlocutory appeal the Court of Appeal expressed the view (see paragraph 66 above) that the plaintiff was at liberty to bring this action against the 1st and 2nd defendants. Given the interlocutory nature of this appeal I do not regard myself as bound by this observation, which in any event I do not take to mean that the trial judge thus is precluded from examination of arguments relating to jurisdiction.

170. In the Commercial Court basic principle always trumps special pleading. In my view this court has no jurisdiction in order to

recharacterise, under substantive tenets of Hong Kong law, that part of the Award of the CIETAC tribunal relating to "continuous performance" of the Agreement. I so hold.

*(2) Impact of the 'split' trial on the issues to be decided?*

171. This argument (if argument it be, since it seemed to emerge very much at the last minute, and almost as an afterthought) in my view justifies Mr Yu's dismissive description as "obscure in the extreme".

172. Mr Barlow SC latterly contended that since this trial is on the issue of 'liability' only, all that the court should do *at this stage* is to decide upon the plaintiff's general entitlement to liability and not to sound to the specific remedies variously sought (whether such be for orders for share transfer or equitable compensation *in lieu* of specific performance), which thus (on this contention) would be matters necessarily left to the 'quantum' element of the trial.

173. I am unable to follow this logic, and indeed it may be that I have misunderstood Mr Barlow's argument in this regard.

174. The matter of precisely the remedy (or remedies) the plaintiff wished the court to grant specifically was canvassed with leading counsel, and the response was made expressly with reference to the prayer in the Re-Amended Statement of Claim, as the following interchange demonstrates:

> "Court: I'm musing on this liability and quantum dichotomy. What order do you want from me?...
>
> Mr Barlow: My Lord, we want the court to decide that the plaintiff is entitled to the relief in the form sought either by

> paragraphs 3 to 5, or by paragraph 6A…specific performance or equitable compensation in lieu…"
>
> *[Transcript, Day 18, pages 144-145]*

175. Paragraphs 3-5 of the Prayer of the Re-Amended Statement of Claim variously request relief ordering the transfer to the plaintiff by the 2nd and 3rd defendants of all shares now held in the 4th defendant pursuant to the restructuring upon appropriate payment of sums due under the Agreement, whilst paragraph 6A refers to damages or equitable compensation plus interest.

176. I fail to grasp how this court is able to make a determination of liability under these prayers for relief without also ruling upon *first*, the plaintiff's primary entitlement to the shares under the issue of performance (the plaintiff having conceded that the Award does not amount to specific performance at common law); and *second*, whether the plaintiff has any claim whatever for the value of the shares in the 4th defendant as damages or equitable compensation *in lieu* of performance, or equitable damages for the plaintiff's claim in constructive trust, or damages for the tort of conspiracy. These particular issues clearly require specifically to be decided at this stage, and are not to be held over to the 'quantum' judge, whom, as I understand it, would be tasked merely with assessing quantum should such require to be assessed within the particular liability category as may have been determined relevant by the 'liability' judge.

177. Mr Yu SC suggested that this argument on the scope of the present trial was mounted "in order to postpone the evil day" of an adverse liability finding, in particular upon the issue regarding public policy under the New York Convention. This criticism may, or may not, be well-

founded, and, as I have said, so strange is the proposition that I may have misapprehended the thrust of Mr Barlow's argument.

178. The short point is that this trial has been conducted throughout on the basis that these particular issues of share entitlement or damages/equitable compensation will be decided in principle, and that if as a consequence any element of quantum remains to be assessed – eg the value of the shareholding in the 4th defendant – then this would be the comparatively straightforward task of the judge dealing with 'quantum' matters properly so-called, although in such circumstance I would hesitate to describe such task as 'mechanistic'.

179. Accordingly I reject such argument also.

*(3) Assuming that jurisdiction exists?*

180. I proceed now on the basis that the primary conclusion as now reached as to an absence of jurisdiction is in error, and that jurisdiction *does* exist to recast/recharacterise, in terms of alternative remedy, that part of the Award of the CIETAC tribunal dealing with 'continuous performance' of the Agreement.

181. I am conscious that it is incumbent upon the trial court to make alternative findings, given the inevitability of this case going further; it is difficult to imagine that the opinions at first instance level, and by a Deputy Judge at that, might be regarded as finally dispositive of a case which to-date has been so hard fought (at all levels) and at such obviously vast expense.

182. Accordingly, on the *assumption* that this court in fact possesses jurisdiction, as Mr Barlow SC contends is not and should not be in doubt, I turn to consider whether the remedies variously sought within the Prayer to the plaintiff's Re-Amended Statement of Claim (at paragraphs 3-5, 6A) otherwise could be achieved.

183. To properly undertake this exercise, it becomes necessary to identify at the outset the system of law under which such analysis is to be conducted, and thus to identify the proper law of the Agreement specified as governing the rights and obligations of the parties *inter se*.

*(i) Applicable proper law*

184. This issue ought not to cause undue difficulty, given the express provisions within the Agreement.

185. Article Thirteen of the Agreement contains two clauses: *Clause 1* provides for dispute resolution via negotiation, and thereafter by arbitration at CIETAC; this of course was the route adopted, and which provides the provenance of this case, whilst *Clause 2* provides in terms:

> "The Agreement is governed by the laws of the People's Republic of China, but the procedure and validity relating to the transfer of the shares in Hong Kong Legend is governed by the laws of the Hong Kong Special Administrative Region."

186. The plaintiff argues that in order to accord this clause an interpretation consistent with commercial reality, the clause *must* be interpreted to mean that Hong Kong law is the proper law, otherwise the commercial purpose of the Agreement, and its intended functioning, would be susceptible to improper interference – as, says Mr Barlow, actually

occurred with the occurrence of the 'Impugned Transactions', which he says are to be classified as 'fraudulent'; an alternative argument (subsequently propounded by Mr Wong for the plaintiff) is that when one analyses the interest in shares (he must, I think, have meant to say 'potential/alleged interest') then the *lex situs* applies, and one "then considers whether property rights arise from that" *[Transcript, Day 20, page 28]* – the difficulty with this latter submission, of course, is that it presupposes an interest in the shares vesting in the plaintiff at the time of the signing of the Agreement, a proposition which I am unable to accept.

187. Mr Barlow goes so far as to label the contractual construction he moots as the *sole* construction viable in the circumstances, stating in his Opening (at paragraph 12.11):

> "We similarly contend that the objectively-likely commercial purpose of the Agreement was to bind the contracting parties into a series of transactional performance obligations, with the ultimate objective of effecting the mandatory transfer to P of D1 and D2's entire shareholding in D4, so that P would receive the benefits of the development of Lot 22 which P had contracted to undertake. We also submit that the only construction which can provide business efficacy to the fulfillment of that objective is one which recognizes that the vendor's contractual commitments to preserve the entire shareholding in D4, pending their ultimate transfer to P of the same, arose as soon as the Agreement concluded."

188. From the plaintiff's perspective, therefore, the proposition seems to emerge that in the circumstances Hong Kong law must be held to govern *whatever* the relevant choice of law clause actually says in the Agreement, which is an ambitious argument; it strikes me that even the most liberal and ambitious application of Lord Hoffman's seminal speech on the question of construction in *Jumbo King* cannot rescue a submission which, on the basis of the present factual matrix, in my view is untenable.

189. The Agreement is a complex and conditional document: it is a far cry from a standard agreement for the sale and purchase of land or for shares, a fact also recognized by the arbitral tribunal, who variously described it (correctly in my view) as a "framework agreement" and "neither an agreement of share transfer nor an agreement of transfer of land use right" the performance of which "may be difficult due to various uncertainties…"

190. With respect, Article Thirteen (2) says what it means and means what it says; accordingly Hong Kong law is not relevant and is simply not in play *unless and until* the situation arises wherein the prospective consummating act under the Agreement, namely the share transfer of the shares of the 4th defendant, falls to be effected.

191. I therefore hold that the proper law of the Agreement is the law of the PRC.

*(ii) The plaintiff's claim in 'constructive trust'*

192. A fundamental element within the argument by which the plaintiff aims to secure the relief expressed in the Prayer to the Re-Amended Statement of Claim – in this context the declaratory relief relating to the shares in the 4th defendant, and thereafter, "upon payment by the plaintiff of the full consideration under the Agreement", that the 2nd and 3rd defendants do transfer to the plaintiff all the shares of the 4th defendant – is the notion of a constructive trust having arisen in favour of the plaintiff which, it is asserted, conceptually has attached to the shares as a matter of law; in fact, when making one segment of the plaintiff's final submission Mr Wong, one of Mr Barlow's able juniors, submitted that such a

constructive trust crystallised *at the moment of* signature by the parties on the Agreement:

> "Mr Wong: The difference between the defendants' side and our side is actually a question of timing. Mr Yu and Mr Shieh said 'Hong Kong law only kicks in towards the end of the whole series of transaction, when the shares were actually transferred.'
>
> Court: And you say?
>
> Mr Wong: Hong Kong law applies since the inception of the agreement.
>
> Court: You say that as soon as the ink is dry by the signatories to the agreement, Hong Kong law is kicked in?
>
> Mr Wong: Yes, my Lord.
>
> Court: Which in turn begs the question of the nature of the agreement, does it not?
>
> Mr Wong: Yes, my Lord.
>
> Court: So in order to swallow this, I have to accept your characterization of the Agreement?
>
> Mr Wong: A very good question, my Lord…"
>
> *[Transcript: Day 20, pages 31-32]*

193. Having isolated the argument linking the Agreement/shares to the desired remedy, the court thus is required to consider its validity under that which has been found to be the proper law of the Agreement.

*(iii) The 'constructive trust argument' under Chinese law*

194. As Mr Yu SC submitted, this argument does not get off the ground. The reason is straightforward, and permits of little elaboration.

195. This is because it is clear (and I so find) that Chinese law has no concept of 'constructive trust'.

196. Professor Cui, whose views I have accepted, says so in terms in his Report:

> "I am of the view that there is no provision for presumed trust under PRC laws, and there is no concept analogous to the common law concept of constructive trust"

See his Final Expert Report dated 29 February 2012, at paragraph 4.2; and further at paragraph 4.11:

> "As mentioned above, there is no provision for presumed trust under PRC law, and there is no concept analogous to the common law concept of 'constructive trust'. I am of the view that Article 106 of the Property Law and Articles 26 and 28 of the Judicial Interpretation of the Company Law (III) are not analogous to the common law concept of 'constructive trust'".

197. Even Mr Fei, whose forensically-combative instincts on occasion led him into difficult waters, was minded broadly to accept this view under cross-examination:

> "…First of all, I admit that under the current Chinese law system, there's no entirely the same concept of constructive trust as in the English and American law system. But in relation to or where the situations involved are similar to the present case, or the scenario in the present case, in China, in the laws of China, one can find similar ways or a similar basis or similar legal principles to deal with similar situations…"

198. During the expert evidence on Chinese law, it became clear that the PRC only adopted the Trust Law in 2001, and that this Law introduced certain specific types of *express* trust only.

199. A good deal of detailed evidence was discussed within this area about diverse elements of Chinese law – for example, Article 106 of the Property Law, which on its face is not dissimilar to the exceptions to the common law '*nemo dat*' rule, and to Article 28 of the Judicial

Interpretations, which appears to deal with registration of an equity transfer – but there seems to me to be no good reason to dwell on such peripheral matters; whichever way this particular cake is cut, it is clear that the plaintiff cannot arrive at a situation in which there can be considered to be a concept of constructive trust within and under the provisions of PRC law.

200. If this be correct, as I think that it is, it is not apparent how validly it may be contended that under Chinese law the 1st and 2nd defendants could be said *at any time* to have held the shares in the 4th defendant upon constructive trust in favour of the plaintiff by reason of having entered into the Agreement. This seems to me to be unarguable, which in turn perhaps provides the reason why initially the plaintiff was intent upon steering the court toward the view that on a proper construction the proper law of the Agreement was and is Hong Kong law; as earlier noted, Mr Barlow had trailed his coat upon the idea of the exclusion at the outset of the trial of any consideration of Chinese law *[Plaintiff's Opening Submissions, paragraph 10.3]*

201. In the course of this trial there have, I think, been suggestions, albeit unpleaded as such, that the 1st and 2nd defendants are in breach of an implied agreement that it would perform any arbitral award.

202. However, the evidence is that under PRC law there is no concept of a separate implied agreement, and that in the PRC enforcement of an arbitral award must comply with the laws of the PRC: I further accept the Supplemental Opinion on the point of Professor Cui, dated 20 March 2012, as produced during this trial (precisely to meet this point as it belatedly emerged.)

203. However, in light of the inevitable appellate progression of this case, once more the 1st instance court is required to indulge in the mental gymnastics involved in assuming that thus far it is in error in its primary analysis/conclusions, and that the plaintiff is correct in its contention as to the pre-eminence and applicability to this case of Hong Kong law.

*(iv) The 'constructive trust argument' under Hong Kong law*

204. To repeat, the sole basis upon which the court is asked to translate an order from a CIETAC tribunal to "continue to perform" to one in which either the 3rd defendant either is ordered to transfer all the shares it holds in the 4th defendant to the plaintiff or, alternatively, to grant damages/equitable compensation *in lieu* (the claim, within the 'new' paragraph 35 first introduced by re-amendment in December 2011, which ultimately resulted in the appellate direction for a 'split' trial), can only be based upon the allegation that there came into existence in favour of the plaintiff a constructive trust over the shares in the 4th defendant.

205. How, then, does a constructive trust arise, or be said to arise (by reason of the 1st and 2nd defendants' contractual commitment) even upon the *assumed* application of Hong Kong law?

206. In the present case the plaintiff seems to be saying – I hope that I have followed the logical sequence – that since there is an arbitral award that the parties should continue to perform the Agreement, and since that Award *now* has been made an Order of the Hong Kong court (*vide* the Order in HCCT 54 of 2007), the obligation to perform the Agreement is governed by Hong Kong law, and hence that a constructive trust arises. I do not accept this line of reasoning, which involves a total disregard of the

parties' express choice of law, and if taken to its logical conclusion would mean that a party obtaining an order such as the present from an arbitral tribunal would be in position to register the award in different jurisdictions and thus have a choice of the application of differing legal principles variously applicable in the chosen enforcing court.

207. However, on the *assumed* basis that Hong Kong law does apply, I fail to see how this proposition is sustainable even then: once more, in any analysis the court is thrown back onto considering the nature of the Agreement, and whether in signing the Agreement a constructive trust in favour of the plaintiff may be said to arise over the shares in the 4th defendant which, as we now know, were transferred in the Eton Group restructuring.

208. It is trite law that under Hong Kong law a constructive trust arises when a contract is specifically enforceable: thus, a constructive trust is imposed upon a vendor who has entered into such a contract: see, for example, *Lysaght v Edwards* (1876) 2 Ch D., 499 at 506.

209. In this instance, however, it is difficult to see how the Agreement in this case could be regarded as specifically enforceable under Hong Kong law; to the contrary, in my view plainly it is *not* so enforceable, given the existence of provisions within the Agreement (eg Articles 5, 6 and 11) requiring supervision by the contracting defendants, when taken together with the concomitant principle that the court will not enforce by way of specific performance contracts which require constant supervision: see, for example, *Co-operative Insurance Society v Argyll Stores (Holdings) Ltd.*, [1998] AC 1, at 11-16, per Lord Hoffmann.

210. Mr Yu SC makes the correlative point that as the Agreement contains various conditions, as a matter of Hong Kong law the equitable interest in the subject-matter of the Agreement will not pass until such conditions are fulfilled, so that any claim for specific performance is bound to fail, citing in this regard Nourse LJ in *Sainsbury plc v O'Connor* [1991] 1 WLR 963, at 979.

211. These points are well-taken, and when added to the indisputable fact that there can be no dispute that the parties no longer are in any position to perform their respective obligations under the Agreement – not least because the site already has been developed by the 5th defendant and the units built thereon onsold – any such argument cannot succeed.

212. Mr Barlow recognized this in his Opening, I think, when the following exchange took place between Bench and Bar:

> "Court: Look, in 25 words or less, what do you want from me?
>
> Mr Barlow: My Lord, this of course is the trial of liability.
>
> Court: Yes.
>
> Mr Barlow: So we seek from your Lordship judgments of liability in respect of (a) to (d) in paragraph 4.3 [of the plaintiff's Opening Submissions]
>
> Court: Well, you must give up on SP now, mustn't you?
>
> Mr Barlow: My Lord, yes. *We accept that specific performance is impractical and for the reasons I'm about to take your Lordship to, we take the view that the remedy would be inefficacious.*
>
> Court: So, boiling it all down, at the end of the day this is purely a trial on liability for a monetary claim, however you want to characterize the money, whether it's equitable damages or whatever?
>
> Mr Barlow: My Lord, yes, we respectfully agree…"

*[Transcript, Day 1, page 98; emphasis added]*

213. This particular matter is not susceptible to further elaboration. Although it was stated that the parties should continue to perform the Agreement, it was silent on whether the Agreement was capable of being performed, or how and to what extent the parties should continue to perform the Agreement, contenting itself in stating, in wholly general terms, that the parties should have "close co-operation" and were to make "reasonable efforts to seek alternative approaches to meet the purpose of the Agreement."

214. Accordingly (and as I think the plaintiff through its leading counsel now accepts), the Award *cannot* be taken as equivalent to the grant of the equitable relief of specific performance under Hong Kong law by reason of a manifest lack of precision: as Reyes J aptly remarked in his judgment in *HCCT 54 of 2007*, "a definite reading of the effects of the Agreement or the Award is…within the province of the arbitration tribunal or the Beijing Court".

215. In fact, it is clear that this Award was a type of 'in principle pronouncement' based upon the ethos and ideology of and within the framework of PRC laws, and it was noteworthy that Professor Cui opined that the Award in this form cannot be regarded as analogous to an order for specific performance at common law [*vide* his Report, at paragraph 7.4], and that in his evidence Mr Fei agreed with this proposition [*Transcript: Day 11, page 46*].

216. If it be correct, therefore, that the contract is *not* one susceptible to specific performance, it follows that there can be no question of any trust arising under Hong Kong law, and there is no need to venture in detail into the authorities carefully rehearsed in argument by Mr Yu SC to the effect that the so-called 'trust' imposed on a vendor of land under a sale and purchase contract is not a conventional trust with the usual corresponding trustee duties – a line of argument expressed in the 19th Century by Brett LJ in *Rayner v Preston* (1881) 18 Ch D 1, at 10-11 – nor to venture into the principle that the interest a purchaser acquires in association with a sale and purchase of property depends upon the particular stage the contract has reached, by reason of the fact that the purchaser's interest constantly is changing as the contract progresses from execution to assignment: see *Gray & Gray, Elements of Land Law*, 5th ed., at paragraph 8.1.59, wherein the learned authors state:

> "The transactional history of the sale is all about the gradual accretion of equitable property in the purchaser. The vendor-purchaser relationship, as it moves steadily through its various phases, involves the progressive transfer of beneficial property to the purchaser until the point when the purchaser finally becomes the full beneficial owner of the relevant estate in land and the vendor ranks as no more than a bare trustee. A specifically enforceable contract thus filters elements of beneficial ownership away from the vendor and towards the purchaser, these elements eventually merging with the legal estate at the point of transfer…"

217. Thus, concluded Mr Yu SC, *even if* this case could be construed in the manner of a standard contract for the sale and purchase of land (which plainly it cannot), as long as the purchaser has not paid all the purchase money, the only interest he has is an equitable lien co-terminus with the amount of money he has paid – in the instant case, therefore, the plaintiff's payment of RMB 5 million could at its highest have given rise to an equitable lien over the land solely to that extent, and not to a

constructive trust on the part of the 1st and 2nd defendants to hold the shares in the 4th defendant (which held the 5th defendant) upon trust for the plaintiff.

218. It followed, said Mr Yu, that when the 1st defendant transferred one share in the 4th defendant to the 3rd defendant, there could have been no breach of trust; equally, if a constructive trust cannot be established, there is no basis for the plaintiff to allege that the 1st defendant owed any fiduciary duty not to exercise its voting right in respect of the allotment to the 3rd defendant of the 9,998 new shares in the 4th defendant.

219. I agree with, and accept, these arguments. Even if Hong Kong law were applicable, no constructive trust in favour of, nor fiduciary duty to the plaintiff, is established, and I fail to grasp how or why, absent such trust/fiduciary duty, the plaintiff has any claim to the shares of the 4th defendant (which remains one of its alternative claims in the Prayer in the Re-Amended Statement of Claim).

*(v) The 'Johnson v Agnew' point*

220. This was the final arrow in Mr Yu's forensic quiver, and I mention it for the sake of completeness. The point is predicated upon the assumption (1) that Hong Kong law applies and (2) that the Award could be treated *as if* it were an order for specific performance.

221. The argument is thus: if in a contract which is (assumed to be) specifically enforceable, the other party fails to complete – as did the 1st and 2nd defendants in this case – then the plaintiff has the choice: *either* to accept the repudiation and to sue for damages, both parties thereby being

discharged from further performance of the contract, *or* alternatively the non-repudiating party may elect to seek an order for specific performance with damages for any loss arising from delay in performance.

222. In the instant case the plaintiff obtained an order for "continuous performance" from the arbitral tribunal, which award already has been converted into a judgment of the Hong Kong Court, that is, by Order in HCCT 54 of 2007.

223. Both the award and the judgment have been obtained on the footing that the contract remains alive, but if the plaintiff now seeks damages (or equitable compensation *in lieu*, for present purposes there being no significant difference), Mr Yu insisted that unequivocally it must initially signal its intention to treat the Agreement as being at an end, and where (as here) there is in place an extant order to perform, it is incumbent upon the plaintiff to apply for an order to discharge the order for performance so as to terminate the Agreement: *Johnson v Agnew* [1980] AC 367, at 392E-F, per Lord Wilberforce.

224. However, this has not been done in this case, either by virtue of application to the CIETAC Tribunal or to the court, and it is wrong to suppose that *after* a party has obtained an order for specific performance, then damages/equitable compensation can be claimed *without first* having moved to discharge that order for performance, which cannot simply be ignored, since *ex hypothesi* the contract remains in effect and is not merged in the judgment for specific performance: see *Austins of East Ham Ltd v Macey* [1941] 1 Ch 338, at 340-341, per Sir Wilfred Greene MR, a

proposition regarded by Lord Wilberforce in *Johnson v Agnew* as "undoubted law".

225. When pressed by the court on the required mechanism to seek to discharge the prior order for specific performance, Mr Yu SC insisted that this must be effected by motion or appropriate application to a tribunal, and that until this was done it simply was not open to award damages or equitable compensation.

226. Allied this argument Mr Yu mounted the further submission that it is established that if, as here, the plaintiff seeks to invoke the court's jurisdiction to award damages *in lieu* of specific performance, there is no jurisdiction so to do if, as at the date of the writ, the court could not have granted specific performance – and in the present case, at the date of commencement of this action, the land had been developed and the units onsold, thus rendering specific performance impossible.

227. In this case, of course, there remains the procedural oddity not only that the tribunal Award is extant, and now already has been made a judgment of this court, but also that the plaintiff's pleading on the point remains unamended, paragraph 10A reading:

> "Notwithstanding the wrongful attempts by the 1st and 2nd defendants to return the deposit to the plaintiff, the plaintiff insisted (as it was entitled) on the specific performance of the Agreement and was at all times (and is still) ready willing and able to do so".

228. I consider that in this regard Mr Yu's analysis is correct. However, on the point as to the necessity formally to apply for an order discharging the extant order to perform, I would observe that *if* otherwise

this court had been able to assist the plaintiff in terms of the substantive relief it now seeks in this self-proclaimed action on the arbitral Award, it is unlikely that the court would have declined by reason solely of the absence of a formal motion, Mr Barlow having made it clear at the outset from the Bar table that he is no longer aiming at the "inefficacious" remedy of specific performance.

*(4) Disposition of the 'derivative' action*

229. From the foregoing it is clear that what has been termed the 'derivative' action against the 1st and 2nd defendants in my judgment must fail.

230. I can perceive no legally justifiable course to grant to the plaintiff any of the remedies as now are sought against the 1st and 2nd defendants within this 'derivative' action. Notwithstanding the extraordinary efforts of Mr Barlow SC, whose "amazing finesse" (to adopt Mr Yu's apt phrase) served to sustain the diverse arguments mounted in support of the plaintiff's present claim, in my view the plaintiff simply does not have the analytical case to permit this court to come to the plaintiff's aid.

231. Looking at the matter in the round, it is not easy to avoid the conclusion that what initially was, and self-evidently should have been, conducted as a straightforward case of breach of contract sounding in damages has been rendered vastly the more difficult (and ultimately unproductive) by virtue of the decision to go to arbitration fully 21 months *after* the contractual breach, and then to proceed to seek from the Tribunal performance of an Agreement which by that stage – given the obvious

development of Lot 22 in the intervening months – physically was no longer possible. For this purpose, and from a causation perspective, I do not share the plaintiff's view regarding the alleged 'impugned' share restructuring within the Eton Group, which, whilst admittedly serving to cut across the provisions in the Agreement relating to the contractually-anticipated share transfer to the plaintiff, nevertheless in provenance/design *antedated* the breach of the Agreement by the 1st and 2nd defendants.

232. It is also not apparent why, notwithstanding the obvious uncertainty of the CIETAC Award in its terms (eg how the parties were to perform the Agreement), the plaintiff never has sought to return to the arbitral tribunal, nor to the Beijing Court (which must be the court of supervisory jurisdiction of the arbitration) in order to explore, in light of the physical reality on the ground, the nature of such alternative remedies as were available to the plaintiff.

233. True it is that it was the 1st and 2nd defendant who returned to the Tribunal (or attempted so to do in the third application), but the fact that the Tribunal declined to entertain these approaches – which clearly were perceived to emanate from self-serving contract breakers – does not explain the complete absence of action from the plaintiff in this regard.

234. In fact, it may be that even now this option remains open, to which end Mr Yu made an offer in open court on behalf of the 1st and 2nd defendants to do precisely that, although Mr Barlow pointedly (and, it must be said, highly dismissively) declined to countenance any such course. I appreciate that in his Reasons for Judgment dated 14 February 2012 in the Court of Appeal the learned Chief Judge had opined (at paragraph 24) that:

> "Without intending to prejudge any issues, the suggestion that the plaintiff must go back before the tribunal to discharge the order for the continued performance of the contract before it can claim damages in lieu of performance (or damages for economic torts) is, so it seems to me at this stage, most unattractive…"

With respect, I can appreciate this instinctive sentiment absent the advantage of full argument on the point, but unattractive or not, it seems to me that in the particular circumstances there remains the necessity either to return to the tribunal or, if the tribunal declines so to entertain, to the court of supervisory jurisdiction.

235. I also bear in mind that reference has been made by Mr Barlow to the fact that the Tribunal now apparently considers itself *functus* – an aspect alluded to by the Chief Justice in his judgment in the application for leave to appeal before the Appeal Committee of the CFA – but even if this were to be the situation (which I doubt, should the plaintiff itself to return to make appropriate application) recourse nevertheless could be had to the Beijing court as the court of supervisory jurisdiction; as Reyes J saliently noted in his interlocutory judgment of 24 June 2008 in HCCT 54 of 2007, citing *A v B*, [2007] 1 Lloyd's Rep 237 (Colman J at para 111)) and C v D, [2008] 1 Lloyd's Rep (CA at para 17):

> "An agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy going to the existence or scope of the arbitrator's jurisdiction or as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of the arbitration."

236. However this is by-the-by. The short (and immediate) point is that this court now finds that the 'derivative action' as now mounted by the plaintiff against the 1st and 2nd defendants does not and cannot succeed. I so hold.

## *II. THE ORIGINAL ACTIONS*

237. All 11 defendants are in the frame under this head, albeit the plaintiff proceeds against some of these defendants with more obvious enthusiasm than against others. In each instance, these are causes of action which first saw the light of day in the Hong Kong court, hence the term 'original', and principally are predicated upon what generally have been referred to as the 'economic torts'. There are four tranches of defendants, and for convenience I take them in representation order, which was the procedure adopted at trial.

### *(A) AGAINST THE 1ST AND 2ND DEFENDANTS*

*Case in conspiracy*

238. 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.

239. The common factual premise underpinning the conspiracy allegation focuses upon the Eton Group restructuring, in particular the idea that this restructuring specifically was conceived and/or specifically aimed at fraudulently subverting performance of the Agreement as ultimately ordered by the arbitral tribunal.

240. Earlier in this judgment I have expressed the view (and have so found) that the idea of having a holding company had been in existence well before the dispute with the plaintiff arose from the breach of the Agreement, and that it was Daisy Wong, an employee (and not party to this action) whose idea it had been to use allotments of shares as the method to

cause the holding company, the 3rd defendant, to become the majority shareholder, instead of the method of transferring the necessary shares: relevant considerations involved issues relating to incurring of stamp duty, preparation of accounts, and a review of the relevant articles of association if the 3rd defendant was to be a sole shareholder; in fact, in cross-examination the fact plaintiff, Ms Wong, then senior company secretarial manager saying in chief:

> "Then I suggested to Barry [Mok] a possible alternative, namely, making allotment of shares in the intermediate companies to EPGL direct. As compared with the direct transfer of shares, this method was relatively straightforward…"

a contention which was corroborated by Mr Mok in his evidence in chief:

> "Then Daisy suggested that an alternative was possible by allotting the unissued shares of the company to EPGL – such that EPGL could by the allotment become the major shareholder of the intermediate companies involved…"

241. There was also no doubt that a holding company in the Mainland first had been set up in 1995 then in respect of the Eton Group's brewery business, the evidence of Cheung Chi Ming, which in this regard I accept, being that Mr Lucio Tan, the 'big boss' of the Group, had directed him to do the same with the Eton mainland property projects, leaving it to Mr Cheung to decide the appropriate time to do so. A further consideration is that the potential commercial advantages perceived in having a holding company can be seen in the PRC legal opinion provided to Eton by Zhong Lun Law Firm dated 15 May 2005, a holding company enabling inter-group shareholders' loans and inter-group guarantees for finance deals which, absent a holding company, otherwise would have been prohibited by Mainland legal restriction.

242. For the purpose of demonstrating the independent provenance of the restructuring Mr Yu SC has taken the court through a lengthy sequence of documents, culminating in what has become known as 'the Barry Mok Memo', dated 25 August 2005, proposing the restructuring as eventually was approved and executed. The idea was to have a simple and clear three-layer corporate structure which held the ten FIE's via the registered shareholding of the holding company through a Hong Kong corporate vehicle, with each vehicle holding one FIE (Foreign Investment Enterprise).

243. Notwithstanding strenuous criticism by Mr Barlow of the model as chosen – and his mooting in cross-examination of alternative and, in the plaintiff's view, clearly more appropriate 'restructuring models' catering to the plaintiff's putative interest under the broken Agreement – Mr Mok's evidence, which I see no reason not to accept, was that at the time he had not thought of any other form of structure, and again I accept his evidence that he had any fundamental purpose in mind other than to form a holding company, which plan then was for his corporate bosses to consider and, if they wished, to adopt.

244. For the avoidance of doubt, I specifically reject the contention put to Mr Mok by Mr Barlow that it was the 10th defendant, Mr Cheung Chi Ming, who had instructed Mr Mok, the 11th defendant, to make it impossible for the 1st and 2nd defendants to deliver the shareholding in the 4th defendant, and I accept as true Mr Mok's response to this suggestion:

> "This never was what D10 told me to do. And this was never in my mind as the purpose for my restructuring the company…"
>
> *[Transcript, Day 6, page 70]*

and further :

> "Let me tell you my state of mind at the time…
>
> According to article 11(3) of the agreement, it was clearly stated that in case we were in breach of the agreement, the other party had the right to ask for compensation or damages as the deposit or money being paid, but the amount should be in double. Actually this opinion had been reflected in that given by Deacons…
>
> …if one looked at the letters given by the plaintiff during the year 2003 to 2004…it was only mentioned that Lot 22 should be handed over. There had never been any mentioning of the handing over of share rights…
>
> Let me repeat. Because all along in my mind I was thinking that in case we were in breach of the agreement, we had to pay damages…my thought was consistent, or should I say similar, to the idea of the CIETAC arbitration. The agreement was valid, and the agreement did not involve the handing over of the share rights…"
>
> *[Transcript, Day 7, page 3]*

245. The evidence, as to which (the plaintiff's dire suspicions apart) there is no objectively cogent reason not to accept, was that the proposal as made was approved by Mr Cheung, the 10th defendant, and by Mr Mariano Tan, the 8th defendant, and both denied having had any thought about the dispute with the plaintiff when approving of the restructuring proposal. Mr Tan was not concerned with the Eton Group's property business in China, whilst the 9th defendant, Mr Kwan Kie Yip, who also was but peripherally involved – his primary area of responsibility was Hong Kong, and he was never concerned about the Agreement and the dispute with the plaintiff, or the arbitration – gave evidence that he had thought it prudent to seek Mr Tan's approval of the proposed restructuring, because this involved overseas companies within Mr Tan's sphere of responsibility. I accept Mr Kwan's evidence also; he was a mere employee (as opposed to family

member) and in the circumstances I can discern no reason for him to lie about this particular matter.

246. After approval of the restructuring was given, it was Ms Daisy Wong who had prepared the relevant documentation; her evidence, which I have accepted, being that neither Mr Mok nor any other individual was involved in this documentation, which was voluminous: in addition to the contemporaneous documents in Hong Kong regarding the establishment of a holding company within the period 16 March 2005 to 26 October 2005, Mr Yu has specified no less than 20 contemporaneous documents emanating from the Mainland in that period on the issue of the setting up of a holding company.

247. The delay in implementation might well superficially be regarded as suspicious (although I do not attribute any legal consequence thereto), although it is true, as Mr Yu pointed out, that the macroeconomic regulation and control climate had changed in 2006, with the holding company in the name of Eton Investment Company Limited coming into being in November 2009, before once more being changed, in June 2011, in response to a further change in Mainland conditions.

248. In my judgment it is difficult to look at the largely undisputed facts surrounding the restructuring and the evolution of the holding company, involving obtaining PRC legal advice, and the involvement of companies and salaried individuals wholly unconnected to the 'Lot 22 dispute' with the plaintiff, and nevertheless to be satisfied, on the probabilities, that there existed a form of 'conspiracy' specifically to produce a situation to take the 4th and 5th defendants out of the reach of the

plaintiff, as the plaintiff now so vehemently alleges. Accordingly, I find as a fact that such a proposition is *not* established to the requisite standard of proof.

249. All that the court is faced with amounts in reality to an highly elevated (and elegantly propounded) form of unsubstantiated suspicion and supposition, notwithstanding Mr Barlow's efforts to make a case to the contrary in his stringent cross-examination, and in my judgment this is the consequence solely of the fact that the restructuring as ultimately approved/effected cut across the provisions of the Agreement, and in turn the terms of the CIETAC Award.

250. However, the crucial point in this debate is that – even given that an incidental effect of the restructuring was to take the 4th and 5th defendants out of 'the performance frame', and putting to one side the ineluctable fact that by the time of the arbitral award performance of the Agreement physically was impossible in any event, given the development of Lot 22 by the 5th defendant – there is a lack of evidence of the significance and degree of probity required under our law when it is sought to establish serious allegations of conspiracy/fraudulent behaviour.

251. I go further. Not only do I *not* consider that the restructuring was fraudulent or illegal – for obvious reasons it is regarded by the plaintiff as commercially nefarious, and in pure timing terms one can see how it may be thought to have been opportunistic, although in itself that is far from fraudulent or illegal – but the overarching idea (which permeates this case) of divers corporate officials conspiring with the 'boss' Lucio Tan precisely and predominantly to produce a share structure which happened

to run counter to a contingent contractual provision within an Agreement which had been breached some two year's previously seems to me, with respect, to be wholly unsustainable in light of the history and provenance of the restructuring.

252. The foregoing discussion is based on the proposition that Hong Kong law governs, and in evaluating the case against other categories of defendants I shall be adverting to the constituent elements of conspiracy to injure and conspiracy to use unlawful means.

253. 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' so to injure.

254. As to 'unlawful means conspiracy', the overt acts relied upon by the plaintiff either are acts in relation to breach of the Agreement or to the restructuring. As I have earlier observed, the restructuring *per se* was neither illegal, nor was it 'fraudulent', whilst I decline to accept the proposition that a breach of contract amounts to an 'unlawful act' for this purpose – the contractual breach having occurred some two years prior to the restructuring, so I fail to see how in any event this could be said to constitute the 'unlawful means' for the conspiracy as now relied upon by the plaintiff. It remains the case that the plaintiff, the innocent party to the

contractual breach, always has had its remedy in breach of contract (and if concerned as to a possible 'spiriting away' of assets no doubt could have sought urgent interlocutory remedy of *Mareva* relief), and I repeat the sentiment earlier expressed that if the plaintiff had approached the case, and indeed the remedy sought in the arbitration, from this vantagepoint its interest would have been far better served.

255. Nor, as regards 'conspiracy to injure', do I accept that in this case there was any 'predominant purpose' to injure the plaintiff *via* the corporate restructuring; as I have said, this may well have been regarded as beneficial by Mr Lucio Tan, who is likely to have appreciated an incidental 'benefit' given the way that matters arose, but in this area mixed motives will not suffice.

256. These observations are *dehors* Mr Yu's further complaint that no 'dominant purpose' to injure is to be found within the pleading of the plaintiff's case; in this he is correct, but in truth this case has struck me as being such an amalgam of ambitious characterization/analysis – it is testimony to Mr Barlow's forensic skill that throughout he invested this case with an aura of intellectual respectability – that to decide a point on a pleading basis intrinsically is unattractive given that, substantively, the point must fall in any event.

257. However an additional – and compelling – complication within this analysis is that in any event it is *not* simply to be assumed that Hong Kong law is the appropriate arbiter for this analysis.

258. To the contrary. It seems to me that the proper law of any such alleged 'conspiracy' must be regarded as PRC law given that the majority of the 'overt acts' pleaded by the plaintiff in support of its case on conspiracy allegedly were committed in the PRC, so that the proper law of the tort is PRC law.

259. If this be correct, as I consider that it is, then the views of Professor Cui once more loom large. His evidence, which I have accepted, is that there is no concept under PRC law which identifies with the common law idea of conspiracy. Professor Cui opined that the provisions of Article 61 of the General Principles of Civil Law of PRC (which talks about two sides collaborating 'maliciously' and performing a civil act detrimental to the interests of the state or third party to obtain property is not analogous, not least before the third party object of the malicious collaboration must have enjoyed legal ownership of the property before it can be recovered and returned ) – which led Mr Yu to argue that in the instant case the plaintiff never had acquired ownership of Lot 22.

260. Nor did Mr Fei disagree with this view *per se*, albeit he argued (I think) that the plaintiff in the present case should be regarded as having a right under Article 61, although he subsequently accepted that such a right was not a property right.

261. On the basis therefore that PRC law is the proper law of the conspiracy alleged, and in light of Professor Cui's opinion, which I have accepted, the plaintiff's claim against the 1st and 2nd defendants also founders on the shoals of the 'double actionability' concept, which requires the acts complained of to be actionable *both* in the place where the tort was

committed and in the forum (see *Dicey, Morris & Collins, 14th ed.*, 2006, at 35-002 – 35-011).

262. Accordingly, in my judgment the plaintiff also has failed to make a case in conspiracy against the 1st and 2nd defendants, and I so hold.

*(B) AGAINST THE 3RD TO 5TH DEFENDANTS*

263. It will be recalled that the 3rd, 4th and 5th defendants were named as defendants in the writ as initially issued in the present case; they were not, of course, parties to the CIETAC arbitration, nor for like reason were they included in 'the first action' in this jurisdiction, HCCT 54 of 2007.

264. The 3rd defendant, EPGL, is a company incorporated in the BVI. At all material times after April 2006, and consequent upon the restructuring, the 3rd defendant beneficially owned the entire shareholding in the 4th defendant, save for one share thereof, which was held by the 2nd defendant on trust for the 3rd defendant; prior to the restructuring, the 1st and 2nd defendants each held one share in the 3rd defendant on trust for a wholly-owned subsidiary of the 3rd defendant.

265. The 4th defendant, 'Hong Kong Legend', is incorporated in Hong Kong, and at all times material to this case was the registered shareholder of the entire issued share capital of the 5th defendant, 'Xiamen Legend', a foreign owned enterprise established in the PRC, and the holder (and subsequently developer) of Lot 22 in Xiamen – which development constituted a breach of the Agreement with the plaintiff.

266. No factual witness statement was filed on behalf of the 3rd, 4th and 5th defendants, albeit these defendants jointly instructed Professor Cui, the Chinese law expert, in common with all defendants save for the 6th defendant.

267. Against these 3 corporate entities Mr Barlow SC attacks on three fronts: first, in constructive trust; second, in "knowing receipt"; and third, in conspiracy. I take each cause of action in turn; as might be anticipated there is unavoidable overlap in considering the case against these three corporate defendants when compared with earlier consideration of like allegations as made by the plaintiff against the 1st and 2nd defendants.

*(a) The case in constructive trust*

268. If the plaintiff were to be able to establish a constructive trust over the shares in the 4th defendant formerly in the hands of the 1st and 2nd defendants, similarly the plaintiff seeks, post-restructuring, to impose a comparable constructive trust on the shares now in the hands of the 3rd defendant, as well as over the additional 9,998 allotted new shares.

269. The commonality of issues pertaining to such alleged constructive trust led Mr Shieh SC, leading for the 3rd to 5th defendants, specifically to adopt the submissions in this regard of Mr Yu SC for the 1st and 2nd defendants.

270. In summary, Mr Shieh took the following key points:

(i) the issue of constructive trust is a matter for PRC law in any event, and he asked the court to accept the opinion of

Professor Cui, whose experience, particularly his participation in the legislative process of various laws of the PRC, was, said Mr Shieh, impressive, as was his demeanour *qua* expert. I agree with this submission.

(ii) I also agree with Mr Shieh's contention that in considering whether, in PRC law, there is anything analogous to a constructive trust – which Professor Cui is adamant there is *not* – the burden rests on the plaintiff to demonstrate the existence of such analogous concept, and that if there is ambiguity or uncertainty the plaintiff necessarily fails. However, as already is evident, I have no difficulty in accepting Professor Cui's opinion, and I will not further rehearse in detail the underlying arguments – to which Mr Shieh has devoted considerable time in his helpful written closing submissions – in terms of Article 106 of the Property Law, Article 28 of the Judicial Interpretations, and also Article 45 of the Contract Law – upon which latter provision the plaintiff also relied with a view to showing that the 'conditions' stipulated under the Agreement are "deemed" to have been fulfilled. On this latter point, namely Article 45, I do not accept Mr Fei's evidence, when he sought to suggest that Article 45 applies to all kinds of contractual conditions; not only does this go directly against Professor Cui's view of the matter, but on its face Article 45 plainly deals with conditions precedent going to the intrinsic validity of a contract, and whether such contract even has started to take effect.

271. I reiterate that in accepting the conclusion/finding that there is no concept in Chinese law even analogous to constructive trust, for reasons earlier given I have *not* acceded to Mr Shieh's *ad hoc* request that this court should rely on the two expert reports of Mr Anthony Dicks QC.

*(b) "Knowing receipt"*

272. Mr Shieh has pointed out that in the plaintiff's opening submissions (at paragraph 7.9-7.11) there appears a claim for "knowing receipt". The plaintiff puts it thus:

> "As the knowing recipient of the unlawfully allotted and transferred shares, D3 is liable to pay equitable compensation for D3's knowing receipt of misapplied trust property, since the shares were received in circumstances where there was unconscionability on the part of D3: see *Thanakharn Kasikorn Thai Chamkat v Akai Holdings Ltd (No 2)*, (2010) 13 HKCFAR 479, at paras 124-125.
>
> It is the plaintiff's case that knowledge of the facts establishing knowing receipt is to be imputed to D3 through D7 and/or D6, who controlled all the Eton group companies including D3 eg. *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, per Lord Hoffman at 506.
>
> It is also P's case that the Impugned Transactions were undertaken during the 1st Arbitration with the fraudulent intent of the participants (in particular D1, D2, D3, D4 and D6) to deprive P of the benefit of the award which P was seeking therein (and which was subsequently granted by the CIETAC Arbitrators, viz the Award) including the entitlement to register that award in the jurisdiction where the relevant companies (D1/D2/D4) are incorporated, viz Hong Kong."

273. Mr Shieh points out that this apparent claim in 'knowing receipt' presupposes that the shares in the 4th defendant were trust property received by the 4th defendant, and also that it is Hong Kong law which is operative. I agree. Absent such classification of the shares *qua* trust property, a classification I have rejected, there can be no constructive trust,

and thus no claim for 'knowing receipt', which consequently also must fail. I so hold.

*(c) The 'economic torts' alleged*

274. Within the Re-Amended Statement of Claim, at paragraphs 31-32 (which were added by the first amendment, the original case being framed solely in constructive trust) the plaintiff has pleaded an alternative claim for damages arising from an alleged conspiracy or unlawful interference with contract, the factual premise being (at paragraph 31) the "close inter-relationship…[between the 3rd to 11th defendants making them] fully aware of the contractual commitments by the 1st and 2nd defendants under the Agreement to transfer to the Plaintiff the entire issued share capital of the 4th Defendant…"

275. As to this plea, in his closing submission Mr Shieh SC on behalf of the 3rd, 4th and 5th defendants outlined four bull points:

(1) the torts alleged (but denied) took place on the Mainland, and thus attract the "double actionability" principle, which can only be satisfied/established if the alleged complaints are actionable *both* in the place where the tort was committed – in this instance he asserts that the most significant of the alleged overt acts occurred in the PRC, and thus PRC law is the relevant law – *and* under the law of the forum, in this instance Hong Kong: see *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190;

(2) that under Mainland law there are no such economic torts nor analogous equivalents, and thus there can be no satisfaction of the "double actionability" requirement;

(3) even were the governing law to be Hong Kong law (which it is not), "unlawful means conspiracy" does not extend to breach of contract as a matter of principle; and

(4) in any event the evidence received in this case does not sustain any finding of conspiracy to injure, nor conspiracy to breach/procuring breach.

276. I take these points relatively briefly.

277. Earlier in this judgment the issue of the existence, or otherwise, of such economic torts has been considered, and despite Mr Shieh's useful written proffering of chapter and verse in terms of the expert evidence (with which summation I agree), and having preferred the evidence of Professor Cui, I see no necessity to duplicate or further to amplify the court's earlier findings/observations on the point.

278. The only aspect I consider it worthwhile to add in this context is that 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, whilst Article 106 (section 2 thereof) and Article 120 are merely used "as the formalised basis for the right to make a claim" – Article 106, section

2 concerning only civil liability for the encroachment of property, and Article 120 the "right to reputation", and thus do not assist the plaintiff either.

279. It follows therefore that I agree with, and accept, Mr Shieh's "double actionability" objection, and that these claims of 'economic torts', to which there is no equivalent under Chinese law, must fail on this basis.

280. This finding is sufficient to decide the point, but, consistent with the approach generally adopted in this judgment, I go on now to consider the situation were Hong Kong law to govern the position.

281. I have already dealt in part with area in considering the 'original' case against the 1st and 2nd defendants.

282. To recap, however: the tort of conspiracy takes two forms: first, conspiracy to use unlawful means, which does *not* require a predominant purpose to injure, and conspiracy to injure, which does: see *Meretz Investments NV v ACP Ltd* [2008] Ch 244, at paragraph 117, per Arden LJ.

283. As to 'unlawful means conspiracy' (*assuming* Hong Kong law to apply, which in my view it does not), I fail to see how the plaintiff can get to first base in establishing liability under this head.

284. I say this for the following reasons.

285. The imputation or attribution of knowledge to these three corporate defendants can only be *via* the instrument of their human officers

or agents – hence, presumably, the inclusion (by re-amendment) of the 6th to 11th defendants.

286. However, this requirement is not satisfied in my view, either on the particular facts of this case or as a matter of law. In fact, in terms of consideration of the position of the individual defendants, as opposed to the 'faceless entities' who are his clients, not surprisingly Mr Shieh SC adopted the detailed submissions (with which I shortly deal) as made by Mr Warren Chan SC on behalf of the 7th to 11th defendants.

287. The law on 'imputation of knowledge', as Mr Shieh SC pointed out, was clarified by the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, which dealt with 'primary' and 'general' rules of attribution, the former normally to be found in the Articles of a company or as a matter of necessary implication, and the latter wherein, absent appropriate 'primary rules', the 'general rules' assist based on principles of agency and vicarious liability, wherein the acts or knowledge of any authorized servant or agent will be counted as that of the corporation – although this is subject to the restriction that an officer 'common' to two companies will not have the knowledge which has come to him by virtue of his position at Company A imputed to Company B *unless* there was a specific duty imposed upon him to communicate that knowledge: see the established line of cases beginning with *Re Hampshire Land Co Ltd* [1896] 2 Ch 743, at 748 to *El Ajou v Dollar Holdings plc* [1994] 2 All ER 683, at 698. Mr Shieh also pointed out that occasionally and in appropriate circumstances the courts are wont to fashion 'special rules of attribution' focusing upon the "directing mind and will" of a natural person, but this element necessarily is fact-specific.

288. It is also the accepted position that when dealing with the issue of attribution/imputation of notice that the burden of proof is on the plaintiff to persuade the court that acts of certain individuals should be attributed to corporate defendants – and, as will become evident, in my view the plaintiff has failed to discharge such burden.

289. The 'overt acts' relied upon by the plaintiff (*vide* the re-amended pleading at paragraph 33(3) – (5)) focus on the corporate restructuring of the Eton Group and upon the development of Lot 22 and the contractual refusal to deliver the Lot to the plaintiff, acts which, as Mr Shieh pointed out, essentially are passive in nature – in fact, it is not easy to discern what, if any, level of contact the 3rd, 4th and 5th defendants had with the plaintiff.

290. Leading counsel made it clear that the case on behalf of the 3rd to 5th defendants was that the changes to the shareholding of the 4th defendant as now were under attack by the plaintiff were part and parcel of a corporate restructuring carried out within the Eton Group for the purpose of establishing a holding company the better to reap greater efficiencies within the management of the Group property investment business in the PRC. It was against this backdrop that he advanced the further argument, which I also accept, to the effect that merely making it more difficult to obtain one form of remedy (for example, specific performance) cannot be considered legally sufficient for the tort of inducing breach of contract nor sufficient to get home in conspiracy – a proposition he derived, correctly in my view, from *Law Debenture Corporation v Ural Caspian Ltd* [1995] Ch 152 (CA).

291. An additional difficulty for the plaintiff in this case is that the issue of 'unlawful means conspiracy' throws into stark relief the question of that which, in law, is considered to amount to 'unlawful means', and in particular whether breach of contract itself will fit the legal bill.

292. In *Revenue and Customs Commissioners v Total Network SL* [2008] 1 AC 1174 Lord Neuberger referred (at 1285F) to:

> " …the notion of a single consistent approach as to what constitutes unlawfulness in relation to all the economic torts can be said to be inconsistent with what Clerk & Lindsell on Torts, 19th ed refer to, at para 25-001, as the "ramshackle" nature of the economic torts and with the statement in Stevens on Torts and Rights (2007), p 297 that the economic torts "have no inherent unity" and that it is "a mistake to group these 'torts' together"…
>
> whilst the editors of *Clerk and Lindsell on Torts*, 20th ed., at 24-11 observe that "the status of breach of contract and procurement of a breach of equitable obligations is still the subject of uncertainty surrounding the boundaries of 'unlawful act or means'".

293. There are no decided cases directly on point – in *Total Network, op cit*, breach of contract was considered as a possibility only – and this issue no doubt is one which would reward high appellate consideration. The point is a difficult one, and in the circumstances of this case I do not need to decide it, but for my part there seem to me to be sound policy reasons for not including breach of contract as a species of 'unlawful means', not least because, as Mr Shieh SC submitted, the tort of procuring breach of contract creates inroads into the privity principle, and since the law already provides such means of affixing a third party with liability for a contracting party's breach of contract, it is a legitimate question of principle and policy as to whether there also should be a 'lesser' form of liability for essentially the like act clothed within the tort of conspiracy.

294. For present purposes, therefore – and in anticipation of appellate clarification – I am prepared to proceed on the basis that a breach of contract does *not* constitute "unlawful means" for the purpose of economic tort of 'unlawful means conspiracy', and thus the plaintiff also would fail for this reason on this plea as directed toward the 3rd to 5th defendants.

295. Nor am I prepared to countenance the late submission by the plaintiff that 'dishonest assistance' or 'procuring breach of trust' can constitute 'unlawful means' for this species of conspiracy; in Mr Shieh's absence his junior, Miss Cheung, complained (*Transcript, Day 21, page 42*) that is was not open to Mr Barlow to make this suggestion in his closing submission, as did Mr Law in his leader, Mr Chan's, absence (*Day 21, page 44*). I agree with counsel's objections. I am not prepared to consider this proposition as raised so late in the day. Whilst it does not, I think, matter for all practical purposes in light of the court's findings on these issues, for the avoidance of doubt (and not least should this case go further) it is necessary to clarify the court's position on these procedural objections.

296. Turning to the second species of conspiracy, 'conspiracy to injure' (otherwise referred to as 'predominant motive to injure conspiracy'), on the evidence in this case I accept Mr Shieh's submission that the pleaded overt acts do not afford a basis legitimately to infer the required 'predominant motive to injure' on the part of the officials of the 3rd, 4th and 5th defendants, and thus that there can be no attribution of relevant knowledge to these corporate entities.

297. For this purpose I am content to adopt as the relevant evidential benchmark the following passage from *Winfield and Jolowicz on Tort*, 18th ed., paragraph 18-23, which reads:

> "The object or purpose of the combination must be to cause damage to the claimant. The test is not what the defendants contemplated as a likely or even an inevitable consequence of their conduct, it is, 'what is in truth the object in the minds of the combiners when they acted as they did?' Malice in the sense of malevolence, spite or ill will is not essential for liability, nor is it sufficient if merely superadded to a legitimate purpose; what is required is that the combiners should have acted in order that (not with the result that, even the foreseeably inevitable result) the claimant should suffer damage. If they did not act in order that the claimant should suffer damage but to pursue their own advantage, they are not liable, however selfish their attitude and however inevitable the claimant's damage may have been…"

298. Clearly therefore, in order to get home on this type of conspiracy the bar is set high, and in my judgment the plaintiff simply has not cleared it in this case, since I am unable to divine that any individual or company concerned with the contractual breach/group restructuring properly could be said to have acted with a *predominant* motive to injure the plaintiff; as indicated, the incidental effect of the restructuring may have not been unwelcome, but in my view (and perhaps unsurprisingly) that which on the probabilities was the predominant motive/driving force behind the entire sequence of events was the potential accrual of economic benefit to the Eton Group as a whole, and any ancillary motive will not suffice – which may well be the reason why it is difficult as forensically to establish this cause of action.

299. Accordingly, I hold that the case against the 3rd to 5th defendants fails under this head also.

300. Under the head of 'economic torts' pressed against these 3 corporate defendants there remains for consideration the additional issue of procuring breach of contract.

301. The plaintiff flags this issue in its Opening thus (at paragraph 1.10):

> "P says that, once the shadow of the SARS epidemic had cleared (by late 2003), D6 developed seller's remorse and that he caused D1/D2 (through their directors, who were accustomed to acting in accordance with his instructions) to default on their Agreement; and that, thereafter, D6 caused or allowed the Eton Group (primarily through D4, of which D6 was a director) to be restructured in order to render D1/D2 incapable of (alone) performing their contractual commitments under the Agreement…"

302. On the available evidence, it is not easy to see what, if anything, the 3rd to 5th defendants did which properly could be said to amount to the tort of procuring breach of contract.

303. Mr Shieh SC submits, in my view correctly, that in this context the acts pleaded cannot as a matter of law amount to such procurement because on the facts these corporate defendants were entirely passive and could not be said to have met the criteria described in *OBG Ltd v Allan* [2008] 1 AC 1, at para [36] by Lord Hoffmann, whom in considering the old distinction which had been drawn between "direct persuasion" which was "unlawful in itself" and bringing about a contractual breach by "indirect methods", which had to involve "independently unlawful means", observed as follows:

> "[36] This treats the distinction as turning simply upon whether there was communication, directly or through an agent, between the defendant and the contract-breaker. But, like Lord Denning in the *Daily Mirror* case, I cannot see why this should make a

> difference. If that is what the distinction between 'direct' and 'indirect' means, it conceals the real question which has to be asked in relation to *Lumley v Gye* 2 E & B 216: *did the defendant's acts of encouragement, threat, persuasion and so forth have a sufficient causal connection with the breach by the contracting party to attract accessory liability?* The court in *Lumley v Gye* made it clear that the principle upon which a person is liable for the act of another in breaking his contract is the same as that on which he is liable for the act of another in committing a tort. It follows, as I have said, that the relevant principles are to be found in cases such as *CBS Songs Ltd v Amstrad Consumer Electronics plc [1988]* AC 1013 and *Unilever plc v Chefaro Proprietaries Ltd* [1994] FSR 135…" [emphasis added]

304. In the present case it is difficult to see that the 3rd to 5th defendants have committed any such "acts of encouragement, threats of persuasion and so forth" to attract liability under this head, but, for the purpose of argument, even if it be *assumed* that this was the case (which in my view it was not), there still cannot be divined any causal link between the contractual breach in this case, which occurred on the issuance of the Notice of Termination by the 1st and 2nd defendants in November 2003, and the overt acts as pleaded against the 3rd to 5th defendants. In this connection Mr Shieh SC cited the observations of Lord Templeman in *CBS v Amstrad* [1988] 1 AC 1013, at 1058:

> "Facilitating the doing of an act is obviously different from procuring the doing of the act. Sales and advertisements to the public generally of a machine which may be used for lawful or unlawful purposes, including infringement of copyright, cannot be said to 'procure' all breaches of copyright thereafter by members of the public who use the machine. *Generally speaking, inducement, incitement or persuasion to infringe must be by a defendant to an individual infringer and must identifiably procure a particular infringement in order to make the defendant liable as a joint infringer…"*
>
> [emphasis added]

305. Thus as a matter of principle the tort of procuring a breach of contract requires some form of subjective intent, and, as Mr Shieh SC neatly expressed the position, for the 'procurer' there thus "must be an element either of using the breach of contract as an end in itself or as a means to an end, and that it is insufficient simply to know that the consequence of an act is that a contractual breach will enure" – a conceptual position with which Lord Hoffmann appeared to agree in *OBG v Allan, op cit.*

306. It follows from the foregoing that I am able to discern no liability of the 3rd, 4th and 5th defendants to the plaintiff in this case, and I so hold.

*(C) AGAINST THE 6TH DEFENDANT*

307. The unseen presence of the 6th defendant, Mr Lucio Tan, hung heavy over this trial: shades of Hamlet without the Prince.

308. Mr Tan is, and was, the all-powerful head/patriarch of the Eton Group, which I gather originated as 'Tan's Family Enterprise'in the 1960's, and indeed a number of his corporate officials, present and erstwhile, were family members. The Eton Group was, therefore, his personal fiefdom in corporate form – I so find – and in piecing together the picture from the available evidence, it is clear, and again I so find, that the overwhelming probability is that nothing significant occurred in the commercial activity of the Group without Mr Tan knowing about it, in broad structure at least.

309. This much is not, I think, disputed, and it is precisely because of his central and all-powerful position that Mr Tan was very much in

Mr Barlow's sights as the venal progenitor of the contractual wrong which had befallen his client in terms of the abrupt and calculated termination of the Agreement between the plaintiff and the 1st and 2nd defendants.

310. It was presumably in anticipation of Mr Tan's appearance in the witness box – which in the event did *not* transpire – that Mr Barlow's team had prepared a box file of documentary materiel ['file C6'] which had been assembled for the sole purpose of seeking to demonstrate that Mr Tan fell considerably short of meriting universal accolade in terms of the manner in which he was and is alleged to have conducted his business enterprises.

311. It was to this accumulation of a variety of unflattering documentary materiel – which this court neither has read nor considered in detail – that Mr Tong SC, appearing for Mr Tan, took strong exception. Curiously detailed argument on the point took place during the cross-examination of the estranged brother of Mr Lucio Tan, Mr Mariano Tan, a gentlemen of some age who said in evidence that he had been summarily ejected from the family compound by his brother, with whom, if I understood the thrust of his evidence correctly, he now was estranged and had no contact; at the time of Mr Tong's evidential objection, in his cross-examination Mr Barlow was beginning to broach the subject of Mr Mariano Tan's apparent difficulty with the Philippine tax authorities, which were said to relate to his brother's activities or, at least, to the activities of the Tan family enterprises.

312. The thrust of Mr Tong's argument was that the offensive (and wholly irrelevant) compilation of prejudicial documents residing in 'file

C6' should not form part of the court record. I will not repeat his detailed argument (set out in full in the transcript of Day 9, at page 33 *et seq*). Suffice to say that the main planks of his cogent submission, reinforced by reference to *Phipson on Evidence*, at paragraph 22-07, and the well-known leading cases in this area, were that evidence attacking general credit was impermissible unless it bore "some semblance of relevance" to the pleaded issues in the case, and that even if arguably admissible (for example, in terms of similar fact) there remained the general judicial discretion to "weigh" and to exclude such evidence when, in the time-honoured phrase, its prejudicial effect exceeded any probative value, so that the exclusion of evidence of this type served to achieve a trial process fair (or not unfair) to all parties.

313. Narrative summation may have done injustice to Mr Tong's detailed and forceful submission, but for present purposes I go no further because, in the event, I declined to permit Mr Barlow to cross-examine Mr Mariano Tan as to wholly extrinsic and irrelevant matters, and, whilst indicating agreement with Mr Tong in broad principle, the court also declined at that stage to make any 'blanket exclusion' advance ruling regarding the content of 'file C6' (a 'blanket' ruling which Mr Tong had wished to obtain), and indicated that if necessary the issue would be considered on a document by document basis if and when the matter arose when Mr Barlow SC embarked upon his cross-examination of Mr Lucio Tan, whose witness statement had averred (at paragraph 13 thereof) that "it has always been my principle in doing business that I would not do illegal things" – an assertion which the objective observer might consider amounted to a potential hostage to evidential fortune.

314. As matters transpired, Mr Lucio Tan was *not* called to give evidence – Mr Barlow neatly tagged the situation as "waiting for Lucio" – and thus the question did not arise. I would add that whilst certain of the documents in 'file C6' – which in the event never was used – may properly have been considered, in correct context, to be fair game (for example, an official report of a Philippine Supreme Court case involving Mr Lucio Tan), in principle I should have had nothing to do with, for example, extracts from 'Wikipaedia', an internet publication of which I have no personal knowledge, but in light of the provenance thereof – I understand that this platform is open to any internet browser to add to or to delete existing material/entries from the encyclopaedic data recorded therein – a 'publication' which in my view is unlikely ever to merit consideration, *qua* admissible evidence, in proceedings before the Hong Kong High Court.

315. I have dealt with the dispute at the outset in order to make it clear that 'file C6' has played no part in this court's analysis/consideration of the issues variously raised in this trial. I go further. Even if any part of this file had sought to have been introduced – which in the event it was not – then any overtly prejudicial 'credit' material which may have been admitted/considered by the trial court would have been accorded the evidential weight it deserved (which on the probabilities would *not* have been substantial, given that in principle the Commercial Court remains highly resistant to prejudice).

316. However, the dispute over this file served to place into stark relief the admissible evidence which *was* available against Mr Lucio Tan. Since this gentleman made no appearance at the trial the usual practice of the Hong Kong Commercial Court (or, at least, its practice over the past 15

years) was followed, and no account was taken of his putative witness statement; hence evaluation of the plaintiff's case, and causes of action, against Mr Tan derived from the admissible documents in this case and that which fell from the *viva voce* evidence of other witnesses.

317. On analysis it seems to me that the claim against Mr Lucio Tan is dependent solely upon the fact of the termination of the Agreement as thereafter followed by the Eton Group restructuring (the fact of which is undisputed), and the corresponding characterization of such restructuring by the plaintiff as 'fraudulent' and 'illegal'.

318. I repeat my earlier observation that I am unable to view the restructuring in this light. I cannot see how it can be characterized as 'fraud' or 'fraudulent conduct'. As Mr Tong remarked in closing submission:

> "…there is no fraud here. And fraud, by definition, is 'to do and say something and pretend it is something which it is not.'…But there is no such thing here. …The best you can say, and putting the plaintiff's case at its very highest, is that they have done something which makes it more difficult for them… to get specific performance…" [Transcript, Day 21, pages 126-127]

319. Mr Barlow couched the plaintiff's case against the 6th defendant [at section 21 of his Closing Submission] in terms of (i) knowing assistance in the breaches of trust committed by D1/D2 as the vendors-in-possession/trustees of all the shares in D4; (ii) procuring D1/D2 to breach the Agreement with the Plaintiff; and (c) conspiracy.

320. Once again, analysis of this position will involve reference to, and an element of duplication of, this court's earlier observations/findings in terms of these causes of action common to other defendants.

321. For the 6th defendant, Mr Tong SC – who by virtue of calling no evidence had the last word in closing submission – made no bones about his position. This, he robustly observed, was "an action that should never have been brought", and that on the evidence before the court there was no case for Mr Lucio Tan to answer.

322. Mr Tong made it clear that his client's case was straightforward, and that it was a defence based solely on legal argument, be it PRC or Hong Kong law, since the essential facts were not in dispute, namely that (i) his client had made the decision to terminate the Agreement, or to influence the other directors of the 1st and 2nd defendants so to terminate; (ii) that Mr Lucio Tan is to be regarded as the head or brain or 'directing will' of the relevant companies, and that he had acted as such; and (iii) that Mr Tan was responsible only for 'directional' decisions, leaving the execution of such decisions to his subordinates.

323. I agree with and accept this summation of the factual position, and I am content to proceed on this basis.

324. As will be apparent from earlier parts of this judgment, I further agree with Mr Tong's submission that, as the claim against the 6th defendant lies only in tort and not in contract, that the facts as proved will establish the system of law with which the tort(s) alleged have the closest and most substantial connection with the claim (see *Dicey & Morris*,

14th ed., Rule 232, at page 1934; *Red Sea Insurance Co v Bouygues SA* [1995] 1 AC 190, at 206C, per Lord Slynn), and that in the present case virtually all the 'connecting factors' point indisputably to PRC law as the only relevant system of law in this case.

325. In this connection, Mr Tong ticked off some ten evidential 'connecting boxes' to establish his proposition, *viz.*, the Agreement in substance expressly is governed by PRC law (save as to the process of transfer of shares in Hong Kong, should such enure); the property development on Lot 22, is in Xiamen, PRC; the currency of the transaction was in Renminbi; the plaintiff is a PRC company represented by PRC nationals; the defendant companies are either BVI, PRC or Hong Kong companies, albeit the latter are simply holding companies and not participants in the Lot 22 development; Mr Tan himself is a Chinese national, now residing in the Philippines; the decisions of which vociferous complaint now is mounted by reason of the harm caused to the plaintiff were for the most part made in the PRC, or places outside Hong Kong; in so far as there was any combination/conspiracy (which is denied), this took place in the PRC or otherwise outside Hong Kong; in so far as this is truly an 'enforcement action', the arbitral award sought to be enforced is a PRC arbitration and the remedies as granted by the CIETAC tribunal are PRC remedies; and, finally, that any consequential loss which remains to be assessed, should the plaintiff succeed in its case on liability, must be assessed with reference to events and valuation within the PRC.

326. If, as earlier I have held to be the case, PRC law governs in terms of the causes of action advanced by the plaintiff, then the court is once again directed to the respective merits of the expert evidence of

Professor Cui, called on behalf of all defendants save for the 6th defendant, as against the views of Mr Fei, called on behalf of the plaintiff – as to which I have made it clear that in my judgment the view of Professor Cui is much to be preferred (and has been adopted) upon the particular issues raised.

327. Thus, in terms of the original claim against the 6th defendant in constructive trust/breach of trust – as to which Mr Tong reasserted its unpleaded status – leading counsel repeated the contention that on the basis of the evidence of Professor Cui there is no concept of constructive trust under PRC law; in fact he pointed out that even Mr Fei had been minded to agree that there was no provision or concept of any trust law in the PRC until 2001, and he invoked the evidence of Professor Cui (which I have accepted) to the effect that the plaintiff's alleged right under the Agreement as regards the shares is not a property right but a contractual one.

328. Nor was there any fiduciary relationship arising between the plaintiff and the 1st and 2nd defendants under PRC law, Mr Tong highlighting in this context that Mr Fei had accepted that it was not and never had been his contention that there existed a fiduciary duty on the part of the 1st and 2nd defendants toward the plaintiff, so that it followed that there could be no breach of trust and, thus, there could have been no question of the 6th defendant knowingly assisting in any breach of trust.

329. I agree. I cannot see how this case in constructive trust/breach of trust possibly can get home under PRC law, either directly pursuant to statutory provision – for Article 106 to apply it is clear on the evidence that the plaintiff has to have *actual rights as owner* of the relevant shares, which

it could not have obtained pending payment of full consideration – or by analogy.

330. This leaves this plea to be alternatively considered under the *assumed* basis that Hong Kong law is applicable (which plainly it is not).

331. To repeat the analysis earlier adumbrated, and as Mr Tong submitted, no constructive trust attaching to the shares could arise under Hong Kong law for the plain reason that under our system of law, a beneficial interest in the shares (which had the Agreement run its course and been fulfilled ultimately would have been transferred to the plaintiff) will not pass under a conditional agreement (which was *this* Agreement) absent full payment of the transfer price and fulfilment of the other specified conditions, and it simply could not be successfully argued that this was an Agreement for the unconditional sale of land or the unconditional sale of shares – in this connection Mr Tong stressed that even the CIETAC tribunal had observed that the Agreement was not an agreement for the sale of shares, and further referred to *Article 3* ['Conditions of Transfer'], *Article 4* [providing for payment of the transfer price in 4 separate stages], *Article 5* [providing for physical delivery of Lot 22 land after demolition of the original Legend Commercial Building thereon, and not for transfer of legal title], *Articles 6 and 7* [provisions for the plaintiff's right to develop the land under the supervision of the 1st and 2nd defendants], and *Article 8* [provision for the transfer of shares in Hong Kong Legend "when Party B (the plaintiff) has settled the total transfer price and fulfilled the obligations according to the Agreement, Party A (1st /2nd defendants) will agree to transfer all the shares of Hong Kong Legend

to an approved individual or an approved legal entity outside the territory of China…"]

332. It is tolerably clear, therefore, that, even were Hong Kong law to be applicable, this Agreement is no more than an agreement to a future transfer of the shares upon fulfilment of certain conditions and the future occurrence of certain events, that it cannot properly be regarded as an unconditional agreement, and thus that the principle of Hong Kong law, namely that the beneficial interest in shares in a contract for the sale of shares will only pass where the contract becomes unconditional in terms of performance, clearly cannot be satisfied.

333. It follows that, whatever conflictual perspective is adopted, a breach of trust claim against the 6th defendant cannot and does not succeed. I so hold.

334. There remain the plaintiff's alternative claims in conspiracy and in procurement of breach of contract, and once again, in considering these elements of the case, there arises a degree of unavoidable repetition.

335. Mr Tong castigated these pleaded claims as supported neither by the facts nor the law. The 6th defendant's primary case, he submitted, was that his actions were done as the *alter ego* and/or a director/shadow director of the Eton Group, and that as such he cannot be held liable personally for procuring a breach of his company's contract, be it under PRC or Hong Kong law.

336. As to PRC law, which I have accepted should be the governing law of this claim, it is evident that 'procurement of breach of contract' is an unknown cause of action.

337. Professor Cui's expert evidence is clear: he noted that Article 5 of the General Principles of Civil Law protects the general civil rights and interests of citizens, but not specific obligatory rights under contract, which should be governed by the Contract Law, and that Tort Law cannot protect contractual obligatory rights; in fact, it is apparent that Article 2 of the Tort Law cannot be applicable to the present claim anyway, since it came into effect only *after* commission of the alleged torts. Professor Cui also reported that under PRC law, any acts done by a director or a legal representative of a company are not to be attributed to that company as long as such acts are not outside the scope of their duties: it followed therefore, he opined, that a director or senior manager could not, as a result of a company decision, be accused of conspiring to injure the plaintiff's interests. I accept this evidence.

338. As to the position should Hong Kong law be applicable (which in my view it is not), Mr Tong submitted, in my view correctly, that any such claim equally is unsustainable, because as the 'controlling mind' of the Eton Group, the 6th defendant could not have procured a breach of the Agreement as he was the one who had made the decision to breach the Agreement: see *Halsbury's Laws of Hong Kong*, at 380.504:

> "Where a servant or agent acting within the course of his employment procures a breach of contract, the plaintiff cannot sue him because he is only the alter ego of his employer or principal. The plaintiff's remedy is to sue the employer or the principal, or as the case may be, for breach of contract."

339. I also agree with and accept the submission that this cause of action was created to establish a third party liability for intentionally inducing a contractual breach between the claimant and his employee: see *Clerk & Lindsell, op cit.,* at paragraph 24-03. In other words, the errant third party is distinct and separate from the contractual relationship; as Mr Tong SC argued, if this were not the case, every breach of contract by a company would result (or potentially result) in its directors becoming personally liable, for *ex necessitatis* the directors would have 'combined' to 'procure' such corporate contractual breach by reason of authorizing the acts of the company in the course of their employment, which cannot be the position; this tort thus had arisen to provide a remedy to an innocent party to a contract to pursue the third party procuring the breach, and not to duplicate the innocent party's contractual remedy.

340. Accordingly, it is difficult to see how the actions of the 6th defendant, whether *qua* director or shadow director, can or could be impugned under this head as a matter of Hong Kong law, nor, for reasons shortly to be adumbrated, is the court willing to consider any allegation that the 6th defendant was acting outwith his authority as director or shadow director. Mr Barlow also submitted that 'fraud' formed the exception to this rule. Without commenting on the validity of this proposition – although I suppose that this falls within the old legal chestnut of 'fraud unravels all' – this begs the question of what exactly is the fraud in this case, and as I have endeavoured to make clear, I am unable to convince myself that the restructuring as effected was either fraudulent or illegal.

341. Finally, there arises the claim of <u>conspiracy</u>.

342. Once again Mr Tong SC argues that this does not get off the ground, whether as a matter of PRC or of Hong Kong law. He pointed out, in my view correctly, that if his client cannot be held personally liable for procuring a breach of contract by his company, it is difficult to see how he can be regarded as a party to a conspiracy to procure a breach of contract by his company.

343. In any event, the case as pleaded against the 6th defendant is conspiracy to use unlawful means, albeit there is no pleading as to predominant purpose.

344. In my judgment this claim must be dismissed also.

345. Under PRC law conspiracy to injure is not a valid cause of action, and in so far as Mr Fei attempted to convince the court otherwise by analogy with the tort of 'malicious collaboration', premised on the right of a third party to demand return of property over which he already has obtained ownership of the legal right of disposition, such plainly is not the case in this instance as this plaintiff never had enjoyed ownership of the relevant shares. I reiterate the court's acceptance of Professor Cui's evidence on the point, namely that there is no question here of a 'joint tort' (which Mr Fei also attempted to argue), and that the right actually being damaged in the instant case is limited to a contractual and not a proprietary right, which contractual right is not protected under the tort laws of the PRC.

346. So far as Hong Kong law is concerned regarding 'unlawful means conspiracy', once again in my view the plaintiff cannot succeed,

because I am unable to identify the 'unlawful means'. The contractual breach cannot suffice, and as I have earlier made clear I do not consider the Eton Group restructuring to satisfy this benchmark: it may well have been viewed by Mr Lucio Tan as convenient, and no doubt even collaterally desirable in the form as chosen, but it was not unlawful, it was not fraudulent, and as I have observed, when it was done I do not accept that the plaintiff had acquired any proprietary interest in, or right over, the shares.

347. In this connection Mr Tong reviewed the history of events, and emphasized that the need to establish a holding company was raised well before the Agreement, and already had been acceded to in principle by his client before March 2005; indeed the restructuring involving issuance of new shares had not actually occurred until August 2005 and originally was the 'brain child' of Daisy Wong, counsel stressing that there was simply no evidence that the 6th defendant had made any connection between the land transaction and the setting up of the holding company.

348. However, even assuming this to be incorrect, in my view the 'unlawful means' benchmark remains unsatisfied, as does the necessity to establish 'predominant purpose': as earlier indicated, the highest that it can be put is that the manner of restructuring may have been incidentally welcome by the 6th defendant, but it cannot fairly be characterized as constituting a 'predominant purpose' to defeat the plaintiff's rights.

349. Further, as Mr Tong also submitted, in order to succeed under this head the plaintiff would have had to demonstrate damage caused by or consequent upon the restructuring, and the hard fact was that this could not

be demonstrated either: the plaintiff always has had its remedy in damages for breach of contract, and the claim for specific performance now is not being pursued by reason not of the restructuring but because of the irreversible physical situation on the ground, namely the completed development of Lot 22 and the on-sale of the flats erected thereon.

350. I agree. Against the 6th defendant I can perceive no legitimately constituted case in conspiracy, under either PRC or Hong Kong law, and thus I reject this element of the claim also.

*(D) AGAINST THE 7TH TO 11TH DEFENDANTS*

351. It will be recalled that these 5 defendants (in addition to the 6th defendant) first were added to this action pursuant to the leave to amend granted by Fok J in his judgment of 16 March 2010.

352. The pleading of the plaintiff against these defendants relies on the two 'economic torts' of (1) conspiracy to injure/ conspiracy to defraud; and (2) procuring breach of the Agreement (Re-Amended Statement of Claim, at paragraphs 31-34).

353. In considering the causes of action against these individuals once again there is overlap in applicable principles (and findings) already touched upon in the consideration of the plaintiff's case against the other defendants.

354. As a starting point, however, I confess that I find it difficult to understand what has been achieved by joining the 7th to 11th defendants to this action, given that (and I mean no disrespect in thus observing) self-

evidently they are no more than corporate officials/functionaries; indeed, two of these 5 defendants are mere employees. And I should also indicate that I have found it difficult to (and do not) accept that the 7th to 11th defendants have participated in, to use Mr Barlow's strong words (at paragraph 17.83(l) of his closing address) "a continuous, co-ordinated, dishonest and unlawful course of conduct ultimately orchestrated by D6 and carried out at his behest by the other defendants."

355. The immediate consequence of these defendants being company officials is that this brings into the analytical framework considerations not just relating to PRC law as the applicable proper law of the torts alleged, or the application of the 'double actionability' principle, but that which constitutes an even more fundamental consideration.

356. *Assuming* for the purpose of argument that Hong Kong law governs these torts in this case – which in my view it does *not* – the plaintiff's claim against these 5 defendants in terms of the allegation of procuring breach of contract runs squarely against the established rule that directors and company officials cannot be liable for the tort of procuring that company's breach of agreement: see *Said v Butt* [1920] 3 KB 497, at 503-506, per McCardie J; *East Asia Satellite Television (Holdings) Limited v New Cotai LLC*, (unrep.), HCA 2189 of 2009, first instance judgment dated 16 July 210, per Reyes J at paragraphs 74-85; on appeal, at [2011] 3 HKLRD 734, per Tang VP, who observed, at paragraph 75:

> "75. However, the general rule is that, where a director is acting bona fide and within the ambit of the director's authority, the director has no personal liability for procuring the director's company to commit a breach of contract. More particularly, a director or other agent of a company who causes the company to act in breach of contract incurs no personal liability and is under no duty of care to counterparties to the contract, to ensure that the

> company fulfils its contractual obligations. See *Crystalens Ltd v Dr John White* [2006] EWHC 3357 (Gloster J at paras 11 and 12) summarizing what is sometimes referred to as 'the rule in *Said v Butt* [1920] 3 KB 497…"

357. When viewed in this light that Mr Warren Chan SC, for the 7th - 11th defendants, submitted that all other considerations apart, the claims against his clients were misconceived and "amount to no more than an abuse of process of the court so as to bring maximum pressure on them to settle (with D9 and D11 being mere employees)". In this context Mr Chan cited the observations of Slade LJ in *C Evans Ltd v Spritebrand Ltd* [1985] 1 WLR 317, at 329A-C:

> "The authorities, as I have already indicated, clearly show that a director of a company is not automatically to be identified with his company for the purpose of the law of tort, however small the company may be and however powerful his control over its affairs. Commercial enterprise and adventure is not to be discouraged by subjecting a director to such onerous potential liabilities. In every case where it is sought to make him liable for his company's torts, it is necessary to examine with care what part he played personally in regard to the act or acts complained of. Furthermore, I have considerable sympathy with judges, particularly when dealing with commercial matters, who may be anxious to avoid or discourage unnecessary multiplicity of parties by the joinder of directors of limited companies as additional defendants in inappropriate cases. As Mr Watson emphasized, the very fact of such joinder could in some cases operate to put unfair pressure on the defendants to settle. In some instances, where the joinder is demonstrably a mere tactical move, a striking out application may well be justified…"

358. In the event whilst there was no such strike out, I understand there was resistance to amendment by way of the addition of the 6 individual defendants, although this was unsuccessful. Nevertheless, after hearing the evidence at trial I find it difficult to see how the *'Said v Butt'* line of argument successfully can be circumvented, since as earlier indicated, I am unable to discern any fraud within the corporate

restructuring which, Mr Barlow contended, formed an exception to the rule, nor am I minded to entertain the suggestion that any of these defendants were acting outwith their authority.

359. This latter issue, namely of corporate officials acting outside the scope of their authority, was raised (to the consternation of the defendants' counsel) very late in the day in the plaintiff's closing argument, Mr Barlow submitting, for example, that the 7th to 11th defendants, being agents or nominees within the Eton Group, had failed to act in the interests of the companies and merely had acted in accordance with the 6th defendant's instructions, although this allegation had not been put in cross-examination.

360. If and in so far as 'acting outside the scope of authority' ever formed part of the plaintiff's case, *even* the Commercial Court – with its robust attitude to pleadings in general – requires (or would have required) such a fundamental proposition to have been pleaded and opened, and thereafter the matter ventilated/explored fully in evidence. This was not done, and to permit it to be raised in the way that it emerged simply would not be just. Accordingly, far as this court is concerned, this issue, in whatever form it is advanced (a further example asserted being the alleged failure to hold directors' meetings) simply never has been in play in this case, and for the avoidance of doubt is *not* now entertained. To this I would add parenthetically that the matters variously raised in this context by Mr Barlow did not seem to me to amount to very much in the factual circumstances and culture of the Eton Group, and thus in any event would have been unlikely to get him home on this point.

361. In his closing submissions Mr Warren Chan SC took as one of his principal themes the quite extraordinary profile and significance now accorded by the plaintiff to the 'corporate restructuring', and the concomitant allegation by the plaintiff that this had been effected fraudulently and in bad faith.

362. In this context leading counsel went into a great deal of detail, during the course of which he made three basic points: *first*, that the many contemporaneous documents as existed (detailed within paragraph 2 of his Closing Submission) made it clear that the restructuring as took place was carried out for genuine commercial reasons, and that well before the Notice of Arbitration in August 2005 there already was clear intention on the part of the Eton Group to set up a holding company for its property development business in Mainland China: see for example a handwritten memo of Mr Barry Mok dated 16 March 2005; *second*, the undisputed evidence that the concept of allotment and transfer of shares in the 4th defendant to the 3rd defendant originated from Daisy Wong, the company secretarial manager of the 1st defendant, who appeared unaware of the termination of the Agreement and the subsequent arbitration proceedings, and against whom no adverse allegation in conspiracy has been levelled by the plaintiff; in fact, as Mr Chan pointed out, the asserted provenance of the allotment idea was not even cross-examined upon, and that Mr Barry Mok, who was central to the restructuring as was effected, had wanted a "simple and clear structure", which structure as selected, said Mr Chan, was both simpler and clearer in concept than any of the alternatives postulated by the plaintiff in cross-examination; and *third*, and allied with this submission, Mr Chan focused upon that which he termed the "management culture" within the Eton Group, which was, corporate entities notwithstanding, in effect run as

a personal fief by Mr Lucio Tan, the 6th defendant and patriarch of the family clan, with relatives intermittently overseeing individual projects.

363. Mr Chan noted that in so far as the Lot 22 Xiamen project was concerned, this previously had been handled by Domingo Chua, the 7th defendant and the brother-in-law of Lucio Tan, but that he had stepped aside and had had no further involvement, the project then being taken over by the the 10th defendant, Cheung Chi Ming, another brother-in-law of Mr Tan, and that, for example, each of Mariano Tan, the 8th defendant and the younger brother of Lucio Tan, and Alan Kwan, the CEO of the 1st defendant, who was employed to oversee the 1st defendant's business solely in Hong Kong with no involvement in Mainland ventures at all, had had no involvement whatever with the Xiamen development.

364. In my view these factual submissions are well-founded, and I accept as justified Mr Chan's description as "groundless surmise" of the plaintiff's allegation that *prime* object of the restructuring was to render it impossible to transfer the shares in the 4th defendant to the plaintiff (had the Agreement not been terminated); upon the totality of the evidence before the court it strikes me as nothing of the sort.

365. Mr Chan SC allied these factual observations with arguments of law, which for the most part have been outlined earlier in this judgment: namely that the proper law of the torts of procurement of breach of contract and of conspiracy (of either type) was PRC law, which did not exist in the PRC system – Professor Cui's evidence refers – so that the 'double actionability' rule remained unsatisfied, and that even if Hong Kong law did apply, in the case of these defendants the so-called 'rule in *Said v Butt*'

came into play, and could not be gainsaid, so that in any event the 7th to 11th defendants could not be liable for the tort of procuring breach of contract or, for that matter, as directors/employees could not be party to any conspiracy – and in the instance of conspiracy to injure (which he stressed remained unpleaded) it could not be said that there was any 'predominant purpose' to injure the plaintiff via the restructuring.

366. To this analysis Mr Chan added that in order to get home under either of the economic torts prayed in aid by the plaintiff it was incumbent upon the plaintiff to establish that loss suffered consequent upon breach of the Agreement must have been caused by the overt acts of his clients, the 7th to 11th defendants, and, he submitted, the plaintiff manifestly had failed to discharge the burden of proof thus placed upon it. He argued that the breach of the Agreement had taken place in November 2003, with the Notice of Termination being issued on14 November 2003, whilst the overt acts of which complaint now was made took place in November 2005 (with the allotment of 9,998 shares in the 4th defendant in favour of the 3rd defendant), so that there could be no question of any breach of the Agreement which had been caused by any alleged overt acts on the part of his clients; in other words, that there was no causal correlation or connection between the breach of the Agreement and the subsequent restructuring, and thus the 'but for' test could not be satisfied. Taken together with the contention – as advanced by counsel for other defendants – that since the governing law of the Agreement was PRC law, under which the plaintiff could not have had any interest in the shares of the 4th defendant, and thus there could be no question of any constructive trust/fiduciary duty arising in the plaintiff's favour, and Mr Chan concluded that the case against his various clients was doomed to fail.

367. I accept these arguments, cogently and economically advanced.

368. Mr Chan SC lastly adopted the refrain first voiced by Mr Yu SC, namely that *if* in the prevailing circumstances the plaintiff should have returned to the arbitral tribunal for the purpose of recharacterising the remedy presently granted, and seeking a remedy which the Hong Kong system would classify as damages *in lieu* of specific performance, and that *if* such relief were to have been granted, it would follow that the plaintiff would have suffered no loss consequent upon either of the economic torts as had been alleged, and thus for this reason also the plaintiff would not be entitled succeed against the 7th to 11th defendants. The concomitant to this proposition, he continued, is that had the plaintiff in fact pursued a claim for damages *in lieu* of specific performance – which pointedly it did not – then there would have been nothing to be gained by a restructuring ostensibly to prevent the plaintiff from obtaining the shares in the 4th defendant, because there is and was no evidence that the 1st and 2nd defendants would not have been good for any damages for contractual breach as may be awarded.

369. I agree with and accept these submissions, which once again are conclusive against the plaintiff and in favour of the 7th to 11th defendants. However, lest this primary conclusion be held to be in error, I should advert to the evidence given by these individual defendants, and to record the court's evaluation thereof.

<u>The 7th defendant: Domingo Chua</u>

370. Mr Domingo Chua is the brother-in-law of the 6th defendant, Mr Lucio Tan, and was at all material times (and remains) a director of the

1st, 2nd, 4th and 5th defendants. Until 6 December 2010 he was the legal representative and Chairman of the Board of the 5th defendant, and since May 2009, he has been a director of the 3rd defendant.

371. No allegation is made by the plaintiff that Mr Chua was involved in the corporate restructuring, which, as I have observed, remains the key factual underpinning of the plaintiff's case, it simply being said against him that he had signed a Supplemental Agreement of 1 February 2005 on behalf of the 5th defendant with the Xiamen Municipal Land Resources and Housing Administration Bureau and further, that as legal representative and chairman of the board of the 5th defendant he procured the commission by the 5th defendant of the 'overt acts' pleaded at paragraph 33(7) of the Re-amended Statement of Claim.

372. On the facts alone, I fail to see any case against Domingo Chua. This gentleman had no involvement in the matter of the redevelopment after the signing of the Agreement – indeed the evidence is that he was asked to step aside by Mr Lucio Tan after the Agreement was executed, Mr Tan apparently not being happy with the situation as it then had arisen.

373. Nor did Mr Chua have anything to do with the termination of the Agreement, the corporate restructuring or the subsequent arbitration; the evidence of the 10th defendant, Cheung Chi Ming, was that after Mr Chua had been divested of responsibility for the Xiamen development, he, Mr Cheung, took responsibility therefor. I see no reason not to accept his evidence.

374. I further accept the contention that, *qua* director of the 1st and 2nd defendants Mr Chua could not, as a matter of law (PRC or Hong Kong) be liable for the tort of procuring breach of the Agreement or of conspiracy: see *Said v Butt, op cit.*, *East Asia Satellite, op cit.*, and *O'Brien v Dawson* (1942) 66 CLR 18, at 32-34, wherein the High Court of Australia held that a company is not 'in combination' with its directors/employees, and thus no charge of conspiracy can lie when the directors/employees merely go about the business of the company; see also to like effect *Clerk & Lindsell on Torts* (12th ed) at paragraph 24-93.

The 8th defendant: Mariano Tan

375. Mariano Tan is 72, and has retired from any position in the Eton Group since 28 July 2009.

376. It is difficult to understand how this case ever was pursued (or continued to be pursued) against this gentleman whom, if I may respectfully say so, is now of some age and perhaps no longer as acute as he once was; he struck me as rather frail.

377. It is alleged against him that Mr Tan had approved the corporate restructuring by signing on the 25 August 2005 Memorandum issued by the 11th defendant to the 10th defendant on 26 October 2005, and that as a director of the 1st and 2nd defendants 'caused or permitted them' to carry out the overt acts complained of on the part of the 1st and 2nd defendants (at paragraphs (1) and (2) of paragraph 33 of the Re-Amended Statement of Claim), namely the issuance of the Notice of Termination of 14 November 2003 of the Agreement and returning the plaintiff's deposit and refusing to cause delivery to the plaintiff of Lot 22.

378. I accept the evidence of Mr Tan that he had not been involved in the termination of the Agreement or in the arbitration, that he had had no knowledge of these matters and that he had not been consulted regarding these matters, that he was now retired, and in fact had held no position in the Eton Group since 28 July 2009.

379. I also accept the evidence that Mr Mariano Tan's only knowledge regarding the corporate restructuring was when he was told, in about 26 October 2005 in a telephone conversation with a Miss Nancy Lim, that such restructuring was to be carried out for the establishment of a holding company, and that he was aware of no details of this restructuring, or that it would involve the allotment of shares in the 4th defendant and the transfer of shares in the 4th defendant from the 1st and 2nd defendants to the 3rd defendant.

380. I am able to discern neither factual nor legal basis for finding liability against Mr Tan for the economic torts now alleged against him.

The 9th defendant: Alan Kwan Kie Yip

381. Mr Kwan was employed as the CEO of the 1st defendant, and was responsible for the management of the business of the 1st defendant and its associated companies in Hong Kong. At all material times he was a director of the 1st, 2nd and 4th defendants, and until 27 June 2011 a director of the 5th defendant.

382. I accept the evidence that Mr Kwan had no involvement in the decision to terminate the Agreement or with the Beijing arbitration between the plaintiff and the 1st and 2nd defendants.

383. I accept Mr Chan's submission that there is no basis for liability against Mr Kwan on the basis of the application of the legal principles otherwise accepted and approved in this case, either on the basis of PRC law (wherein these torts do not exist) or of Hong Kong law.

The 10th defendant: Cheung Chi Ming

384. Mr Cheung is the brother-in-law of Mr Lucio Tan, and resides in Beijing. He has been the principal representative of the representative office of the 1st defendant in Beijing, and has been a director of the 4th defendant since its incorporation; from May 2005 Mr Cheung also has been a director of the 5th defendant.

385. The plaintiff alleges that the 10th defendant approved the corporate restructuring, and, *qua* director of the 4th and 5th defendants, procured these entities to carry out the overt acts complained of in the Re-Amended Statement of Claim (at paragraph 33 (10)), namely approving the corporate restructuring, being privy to the resolution at the 16 November 2005 board meeting approving the allotment of the 9,998 shares in the 4th defendant to the 3rd defendant, and subsequently on 31 March 2006 being privy to the resolution approving the registration of the transfer of 1 share in the 4th defendant to the 3rd defendant, and finally, *qua* director of the 4th and 5th defendants, causing or permitting these companies to carry out the overt acts complained of against them, namely refusing to deliver Lot 22 to the plaintiff, approving the development of the residential units on Lot 22, and approving the corporate restructuring in terms of share allotment to the 3rd defendant and the transfer of the single share from the 1st defendant to the 3rd defendant.

386. I see no difficulty in accepting the substance of the evidence of the 10th defendant, notwithstanding the stringency of his interrogation in the witness box; by virtue of his position this defendant clearly was one of the two individuals principally falling within Mr Barlow's sights. Given the acceptance by this court of the legal position regarding these economic torts both in the PRC and in Hong Kong, and given the finding of this court that there was no illegality or fraud in the corporate restructuring, once more the court can see no basis for finding there to be any liability on the part of the 10th defendant.

The 11th defendant: Mok Pui Hong, known as Barry Mok

387. As matters transpired, Mr Barry Mok was the first of the defendants to give evidence, and thus first to be on the receiving end of Mr Barlow's detailed and extensive interrogation; he was strenuously cross-examined about his involvement in the events of this case.

388. Mr Mok is not a director of any of the corporate defendants, and was at the material times, and indeed remains employed as group financial controller of the 1st defendant.

389. The main thrust of the plaintiff's pleaded case against Mr Mok (Re-Amended Statement of Claim, paragraph 33(11) is that it was he who had devised and formulated the corporate restructuring, and had signed on a Declaration of Trust dated 6 April 2006 which had had the effect of constituting the 2nd defendant as trustee holding its one share in the 4th defendant on trust for the 3rd defendant.

390. On the evidence Mr Mok was not involved in the decision to terminate the Agreement nor was he actively involved in the Beijing arbitration, although I understand that he did attend part of that hearing.

391. Once again it is clear that the liability of this defendant to the plaintiff stands or falls with the court's view/characterization of the Eton Group restructuring – I repeat that without the existence of the corporate restructuring in the form which ultimately it took, it seems to me that the plaintiff in this case would have had no basis for complaint, given that for some reason unknown the glaringly obvious claim for damages for breach of the Agreement never was advanced to the CIETAC arbitral tribunal.

392. Be that as it may. The 11th defendant, Mr Mok, is in no worse position than the 10th defendant – if anything he is in a more advantageous position since he was and is a mere employee, and I have earlier commented on my reaction to his evidence (see paragraph 234 above). Once more, for reasons of law earlier given (and whether the position be examined under PRC or Hong Kong law), together with the court's factual evaluation of the restructuring as involving neither illegality or fraudulent conduct, I can see no legal basis for attributing liability to Mr Mok in terms of either of the economic torts alleged against him.

*ORDER*

393. From the foregoing it must follow that the plaintiff's case against the defendants herein fails, and accordingly is dismissed against each of the 11 defendants in this action.

394. I so order.

395. I make a costs' order *nisi*, to be made absolute within 14 days of the date of judgment herein absent application being made to vary such order, that the costs of this action are to follow the event and are to be paid by the plaintiff to the defendants, such costs to be taxed if not agreed.

*FINALLY*

396. Despite the wholly unanticipated length of this trial, the professionalism, industry and (for the most part) good humour of counsel have rendered potentially a difficult case a pleasure to try. I fear that the final judgment which now has emerged also is of some length, perhaps excessively so, and for that the responsibility is mine: I have found it necessary to attempt to cover all possible bases, including the validity of alternative propositions should the primary conclusions expressed herein be wrong; if this be the case, I can but express the hope that they be wrong clearly.

397. More importantly, however, it requires to be acknowledged that the demands of hearing extensive and at times complicated *viva voce* evidence were mitigated and overcome by the excellent translation services of the lady and gentlemen court interpreters, who had to cope not only with difficult subject-matter but with a variety of Chinese dialects (and occasionally very strong accents), whilst the usual extraordinarily efficient production of an accurate contemporaneous running transcript by the talented verbatim transcribers has proved an enormous advantage to all involved during this hearing.

(William Stone QC)
Deputy Judge of the Court of First Instance
High Court

Mr Barrie Barlow SC assisted by Mr David Tsang, Mr Anson Wong and Mr Patrick Siu (instructed by Clyde & Co) appeared on behalf of the Plaintiff

Mr Benjamin Yu SC assisted by Mr Chan Chi Hung SC and Mr Richard Khaw (instructed by Mayer Brown JSM) appeared on behalf of the 1st and 2nd Defendants

Mr Paul Shieh SC assisted by Ms Elizabeth Cheung (instructed by Wilkinson Grist) appeared on behalf of the 3rd to 5th Defendants

Mr Ronny Tong SC assisted by Ms Kate Poon (instructed by Baker & McKenzie) appeared on behalf of the 6th Defendant

Mr Warren Chan SC assisted by Mr Law Man Chung (instructed by Woo Kwan Lee & Lo) appeared on behalf of the 7th to 11th Defendants