Protasco Bhd v PT Anglo Slavic Utama & Ors [2023] MLJU 2435

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

LIZA CHAN SOW KENG J

SUIT NO WA-22NCC-362-09 OF 2014

29 October 2023

Peter Skelchy (with Joycelyn Teoh and Tan ZhiXin) (Cheah Teh & Su) for the plaintiff.
Malik Imtiaz Sarwar (with Jayasingam, Lim Yvonne, Khoo Suk Chyi, Ng Keng Yang and Chuo Chung Cheng) (B H Lawrence & Co) for the second and third defendants.

Liza Chan Sow Keng J:

GROUNDS OF JUDGMENT

"Harap pagar, pagar makan padi."
INTRODUCTION

[1] In this action, the Plaintiff claims against the 2nd and 3rd Defendants (respectively, "Larry" and "Adrian") as former directors of the Plaintiff, among others, to recover the sum of USD27million paid to the 1st Defendant ("PT ASU") and PT Anglo Slavic Indonesia ("PT ASI"). The Plaintiff alleged that Larry and Adrian had fraudulently caused the Plaintiff to enter into a transaction to acquire shares in PT ASI, a company that purportedly owned oil exploration rights in Indonesia from PT ASU, the 1st Defendant. The Plaintiff further alleged that Larry and Adrian had personal interests in (among others) PT ASU, which they failed to disclose to the Plaintiff in breach of their statutory and fiduciary duties as directors.
Plaintiff's case

[2] The Plaintiff's case in summary is that Larry and Adrian:

2.1 acted in breach of their fiduciary and statutory duties owed to Protasco as Directors, in particular breach of Section 132 and 131 of the CA 1965

2.2 deception, fraud, conspiracy to defraud, utilising PT ASU as a vehicle to defraud Protasco, and PT ASU is the signatory to SPA 1 and SPA 2.

[3] The Plaintiff claimed that Larry on or about November 2012 had introduced an investment opportunity in the oil and gas industry in Indonesia to Protasco. The proposed investment involved the purchase of 76% of the total issued share capital of PT ASI from PT ASU. PT ASI at that material time owned and controlled 49% of a company PT Firman Andalan Sakti ("PT FAS") which in turn owned and controlled 70% of PT Hase Bumou Aceh ("PT Haseba"). PT Haseba had entered into a production management partnerhip agreement ("PMPA") with PT Pertamina (Persero) ("Pertamina") wherein PT Haseba was granted rights by Pertamina to develop and produce oil and gas in the Kuala Simpang Timur ("KST") oil field located in Aceh, Indonesia.

[4] The proposed investment was done through 2 agreements executed between Protasco and PT ASU. The 1st agreement ("SPA 1") was executed on 28.12.2012 for a purchase consideration of USD55million. Due to subsequent material discoveries which were discovered through a due diligence, Protasco and PT ASU executed an amended sale and purchase agreement on 29.01.2014 ("SPA 2"). SPA 2 reduced the purchase consideration to USD22million with a further payment of USD5million made as a shareholders' advance to PT ASI ("Shareholder's Advance").

[5] In total, a sum of USD27million was paid by Protasco to PT ASU and PT ASI. This payment of USD27million was secured by shares in a company known as PT Inovisi Infracom TBK ("PT Inovisi") given by a 3rd party, namely Acclaim Investments Limited ("Acclaim"), a company incorporated in the British Virgin Islands ("Blocked Inovisi Shares").

[6] According to Protasco, the securities in the form of Blocked Innovisi shares provided was part of the inducement for Protasco to make the aforesaid payments.

[7] It is also Protasco's case that it was deceived into paying:

(a) the differential sum of USD5,659,437.00 to PT ASU pursuant to SPA 2 on the representation of Adrian that the Conditions Subsequent contained in SPA 2 was attainable;

(b) the Shareholder's Advance of USD5million to PT ASI pursuant to SPA 2 on the representation of Adrian that the USD5million was needed for inter-alia wells re-activation in order to facilitate the process of securing a 10-year extension to the PMPA with Pertamina.

[8] Protasco contends that:

(a) it had discovered that it has become a victim of deception and fraud as Larry and Adrian are in fact the effective beneficial owners of PT ASU, PT ASI, Acclaim, PT Inovisi and PT Green Pine (single largest shareholder of PT Inovisi);

(b) Larry and Adrian breached their fiduciary and statutory duties to Protasco including but not limited to the following: -

(i) that Larry and Adrian failed to disclose their interest in PT ASU, PT ASI, Acclaim and PT Inovisi toProtasco;

(ii) that Larry and Adrian had induced Protasco to make payment of a sum of USD22million without Protasco's knowledge of their personal interest in PT ASU;

(iii) that Larry and Adrian had induced Protasco to make the Shareholder's Advance of USD5million to PT ASI for works that was supposed to be undertaken to assist in the application to Pertamina in order to secure an extension of the PMPA;

(iv) that Larry and Adrian had appropriated a total sum of USD27million for the benefit of themselves using various corporate vehicles, fronts andnominees;

(v) that Larry and Adrian had induced Protasco to accept as security provided by Acclaim for payment of the consideration sum for SPA 1 and SPA 2 and the Shareholder's Advance in which Protasco was purportedly able to dispose of and recover the purchase price and the Shareholder's Advance. Protasco was unable to recover the purchase consideration and the Shareholder's Advance through the security provided;

(vi) that Larry and Adrian either by themselves or through their agents, servants and/or nominees have with fraudulent design and through forgery caused the issuance of the PT ASU's letters dated 21.07.2014 and 04.08.2014.

(c) SPA 1 and SPA 2 were entered into in breach of Section 132E of the Companies Act 1965 due to the non-disclosure of interest by Larry and Adriani in the transaction;

(d) that Larry and Adrian have wrongfully and with intent to injure Protasco and/or cause loss to Protasco by unlawful means conspired and combined together to defraud Protasco and to conceal such fraud and the proceeds of such fraud from Protasco;

(e) The elements of conspiracy include:

(i) causing Protasco to make payment of USD27million to PT ASU and PT ASI with full knowledge that the transaction was nothing more thana scam to defraud Protasco and/or unjustly enriched Larry and Adrian with the payments made by Protasco;

(ii) the receipt by Larry and Adrian of the USD27million via PT ASU and PT ASI is in breach of their fiduciary, equitable and statutory duties; and

(iii) causing and/or authoring the issuance of letters by PT ASU in an attempt to deprive Protasco of its rights to unilaterally terminate SPA 2 and deprive Protasco a refund of the purchase consideration and the Shareholder's Advance.

[9] Premised on facts and events narrated above, the Plaintiff asserts it has suffered loss and damage. The reliefs claimed against Larry and Adrian as particularized in paragraph 76 of the SOC is for payment of the sum of USD27million to Protasco and a declaration that Larry and Adrian had acted in breach of their duties set out in paragraphs 60 to 62 of the SOC.

[10] As against PT ASU, Protasco's claim is grounded on conspiracy to injure/defraud and the relief claimed is:

(a) a declaration that all monies received by it through the defrauding of Protasco are held by it as a constructive trustee;

(b) damages for breach of contract;

(c) damages for conspiracy and fraud;

(d) declaration that SPA1 and SPA2 are null and void for breach of s. 132 of the CA or breach of public policy;

(e) a payment of USD22 million.

[11] The claim against PT ASU was stayed pending arbitration pursuant to section 10(1), Arbitration Act 2005 ("AA 2005"). Protasco subsequently obtained an order to stay the arbitration pending the determination of the action herein.

Larry and Adrian's defence

[12] Larry and Adrian 's defence in gist is that:

12.1 It was Dato' Sri Chong Ket Pen ("DSC or "CKP") who was the executive vice chairman of the Plaintiff that had approached Global Capital Limited ("Global Cap" or "GCL") to procure a purchaser for a controlling stake in Protasco;

12.2 It was promised to Global Cap that in return, the purchaser would be given equal board representation in Protasco and Protasco would jointly develop the oil and gas project in KST Aceh, Indonesia with purchaser;

12.3 DSC and Global Cap entered into the Investment Agreement ("IA") intending to jointly develop the oil and gas project and a master agreement was supposed to be entered into. SPA1 was entered into by Protasco and PT ASU in furtherance of the IA, namely to enable Protasco to diversify its business into oil and gas in Indonesia *vide* related companies;

12.4 That Adrian was not involved in the negotiations and execution of the IA, and that he only became aware of the said agreement after this suit was filed by Protasco;

12.5 That due to time constraints, Global Cap was unable to secure sufficient investors and Larry opted to participate in the deal to purchase the 27.11% of total share capital in Protasco via his corporate vehicle, Kingdom Seekers;

12.6 That both Larry and Adrian were not involved in the discussions and negotiations between Protasco and PT ASU leading up to the execution of the SPA 1 and SPA 2;

12.7 that there was no misrepresentation nor inducement by Adrian and Larry towards Protasco vis-à- vis SPA 1 and SPA 2 and the payments made thereunder;

12.8 That at all material times:

(i) the board of directors of Protasco was under the control of DSC; DSC did not disclose the IA of 3 November 2012 to the Board of Protasco. As such it is contended by Larry and Adrian that it was DSC who was in breach of his fiduciary duties in failing to disclose the terms of the IA;

(ii) Dedi Francis was the commissioner and owner of PT ASU;

(iii) the director of PT ASU was one Tjoe Yudhis, who is answerable to the said Dedi Francis.

12.10 Protasco had appointed several professional parties to conduct due diligence; that in light of the exhaustive due diligence conducted by DSC and his son Kenny Chong, the principal officers acting for and on behalf of Protasco, who actively conducted negotiations with PT ASU and entry into SPA1 and SPA2, they had full knowledge and had participated in the preparation of SPA2 as made evident from correspondence and emails. The entire transaction between Protasco and PT ASU has been undertaken at the behest of, and with the full knowledge and consent of DSC and Kenny Chong. Therefore there could be no inducement, misrepresentation, deception and/or cheating by Larry and Adrian which caused the payment of the said USD27million or any part thereof to PT ASU and PT ASI;

12.11 Protasco was represented by a lawyer while PT ASU was not. Protasco knew that the concession was only until 14.12. 2014. SPA2 reduced the purchase price to USD22 million but sought to extend the tenure by ten years while knowing full well that Pertamina's policy is to grant a contract for only two or three years.

12.12 That Protasco had failed to perform its obligations to reactivate the oilfields or provide a business duration and drilling program for the oil field to facilitate any extension sought, thus prevented PT ASU from carrying out its obligations to secure the 10-year extension from Pertamina;

12.13 That at all material times, Larry and Adrian are not the beneficial owners of PT ASU, PT Inovisi, Acclaim, or PT Green Pine;

12.14 The investigations by the Investigation Committee ("IC") was a sham, no investigation report was produced, no report of its findings were made to the board of directors, nor any queries put to Larry and Adrian at all;

12.5 Contend the claim was filed at the behest of DSC after a board meeting convened to ratify his unilateral action;

12.6 That DSC, Kenny Chong and the senior management of Protasco and its subsidiaries have financially benefited through illegal financial gains of RM10million via an entity named RS Maha Niaga Sdn Bhd.

[13] As gleaned from the parties' cases, the substantive issues before the court are whether Larry and Adrian:

13.1 breached their fiduciary or statutory duties as directors;

13.2 conspired to defraud the Plaintiff;

13.3 if found liable to have acted in breach of their fiduciary or statutory duties as directors, and/or for conspiracy to defraud the Plaintiff, is the Plaintiff entitled to the relief sought?

The Trial

[14] During a protracted trial which first opened before Azizul J (now JCA) pre-pandemic in 2019, and then conducted virtually online by me commencing 2021, using the Zoom video conferencing platform lasting 42 non-consecutive days, the Plaintiff called 14 witnesses whilst Larry and Adrian called a total of 4 witnesses including themselves to give evidence.

14.1 The Plaintiff's witnesses were:

(i)	Ho Chun Fuat	[PW-1]
(ii)	Mea Fak Sin	[PW-2]
(iii)	Dato Sri Chong Ket Pen	[PW-3]
(iv)	Lim Yok Chaw	[PW-4]
(v)	Tjoe Yudhis Gathrie	[PW-5]
(vi)	Manpreet Kaur	[PW-6]
(vii)	Hendra Setiawan	[PW-7]
(viii)	Heriyanto	[PW-8]
(ix)	Johnny Situwanda	[PW-9]
(x)	Aida Zurina binti Mat Yassin @ Adnan	[PW-10]
(xi)	Tan Yee Boon	[PW-11]

(xii)	Mohammad Zahir Talib	[PW-12]
(xiii)	Norliza Harun	[PW-13]
(xiv)	Rachel a/p Dason	[PW-14]

14.2 Larry and Adrian's witnesses:

(i)	Andy Yong Siew Vui	[DW-1]
(ii)	Dedi Francis	[DW-2]
(iii)	Larry Tey	[DW-3]
(iv)	Adrian Ooi	[DW-4]

[15] Having looked the matter entirely, considered the numerous documents and notes of evidence, and having carefully considered the submissions of the parties, I find on a balance of probabilities, that the claim by the Plaintiff has been proven and had on 30.8.2023 allowed the Plaintiff's claim with costs, and gave broad grounds as to why. This judgment contains the reasons for my decision. At the outset, I ought to say that on the facts of the present case, I am in accord with the arguments canvassed by the Plaintiff's counsel and adopt his submissions in these grounds.

Preliminary Issues

[16] It is observed that in post trial submissions, Larry and Adrian contended that as the claim centres on alleged deception by the Defendants, and thus fraud, the pleading lacks specificity, is fatally deficient and thus have caused prejudice to Larry and Adrian in understanding the case they have to meet.

[17] In addition, during the course of trial, various objections were taken by Larry and Adrian on evidence led as being outside the pleaded case and on the inadmissibility of documents which are:

17.1 In respect of DSC's witness statement, Q&A 52A, 60, second paragraph of the answer to 78, the amendments to the thirdparagraph of Q&A129, 129A (premised on Order 18 rule 12 of ROC 2012) , Q&A 199, 200, 201 and 205 (which mentioned PT NRR, Fast Global and Telecity being entities that were connected or related to Larry and Adrian whereas the pleaded case of Protasco had cited only the companies of PT ASU, PT ASI, Acclaim and PT Green Pine);

17.2 Q&A 39 to 51, 59 to 71, 94 to 122 of Tjoe Yudhis's witness statement for contravening Order 18 rule 7(2) of ROC 2012 in that these were material facts which ought to have been pleaded;

17.3 Audio Recordings i.e. IDP82-A and IDP 82-B are not admissible for not having satisfied the law for admission;

17.4 Transcripts by Scribe – Exhibit P83 and P84 are inadmissible as there were conversations in Bahasa Indonesia that were not transcribed, and that some parts were inaudible;

17.5 forgery of Tjoe Yudhis's signatures in the PT ASU Letters dated 09.05.2013, 25.09.2013, 10.01.2014, 21.07.2014, 04.08.2014, 05.08.2014 and signature in the supplemental SPA dated 28.06.2013 cannot be raised as these documents had been included in the bundles marked as Part B;

17.6 Q&A14 to 19 of the witness statement of Johnny Situwanda (PW9) and the entirety of Enclosure 649, which was a

report titled 'Report of Duties to Protasco Bhd' dated 22.12.2021 prepared by Johnny Situwanda being a belated attempt to address deficiencies in the Plaintiff's case that came to light during the cross-examination of DSC and further, constitute hearsay evidence;

17.7 Exhibits P45, P46, P47, P48, P104 - no certificate under Section 90A (2) of EA 1950 was tendered by Protasco and Exhibit P105 bank statements, objection was on the weight of the said document as it was not available earlier for the cross-examination of DSC; IDP12, IDP13, IDP103 and IDP112 as the originals were not available; and

17.8 Printout from PT Inovisi website.

[18] These preliminary issue ought to be disposed of before I turn to the substantive issues before me.

Pleading is fatally deficient and caused prejudice to Larry and Adrian?

[19] The basis for this complaint is that as the Protasco's claim ultimately centres on deception and thus, broadly put, fraud, (i) the failure to plead particulars essential to informing the Defendants the specific basis of the claim against each of them is fatal; (ii) that such deficiencies have caused prejudice to Larry and Adrian in understanding the case that they would need to respond to; and (iii) that the evidence led at trial is an expansion of the pleaded case.

[20] I do not agree. At the outset of the trial, I had conveyed my preliminary view that the pleading as it stands was sufficient but nevertheless, informed parties that it would be open to them to ventilate the point at the close of trial so that I could consider the matter in a more detailed manner. Having done so, I confirm my preliminary view.

[21] To begin with, the trite principles on pleadings are:

21.1 'The function of pleading is to give fair notice of the case which has to be met: *Rosita bte Baharom (an infant) v Sabedin bin Salleh* [1993] 1 MLJ 393, *Perniagaan Kinabalu (S) Sdn Bhd v Sua Ah Yoke & Ham Jon See* [2002] MLJU 601. This is to prevent the opposing party from being taken by surprise by evidence which departs from pleaded material facts, for such evidence if allowed, will prejudice and embarrass or mislead the opposing party: see *Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185; [1994] 3 CLJ 567 *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 MLJ 308. A good pleading should contain a statement of: (1) facts, not law, (2) material facts only, (3) facts, not evidence, and (4) facts stated in a summary form: see *Halsbury's Laws of England* (4th Ed, Reissue), para 13' - *Iftikar Ahmed Khan (as the executor of the estate for Sardar Mohd Roshan Khan, deceased) v Perwira Affin Bank Bhd (previously known as Perwira Habib Bank Malaysia Bhd)* [2018] 2 MLJ 292 FC at [22];

21.2 A party should not be put to surprise. 'Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the judge, and to be given the opportunity of stating what his answer to it is …' - *Hadmor Productions Ltd v Hamilton* [1983] 1 AC 191 per Lord Diplock, cited with approval by the former Supreme Court in *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428

21.3 'It is settled law that parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded: *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1, *State Government of Perak v Muniandy* [1986] 1 MLJ 490, *Veronica Lee Ha Ling & Ors v Maxisegar Sdn Bhd* [2011] 2 MLJ 141; [2009] 6 CLJ 232. In *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428; [1991] 1 CLJ Rep 239 it was held that where a vital issue was not raised in the pleadings, it could not be allowed to be argued and to succeed on appeal. A decision based on an issue which was not raised by the parties in their pleadings is liable to be set aside: *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152. In *The Chartered Bank v Yong Chan* [1974] 1 MLJ 157 the Federal Court set aside the judgment of the trial judge as it was decided on an issue not raised on the pleadings. In that case the trial judge erred in concluding that the pleadings included a claim for breach of contract as well as a claim for libel.' - *Iftikar Ahmed Khan (supra)* at [27];

21.4 'In a case where the matter or material facts are not pleaded but evidence is led without objections at trial, the court is duty bound to consider such evidence although it may be a departure from the pleading. It has the effect of curing defect in the pleading. In such a case the opposite party is not taken by surprise, prejudiced, embarrassed or misled. The exception is where the evidence represents a *radical departure* from the pleading and is not just a variation, modification or development of what has been alleged in the pleading. *Dato' Hamzah bin Abdul Majid v Omega Securities Sdn Bhd* [2015] 6 MLJ 725; [2015] 9 CLJ 677 is an illustration of a case where there was a *radical departure* from the pleading. In that case, loan, which was not a pleaded defence but evidence of it was adduced without objection was rejected as a defence as it was a *radical departure* from pleading, not just a variation, modification or development of what had been alleged in the pleading.' - *Iftikar Ahmed Khan (supra)* at [36]

21.5 'The primary function of the statement of claim is to plead reasonable cause of action against the defendant. Therefore, it must contain all material facts on which the plaintiff relies for his claim. It must also disclose the legal liability of the defendant. By this, it is essential to establish a linkage between material facts pleaded in the statement of claim and the substantive right which the plaintiff claims or seeks to enforce against the defendant. Thus, in a case where breach of duty is alleged, the facts upon which the alleged duty is founded must be pleaded, and where there is an allegation of negligence, facts must set out showing the existence of a duty to take reasonable care owed to the particular person or class of person and that the duty was disregarded.' (*Metroplex Development Sdn Bhd v Mohd Mastana bin Makaddas & anor* [1995] 2 MLJ 276, at p 284 per James Foong J, as he then was).

21.6 Pursuant to Order 18 rule 7 of the Rules of Court 2012 ("ROC 2012") only material facts, and not evidence, must be pleaded in summary form:

> "7. (1) Subject to the provisions of this rule and rules 10, 11 and 12**, every pleading shall contain**, and contain **only, a statement in summary form of the material facts** on which the party pleading relies on for his claim or defence, as the case may be, **but not the evidence by which those facts are to be proved**, and **the statement shall be as brief** as the nature of the case allows."

[22] The former Supreme Court in *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12, explained what constitutes 'a cause of action', as follows:

> "What then is the meaning of "a cause of action"? "A cause of action" is a statement of facts alleging that a plaintiff's right, either at law or by statute, has, in some way or another, been adversely affected or prejudiced by the act of a defendant in an action. Lord Diplock in *Letang v Cooper* [1965] 1 QB 232 at P 242 defined **"a cause of action" to mean "a factual situation, the existenceof which entitles one person to obtain from the court a remedy against another person"**. In my view the factual situation spoken of by Lord Diplock must consist of a statement alleging that, first, the respondent/plaintiff has a right either at law or by statute and that, secondly, such right has been affectedor prejudicated by the appellant/defendant's act."

[23] The UK Court of Appeal in *Bruce v Odhams Press Limited* [1936] 1 All ER 287 at p.294-295 defined 'material facts' as follows:

> "The cardinal provision in rule 4 is that the statement of claim must statethe material facts. **The word "material" means necessary for the purpose of formulating a complete cause of action** and if any one "material" statement is omitted, the statement of claim is bad; it is "demurrable" in the old phraseology, and in the new is liable to be "struck out" under RSC Ord XXV, r 4 (see Philipps v Philipps); or "a further and better statement of claim" may be ordered under rule 7." (Emphasis added)

[24] Bearing the above principles in mind, I find that Protasco has pleaded distinct causes of action for breach of fiduciary duties, breach of Section 132E of the Companies Act 1965, fraud and conspiracy to defraud on the part of Larry Tey and Adrian Ooi. The claim for deception, for fraud and conspiracy to defraud, has been set out in paragraphs 45 to 59, and 66 to 67 of the SOC. The claim for breach of fiduciary duties being a separate claim is set out in paragraphs 60

to 62 of the SOC with loss and damage of USD27million arising from such breach of fiduciary duties set out at paragraph 63. As regards breach of Section 132E of Companies Act 1965, this was set out in paragraph 65 of the SOC that Protasco's shareholders' approval at a general meeting was never obtained; and at any material time, there was no disclosure by Larry Tey and Adrian Ooi of their interest in PT ASU to the shareholders of Protasco.

[25] For the reasons and apt authorities cited by Prostasco's counsel, I agree with him that the above paragraphs in the SOC setting out the various causes of action do not stand alone as the SOC should be read as a whole, even if the ingredients that form each cause of action are not set out in consecutive paragraphs in the SOC. As for the pleading on fraud, in *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697, Jeffrey Tan delivering judgment of the Federal Court after an extensive survey of cases on the subject of how fraud is to be pleaded, held that 'whether the word 'fraud' was specifically pleaded was a semantic detail of no significance whatsoever from the standpoint of pleadings, as the correct test for a valid plea of fraud is whether or not the facts which make the conduct fraudulent were pleaded.'

[26] 'It is an elementary rule in pleading that, when a state of facts is relied on, it is enough to allege it simply without setting out the subordinate facts which are the means of producing it or the evidence sustaining the allegation.' - *Williams v Wilcox and another* [1835] All ER Rep 25 at p.27-28 per Lord Denman CJ cited with approval by Suffian J (later Lord President) in *Jusoh v Ng Ah Sooi & Anor* [1963]1 MLJ 92.

[27] Larry and Adrian have both failed to persuade me as to how they can now honestly argue that Protasco's claim being "broadly put, for fraud" is fatally deficient and that prejudice was caused to them as contended. I therefore dismissed this argument premised on the preceding paragraphs and also due to the fact that:

27.1 Protasco has pleaded:

27.1.1 it was deceived into:

(a) paying the deposit of RM50million pursuant to SPA 1, and the differential sum pursuant to SPA 2, as it was led to believe by Adrian that the conditions precedent in SPA 1 and conditions subsequent in SPA 2 were attainable;

(b) making payment of the Shareholders' Advance on Larry and/or Adrian's misrepresentation that the said USD5million was needed for the oil wells reactivation, and/or construction of wells to facilitate the process of securing the 10-years extension to the PMPA;

27.1.2 that Larry and Adrian :

(a) induced Protasco to accept as security of the PT Inovisi shares for payment of the purchase consideration and Shareholders' Advance, on the premise that Protasco would be able to dispose of the said PT Inovisi shares and recover the purchase consideration and Shareholders' Advance, and that the same was good security;

(b) had knowledge that both the SPA 1 and SPA 2 were nothing more than a scam to defraud Protasco;

(c) had induced Protasco into paying the purchase consideration without disclosing their personal interest in PT ASU;

(d) are the beneficial owners and control PT ASU, PT ASI, PT Inovisi and PT Green Pine;

(e) have appropriated the total sum of USD27million using various corporate vehicles, fronts, and nominees; and they have received the purchase consideration and Shareholders' Advance in breach of their fiduciary, equitable and statutory duties;

27.1.3 that Tjoe Yudhis acted as a nominee of Larry and Adrian at all material times, (ii) that Tjoe Yudhis takes instructions from both Larry and Adrian (iii) Tjoe Yudhis did not issue nor signed any of the PT ASU Letters and other letters attributed to him, (iv) that his purported signatures on the said letters are forgeries; (noting too that 'Forgery' is a specific method of fraud - *Letchumanan Chettiar Alagappan supra at [31]).*

27.2 it was demonstrably obvious to me that Larry and Adrian were able to at the outset respond to the SOC and HAD FILED THEIR DEFENCE contending amongst others, that the entire oil & gas acquisition was an arms-length transaction, SPA 1 and SPA 2 were negotiated without their involvement; there was no misrepresentation or inducement by them towards Protasco, all payments, including the Shareholders' Advance made by Protasco pursuant to SPA 1 and SPA 2 were made pursuant to decisions of the board of directors or management of Protasco after negotiations, discussions and/or consultations with PT ASU; they merely acted as an introducer. Larry Tey's position is that apart from the IA with DSC and introducing PT ASU to Protasco, he was not involved in any manner whatsoever in relation to the transaction and as for Adrian, he avers that he merely was requested by Protasco to follow up with the status of negotiation of SPA 2 for purposes of expediting the matter, he was not privy to discussions between DSC and Augustone who represented PT ASU;

27.3 Both Larry and Adrian DID NOT make any application at all to seek further and/or better particulars in respect of any of the matters in the SOC;

Objections to Q&A 52A, 60, second paragraph of the answer to 78, the am endm e nts to th e t hir d p ar ag rap h of Q&A129 , 129A of DS C's wi tn ess statement

[28] The objections to these questions were premised on Order 18 rule 12 of ROC 2012 on insufficient particulars. These questions and answers relate to the representations made by Larry and Adrian pertaining to the fulfilment of the conditions precedent in SPA 1, the fulfilment of conditions subsequent in SPA 2, the involvement of Larry and Adrian in the negotiation process, the inducement by the provision of securities to guarantee the payments made towards the transaction which led Protasco to believe that it would be able to dispose of the securities and recover the purchase consideration and Shareholders' Advance. I find no merits to the objection as the material facts necessary for the purpose of formulating Protasco's cause of action in relation to these questions have been pleaded in the Statement of Claim at paragraphs 45, 46, 47, 57, 62(a), and (e), 67(c) and (e). There is no reason why evidence on facts relied upon to support the material facts should not be allowed.

Objections to Q&A 199, 200, 2 01 an d 2 05 of DS C's wi tn ess st at em ent

[29] These questions and answers allude to PT NRR, Fast Global and Telecity as entities that were connected or related to Larry and Adrian whereas the pleaded case of Protasco refer only PT ASU, PT ASI, Acclaim and PT Green Pine as the entities under control of and/or related to and/or being the alter ego of Larry Tey andAdrian Ooi.

[30] The objection is untenable as I find the evidence sought to be adduced in these questions and answers are relevant and will throw light on where the money which emanated from Protasco's payments to PT ASU flowed to - facts to support the material facts already pleaded in paragraphs 51(e), 59, 62(b) and (f), and 67(g) that: (i) the money went to various other entities; (ii) were utilized for the benefit of Larry Tey and Adrian Ooi, (iii) that they are in fact the beneficial owners of, amongst others, PT ASU and PT ASI, PT Inovisi and PT Green Pine; and (iv) they have misappropriated the USD27million in breach of their of their fiduciary, equitable and statutory duties.

[31] It ought to be mentioned that in *Protasco Bhd v PT Anglo Slavic Utama &Ors* [2019] 9 MLJ 417, at [45], [46], [49] and [50], Azizul J (now JCA) held that the BBEA documents to the

pleaded case of Protasco are relevant as it shows the money trail to Larry and Adrian's account and this decision was upheld by the Federal Court in *Protasco Bhd v Tey Por Yee & Anor and other appeals* [2021] 6 MLJ 1 as follows:

> "Of course, as rightly found by the learned High Court judge, the general rule of evidence, that is relevancy, is the cornerstone of s 7 and all other discovery applications. **His Lordship was equally right when he considered that from the pleaded claim of the plaintiff, the money trail is relevant to prove or disprove its allegation** of the flow of funds to the respondents."

[32] I accept Protasco's argument that it does not lie in Larry and Adrian's mouths to posit that the matters covered by the Q&As objected to are not pleaded and thus they were caught by surprise when: (i) Larry himself at a press conference on 28.10.2014 had revealed the purported money flow through, amongst others, Fast Global, PT NRR and Telecity; (ii) Larry and Adrian's own witness statement in enc 691 and 688 in evidence in chief sought to attempt to explain some of the very transactions in the money trail that was disclosed pursuant to the BBEA Order.

Objections to Q&A 39 to 51, 59 to 71, 94 to 122 of Tjoe Yud his's witness statement

[33] The objections to Q&A39 to 51, and 59 to 71 were premised on Order 18 rule 7(2) of ROC 2012 in that these were material facts which ought to have been pleaded. I do not agree. The SOC at paragraphs 50 and 51 had already pleaded that: (i) Tjoe Yudhis had acted as a nominee of Larry and Adrian at all material times, (ii) that Tjoe takes instructions from both Larry and Adrian, (iii) Tjoe neither issued nor signed any of the PT ASU Letters and other letters attributed to him, (iv) that his purported signatures on the said letters are forgeries, and (v) that Larry and Adrian are, at all material times, the beneficial owners and/or controllers of PT ASU, PT Inovisi, Acclaim, and PT Green Pine. IC had attained the said information are further subordinate facts to be proven at trial. How the IC obtained the statutory declarations from Tjoe Yudhis, the meetings in Jakarta after this suit was filed are subordinate facts and/or are evidence to establish the material facts already pleaded.

[34] Besides, it is my respectful view that Order 18 rule 7(2) ROC 2012 is not a stand alone rule. It reads:

> "(2) **Without prejudice to paragraph (1)**, the effect of any document or the purport of any conversation referred to in the pleading shall, if material, be briefly stated, and the precise words of the document or conversation shall not be stated, except in so far as those words are themselves material."

[35] Read together with Order 18 rule 7(1), it means if one pleads the existence of a document or conversation, the material effect of the document, or purport of the conversation should also be pleaded briefly. The precise words of the document or conversation shall not be pleaded unless those words are themselves material.

Objections to Q&A 94 to 122 of Tjoe Yu dhis's witness statement Audio Recordings i.e. IDP82-A and IDP 82-B not admissible? Transcripts by Scribe – Exhibit P83 and P84 inadmissible?

[36] Q&A 94 to 122 concern the audio recordings and the transcripts by Scribe of the audio recordings which Larry and Adrian assert are not admissible.

[37] The recordings being documents within the definition set out in s. 3 Evidence Act, are governed by ss 61 to 66 of the same Act pursuant to which the recordings must be proved by being produced for the inspection/viewing of the court. I have heard the audio recordings which

were played in the course of trial on 02.03.2022 and 03.03.2022. Tjoe Yudhis who made the recordings testified in Q&A 94 to123 that:

37.1 he utilized his iPhone 5 to make the recordings;

37.2 he was satisfied that his iPhone 5 was in proper working order at all material times when the recordings were made;

37.3 after making the recordings, he played the recordings again after synchronizing the same to his MacBook Pro Apple Laptop;

37.4 He was satisfied that his laptop was in good working order when he synchronized the recordings;

37.5 That he had unfortunately traded in his iPhone 5 several years ago;

37.6 that at the end of each evening when he recorded the conversation, he then saved the recordings in his external hard disk from his MacBook Pro Apple laptop;

37.7 the recordings in his laptop were then burned into a DVD- R;

37.8 before burning the recordings into the DVD-R from his laptop, Tjoe Yudhis listened to the recordings from his laptop to ensure that the contents are completed and the voices in the recordings are clear;

37.9 that after the recordings were moved into his hard disk at the end of the night, he would then delete the recordings from his said laptop to conserve storage space;

37.10 he had not tampered with the recordings in any manner;

37.11 he is still in possession of his original MacBook Pro Apple laptop and the external hard disk originally used to store the recordings;

37.12 that he had replayed the two recordings and read through the two transcripts of the recordings by Scribe Synergy Sdn Bhd (“Scribe”) and confirmed that the two transcripts are an accurate reflection of the two recordings.

[38] I find from Tjoe Yudhis’s evidence that the criterias as set out by Augustine Paul J (as he then was) in *Mohd Ali Jaafar v Public Prosecutor* [1998] 4 MLJ 210 have been satisfied:

“It is perhaps appropriate at this stage to consider the matters that mustbe established when introducing evidence of a tape recording. They are as follows:

(a) the tape was run through and found to be clean before the recording was made;

(b) the machine was in proper working order;

(c) the tape was not tampered with or altered in any way — it should be established in whose possession the tape was at all times;

(d) the officers (or other witnesses) played the tape over after making the recording and heard voices which they can identify;

(e) a transcript was prepared of the voices; if it was just taken down in shorthand and the typed transcript prepared from the shorthand notes then the notes should be saved;

(f) the officers (or other witnesses) played over the recording andchecked it with the transcript as to the identity of the voices and as to the conversation. (See Canadian Criminal Evidence (3rd Ed) by PK McWilliams QC at pp7-10).

In addition, the following precautionary steps taken by PW5 ought to be followed:

(1) uttering of the introductory and closing words;

(2) breaking of the safety tabs after the recording; and

(3) placing identification marks on the tapes.

Proof of identity of the conversation which comes within the ambitof item (f) above is the most important element to be established when introducing evidence of a tape recording. In *ZB Bulkhari v BR Mehra AIR* 1973 SC 1788, it was held that the accuracy of what was actually recorded had to be proved by the maker of the record (see also Maqsud Ali). **It is desirable that a witness who participated in a conversation that has been recorded gives an oral account of it**. He may refer to the taped conversation to refresh his memory (see *R v Mills* [1962] 3 All ER 298). Alternatively, he must at least confirm that the tape recording is of a conversation which occurred if for some reason or other he is unable to give an oral account of the conversation. If there is no evidence to show that it is an accurate account of a conversation that occurred, then it is not admissible. In my opinion, the absence of such proof means that the tape recording sought to be admitted in evidence is in the same position as a document being tendered in evidence without proper proof of execution. In R v Chen, the Supreme Court of Victoria considered the evidence that must be led in introducing a tape recording and said that it depends on the circumstances of each case. Marks, Southwell and Harper JJ in delivering the judgment of the court added at p 150:

> **The test is whether there is sufficient material before the court to allow the tribunal of fact acting reasonably to conclude that the recorded sounds reproduce those originally made by the persons identified by the evidence**. In other words, there must be evidence, which the tribunal of fact is entitled to accept, that the recording is of a conversation which occurred and which would be admissible if proved by oral testimony. **In our opinion, admissibility does not depend on the party tendering the tapes having removed absolutely any chance that they are inaccurate.** (Emphasis added.)

I agree with this view as evidence to show that the recording tenderedis an accurate reproduction of a conversation which occurred would remove any doubt that the recording is inaccurate due to failure to fullyestablish the other matters that are required to be proved."

[39] The English case of *R v Maqsud Ali* [1966] 1 QB 688 was referred to in *Mohd Ali Jaafar*. In *Maqsud Ali*, the accused was convicted of murder. What was sought to be admitted was a tape-recorded conversation of two suspects talking to each other about the murder in a bugged office before they were charged. The conversation of such words as could be made make out, for not all that was said was clearly audible was first made in Urdu, and then a translation of it into English and transcripts of it were made. The tape had a number of imperfections: first, the microphone did not always clearly pick up all that was being said; secondly, from time to time the recording was overlaid by street noises from the open window, in particular those resulting from the bus stop just under the window. Further, the recording had to be translated into English to be of any use. Some inaudible portions of the recording were not translated. Some translations were not even made directly from the tape. The Court of Appeal agreed with the court below that much of the recording was transcribed and admissible. Marshall J delivering judgment of the Court of Appeal said:

> "For many years now photographs have been admissible in evidence on proof that they are relevant to the issues involved in the case and that the prints are taken from negatives that are untouched. The prints as seen represent situations that have been reproduced by means of mechanical and chemical devices. Evidence of things seen through telescopes or binoculars which otherwise could not be picked up by the naked eye have been admitted, and now there are devices for picking up, transmitting, and recording, conversations. We can see no difference in principle between a tape recording and a photograph. **In saying this we must not be taken as saying that such recordings are admissible whatever the circumstances, but it does appear to this court wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved and the voices recorded properly identified; provided also that the evidence is relevant and otherwise admissible, we are satisfied that a tape recording is admissible in evidence.** Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case. There can be no question of laying down any exhaustive set of rules by which the admissibility of such evidence should be judged."

On the admissibility of the tape recording, the court held:

> "It is next said that the recording was a bad one, overlaid in places by street and other noises. This obviously was so and as a result much of the conversation was inaudible or undecipherable. In so far as that was so, much of the conversation was never transcribed but there still remained much that was transcribed, and the judge after full argument ruled that what was deciphered should be left for the jury to assess. We think that he was right. Lastly, it was said that the difficulties of language were such as to make any transcription unreliable and misleading. This argument the judge treated with great care and circumspection.
>
> [His Lordship then referred to the warning given by the trial judge in his summing-up and set out the facts above in respect of those passages common to the translations and continued:] The court does not feel it necessary to go in detail into the common passages. Suffice it to say that if they are accurate, there are phrases on the tape recording in which words said by both of these appellants on their face value amount to, or come very near to, a confession of guilt. In the matter of the transcripts the court desires only to say this. Having a transcript of a tape recording is, on any view, a most obvious convenience and a great aid to the jury, otherwise a recording would have to be played over and over again. Provided that a jury is guided by what they hear themselves and upon that they base their ultimate decision, we see no objection to a copy of a transcript, properly proved, being put before them. Here all the translations were submitted to detailed and searching cross- examination, and it is to be stated also that one of the translators called on behalf of the defence in the final part of his evidence came very close, if not completely, to agreeing with Rahmet Khan's translation and Changuz's translation, particularly on the one sentence that involved the appellant Maqsud in respect of this matter."

[40] Being satisfied that there is sufficient material before the court to warrant a conclusion that the recorded sounds reproduce those originally made by the persons identified by the evidence, that it was not suggested that the recordings had been interfered with in any way, that the defence has also not put to Tjoe Yudhis or the transcriber from Scribe, Manpreet Kaur, in cross examination that the recordings have been tampered with; and there being no independent expert called by Larry and Adrian to challenge the accuracy and authenticity of the recordings, that the recordings are relevant to the pleaded case, I thus reject the attempt made Larry and Adrian's counsel to persuade this court to exclude the audio recordings and the transcript. I have no hesitation to state that I cannot see any reason why the recordings IDP82-A and IDP 82-B are not admissible. They are thus marked as exhibits P82-A and P 82-B. To be clear, there is also no question here that Larry and Adrian had disavowed their presence in the recordings.

[41] As for the trnscripts of the recordings, the complaints by Larry and Adrian were that there were conversations in Bahasa Indonesia in the recordings that were not transcribed, and that some parts were inaudible. However, much of the recordings made by Tjoe Yudhis were in fact audible and spoken in the English language. Only some parts in the Indonesian language were not transcribed. Bearing in mind that the transcript was not tampered with and is only a means of assisting the court in the appreciation and understanding of the evidence tendered by playing over of the recording, just as in *Maqsud Ali, I* fail to see any reason why the transcript is inadmissible once the recordings themselves have been made admissible.

Forgery of Tjoe Yud his's signatures in the PTASU Letters and supplemental SPA

[42] The PTASU Letters dated 09.05.2013, 25.09.2013, 10.01.2014, 21.07.2014, 04.08.2014, 05.08.2014 and the supplemental SPA dated 28.06.2013 were included in the bundles marked as Part B. Larry and Adrian contend that as these documents having been included in Part B, pursuant to Order 34 rule 2(2)(e)(i), ROC 2012, they ought not to be relied on as evidence of facts to prove alleged forgery.

[43] Order 34 rule 2 (2) (e) ROC 2012 reads:

> "(e) **if the parties are unable to agree on certain documents**, those documents on which agreement cannot be reached shall be included in separate bundles and each such bundle shall be filed by the plaintiffand marked as follows:
>
> (i) Part B – documents where the **authenticity is not disputedbut the contents are disputed**
>
> (ii) Part C – documents where the authenticity and contents are disputed."

[44] In *Jaafar Bin Shaari & Anor (suing asadministrators of the estate of Shofiah Bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693, *the* former Supreme Court in a judgment by Peh Swee Chin FCJ explained:

> "First and foremost, **the agreed bundle of documents means that the documents therein are authentic and they do exist,** therefore they require no proof of their authenticity by calling, e.g. their makers.
>
> Secondly, the truth of contents of any of the documents in the agreed bundle of documents is always not admitted unless the contrary is indicated directly or indirectly and such truth of such contents is liable to be challenged in court at the instance of either of the parties.
>
> Thirdly, such documents therein do not form automatically a part of the evidence of the case in question ipso facto, but any of such documents does become part of such evidence if it is read or referred to by either of the parties, wholly or partly, at length or in a briefest of mention, either in examination of any witness, in submission at any stage or even on any unilateral drawing of court's attention to it by either of the parties at any time before the conclusion of the case.
>
> Fourthly, **at the end of the whole case, the truth of the contents of any of the document is up to the court to determine, regard being had, inter alia, to any absence of challenge by either of the parties on any part of the document and similarly, the question of weight, e.g. either great or no weight to be given to any part of any document is also a matter for the trial court,** which considers the documents including any 'written hearsay' contained therein. The court may refuse to give any weight at all to any document, but then it is accountable like in other matters, to the parties and to the appellate court for reasons for such refusal."

[45] It is manifestly clear to me that, when these impugned documents are placed in Part B, irrefragably, it means that there is no dispute to the existence and authenticity of the documents but only the contents may be disputed. They are not fake or fictitious, in which case they would have been placed in part C where the originals have to be produced, maker called and to have them marked as exhibits. If they remain in Part C, the evidence is not admissible – see *Damansara Realty (Pahang) Sdn Bhd v Om Cahaya Mineral Asia Bhd* [2021] 5 MLJ 1 CA. Here, Protasco is not disputing that the documents do not exist or are not authentic;l but Protasco is disputing that the signature of Tjoe Yudhis in the documents are forged. As was the case in *Beh Sui Loon & anor v Murugesu Kuppusamy & Ors* [2022] 1 LNS 774, it is my view that these documents are correctly placed in Part B of the common bundles. And having been placed in Part B, there is no room to reclassify them as Part C fake documents. Protasco is entitled to dispute Tjoe Yudhis's signature in these documents.

Admissibility of Q&A14 to 19 of J oh nn y Sit u wa nd a (PW 9)'s witness statement and the report in Enclosure 649

[46] Johnny Situwanda is an Indonesian solicitor engaged by Protasco in September 2014 to attend the office of PT Brent. His testimony relates to:

> 46.1 his efforts to procure Ricky Chaniadi or an officer of PT Brent to provide evidence in the trial before the court;

46.2 that he was informed by the said Ricky Chaniadi that:

46.2.1 he was not willing to be a witness in this trial nor would he provide a written testimonial for Protasco in respect of the events which took place in September 2014;

46.2.2 Lim Sue Fern had informed him (Ricky) that she did not sign the blocking letter, and therefore PT Brent was not going to act on the said instruction letter;

46.3 his attempts to enforce the letter of instruction and the unblocking letter on PT Brent to cause the sale of the blocked PT Inovisi shares; and

46.4 that the financial services authority of Indonesia had, on 13.02.2018, revoked the business license of PT Brent and that PT Brent securities was declared bankrupt on 22.03.2021 pursuant to a decision of the central Jakarta Commercial Court.

[47] The objection taken was that PT Brent's status was not relevant in the sense that Protasco chose not to take action against PT Brent to compel the liquidation of the blocked PT Inovisi shares at the material time. DSC was cross-examined on this aspect of the case; that Johnny Situwanda's evidence was hearsay evidence and it was also contended that the report by Johnny Situwanda besides being late, was intended to address deficiencies in Protasco's case arising from the cross examination of DSC.

[48] I reject these arguments. I instead agree with Protasco's counsel that Johnny Situwanda's evidence is admissible and relevant to show Protasco did try and has taken reasonable steps to secure the attendance of Ricky Chaniadi to testify and his attendance could not be procured without an unreasonable amount of delay or expense. Johnny Situwanda's oral evidence of having seen and read the email exchange between Mr Ricky Chaniadi and Ms Lim Sue Fern is thus admissible under Section 63(e) of the EA 1950 read together with Section 65(1)(c) as secondary evidence of the contents of the email received by Ricky Chaniadi. At any rate, learned counsel for Larry and Adrian had utilized Enclosure 649 in their attempt to discredit Tan Yee Boon (PW11). This amounts to a waiver of the original objection to the report.

No s. 90A certificate for Exhibits P45, P46, P47, P48, P104 and P105

[49] The objections to Exhibits P45, P46, P47, P48, and P104 being documents obtained pursuant to the BBEA order are made on grounds that there was no certificate under s. 90A(2) of EA 1950 tendered by Protasco and to Exhibit P105 bank statements on the weight of the said documents as they were not available earlier for the cross-examination of DSC. These objections were withdrawn during clarification/decision on 30.8.23. In any event, I find the objections have no merit as PW2 and/or PW14, both subpoenaed witnesses have testified that these documents were produced by computers in good working order and operating properly at the material time when they were printed. As such the s. 90A certificate is not necessary.

Printout from PT Inovisi website

[50] The objection taken was that there was there was no s. 90A EA 1950 certificate. Tjoe Yudhis however gave evidence that the said document was produced by a computer in the course of its ordinary use and that the said device was in good working order at the material time when the document was printed. I therefore see no reason why the print out is not admissible.

Burden of proof

[51] In *Dato' Pardip Kumar Kukreja & Anor v Vell Paari a/l Samy Vellu* [2016] 4 MLJ 649; [2015] 1 LNS 1482 CA, Vernon Ong JCA (later FCJ) succinctly explained:

> [24] It is settled law that the party who desires the court to give judgment as to any legal right or liability bears the burden of proof (s 101(1) of the Evidence Act 1950). The burden of proof is on that party is twofold: (a) the burden of establishing a case; and (b) the burden of introducing evidence. The burden of proof lies on the party throughout the trial. The standard of proof required of the plaintiff is on the balance of probabilities. The evidential burden of proof is only shifted to the other party once that party has discharged its burden of proof. If that party fails to discharge the original burden of proof, then the other party need not adduce any evidence. In this respect it is the plaintiff who must establish his case.
>
> If he fails to do so, it will not do for the plaintiffs to say that the defendants have not established their defence (*Selvaduray v Chinniah* [1939] 1 MLJ 253 (CA); s 102 of the Evidence Act 1950). On the effect of the burden of proof not being discharged, Terrell Ag CJ in Selvaduray v Chinniah, adopting the position stated by the Court of Appeal in *Abrath v North Eastern Railway Co* [1883] 11 QBD 440 said:
>
> > In such a case as the present the position has been clearly stated in the judgment of Brett MR in *Abrath v North Eastern Railway Co* [1883] 11 QBD 440 at p 452:
> >
> > > But then it is contended (I think fallaciously), that if the plaintiff has given prima facie evidence, which, unless it be answered, will entitle him to have the question decided in his favour, the burden of proof is shifted on to the defendant as the decision of the question itself. This contention seems to be the real ground of the decision in the Queen's Bench Division. I cannot assent to this.
>
> It seems to me that the propositions ought to be stated thus: the plaintiff may give prima facie evidence which, unless it be answered either by contradictory evidence or by the evidence of additional facts, ought to lead the jury to find the question in his favour: the defendant may give evidence either by contradicting the plaintiff's evidence or by proving other facts:
>
> > the jury have to consider upon the evidence given upon both sides, whether they are satisfied in favour of the plaintiff with respect to the question which he calls them to answer; if they are, they must find for the plaintiff;
> >
> > but if upon consideration of the facts they come clearly to the opinion that the question ought to be answered against the plaintiff; they must find for the defendant.
> >
> > Then comes this difficulty — suppose that the jury, after considering the evidence, are left in real doubt as to which way they are to answer the question put to them on behalf of the plaintiff: in that case also the burden of proof lies upon the plaintiff, and if the defendant has been able by the additional facts which he has adduced to bring the minds of the whole jury to a real state of doubt, the plaintiff has failed to satisfy the burden of proof which lies upon him.

[52] The Federal Court in *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697; [2017] 5 CLJ 418 FC speaking through Jeffrey Tan FCJ at [48] to [63] offers valuable guidance on this subject. See also [17] of *Yeohata Machineries Sdn Bhd & Anor v Coil Master Sdn Bhd & Ors* [2015] 6 MLJ 810 CA, also a judgment of Vernon Ong JCA (later FCJ) that "… there must be some preponderance in the plaintiffs' favour at the conclusion of the whole case. Even if the plaintiffs had established a prima facie case, but if at the conclusion of the trial the court finds that the position was exactly even, then any preponderance in favour of the plaintiffs has ceased to exist. If that happens, then the plaintiffs have failed to discharge the burden of proof which is upon it, and the plaintiffs must necessarily fail (*Abrath v The North Eastern Railway Co* (1883) 11 QBD 440, at p 452)."

The Facts and Evidence

Background

[53] The Plaintiff, Protasco is a public limited company whose shares are traded on the main board of Bursa Malaysia with its core business in road and/or infrastructure related works, education, and property development, road maintenance and other related business. It is an investment holding company with its various sbusinesses run through its subsidiaries which together with Protasco generally knownas the Protasco Group.

[54] The 1st Defendant, PT ASU is a company incorporated in the Republic of Indonesia on 06.09.2012.

[55] The 2nd Defendant, Larry is a Malaysian citizen. Larry on or about 26.11.2012, became a substantial shareholder of Protasco through his acquisition of 27.11% shares in Protasco using his corporate vehicle, Kingdom Seekers Ventures Sdn Bhd ("Kingdom Seeker"). Larry was a director of Protasco from 10.03.2014 to 27.11.2014. The 3rd Defendant, Adrian is a Malaysian citizen. Adrian was a director of Protasco from 10.12.2012 to 27.11.2014. Adrian Ooi was also a shareholder of Protasco.

Events leading to SPA1 and SPA2

[56] To determine whether Larry and Adrian's nature of relationship with Protasco was one which fell within the settled categories giving rise to fiduciary obligations, it is necessary to unravel the roles they played in the entire episode. Counsel for Protasco, Mr. Peter Skelchy deftly took the court through the copious documents and evidence which reveal the following.

[57] On 19.09.2012 as reflected in Vincent Tan's email to Andy Yong, there was a search for a passive investor to purchase 80,429,515 of the ordinary shares in Protasco, representing 27.11% of its issued share capital ("27.11% block"), from two of its then existing shareholders, Dream Cruiser Sdn Bhd and FNQAdvanced Materials Sdn Bhd which will cost approximately RM100million.

[58] In September 2012, DSC was informed by Andy Yong that Larry was interested to purchase Protasco's shares from the previous substantial shareholders. In late September 2012, Larry proposed oil and gas project injection into Protasco in meetings with Andy Yong and DSC as a condition for his purchase of 27.11% block.

[59] Following discussions on the terms of the Investment Agreement via email exchanges involving NS Cheng of Fairfield, Andy Yong, Larry, Adrian and DSC, on 03.11.2012, an Investment Agreement ("IA") was executed between Global Capital Limited and DSC. Larry executed the IA on behalf of Global Cap in his capacityas 'co-founder'. The recitals stated that Global Cap, through its 'affiliates/nominees', had been granted rights to develop and produce oil and gas in Kuala Simpang Timur, Aceh, Indonesia. The recitals of the IA disclosed that the parties had intended to develop the oil and gas project in Indonesia via Protasco and that Protasco would, in turn, enter into a master agreement with Global Cap towards that end. It was expressed to be in furtherance of that intention that DSC had entered into the IA in consideration for Global Cap's offer to purchase the 27.11% block.

[60] On 26.11.2012, Larry via his corporate vehicle, Kingdom Seekers became a substantial shareholder of Protasco through his acquisition of the 27.11% block. As a consequence, Larry

wanted and obtained representation on the board. His nominee for this purpose was Adrian Ooi who 2 weeks after the acquisition, became a director of Protasco on 10.12.2012.

[61] Larry introduced Augustone Cheong ('Augustone') to Protasco. Augustone held a power of attorney ("PA") for PT ASU dated 15.10.2012. Vide this PA executed by PT ASU's then President Director, Tjoe Yudhis, Augustone was authorised to deal with all negotiations on behalf of PT ASU for the purchase of the PT ASI shares.

[62] On 14.12.2012, Acclaim wrote to PT Brent Securities ("PT Brent") to block 25,200,000 shares of PT Inovisi on behalf of Acclaim. On 24.12.2012, Messrs Risman Hutabarat & Rekan issued a legal opinion on the blocked shares of PT Inovisi and securities for RM50million deposit. On 25.12.2012, Adrian Ooi emailed Lim Yew Ting of Protasco enclosing the legal opinion from the Indonesia lawyer on the blocking of PT Inovisi shares. On 27.12.2012, Acclaim issued a letter to PT Brent in respect of its application for shares blocking in PT Inovisi ["Blocked Letter"].

[63] On 28.12.2012, Protasco's Board of Directors ("Protasco's Board) by a circular resolution ("DCR") approved the entry into SPA 1 with PT ASU. On the same day:

63.1 SPA 1 was entered between Protasco and PT ASU to acquire 76% share capital of PT ASI for a purchase consideration USD55million; and

63.2 a deposit of RM50million was paid by Protasco to PT ASU via cheque.

[64] Having considered the evidence and submissions before me, I find that Larry had made the oil and gas project in KST Aceh injection into Protasco as a pre-condition for his purchase of 27.11% shares as made evident from the various exchanges of email flowing between the parties between September 2011 and November 2011 starting from Vincent Tan's email to Andy Yong on 19.09.2012 informing Andy Yong of DSC's intention to find a purchaser to purchase the 27.11% block of Protasco shares, belonging to the previous substantial shareholders culminating in:

64.1 the signing of the IA;

64.2 Larry via his corporate vehicle, Kingdom Seekers becoming a substantial shareholder of Protasco through his acquisition of the 27.11% block on 26.11.2012; and

64.3 the signing of SPA1 on 28.12.2012 with a simultaneous payment of a deposit of RM50million by Protasco to PT ASU on the same day.

[65] Protasco asserts that when Larry introduced the potential investment opportunity to DSC he represented himself as the principal of Global Cap, a private equity management firm with expertise in identifying growth and start up companies with regional reach in the Asia Pacific region. Larry disputes this vehemently. He postulates that Global Cap was to procure an investor to acquire the 27.11% block of Protasco. Global Cap was unable to secure sufficient investors due to time constraints and so he via his corporate vehicle, Kingdom Seekers then acquired the 27.11% block.

[66] That there is no shadow of a doubt that Larry is the principal of Global Cap is evident from (i) his own corporate profile provided to Protasco at the material time, where it is expressly stated that in the year 2008, he founded the private equity firm Global Capital Limited to focus

on emerging markets; (ii) the engagement letter dated 02.11.2012 by Fairfield to Global Cap where Fairfield as an advisor was engaged by Global Cap to assist Kingdom Seekers (Larry ‘s corporate vehicle) to sell the oil and gas asset and business to Protasco and in this letter, Larry had confirmed the engagement terms in the capacity as ‘Co- Founder’ of Global Cap; (iii) Global Cap’s company profile produced by Larry and Adrian at trial made no mention of one Kan Ding Yau who was alleged by Larry to be the only shareholder and director of Global Cap; (iv) the position taken by Larry in Global Cap Suit 465 that Global Cap through its representative had acquired the 27.11% block in Protasco; effectively meaning, Larry, Kingdom Seekers and Global Cap are one and the same.

[67] Despite Adrian’s stand that DSC offered him the position of Non- Executive Director in Protasco in view of his business and corporate experience and expertise in Indonesia, I find that it was Larry that caused Adrian to be appointed to Protasco’s Board on 10.12.2012 which was 2 weeks before SPA1 was signed. This is borne out by Larry’s witness statement filed in Suit 465, where Larry states “Pursuant to the Investment Guarantee Agreement, the Plaintiff nominated Ooi Kock Aun (“Dato’ Ooi”) as a director of Protasco. Dato’ Ooi was appointed to the Board of Protasco on 10.12.2012.”

[68] Adrian pleaded that he was not involved in the negotiations and execution of the IA and that he only became aware of the IA after this suit was filed by Protasco. I find however he was being economical with the truth as the email exchanges between Adrian and Dr Cheng on 01.11.2012 show unequivocally that he was in the loop in the email exchanges concerning the terms of the IA, and he provided his comments on the terms to be included therein.

[69] Both Larry and Adrian deny Protasco’s contentions that they were involved in the negotiations involving the terms of the purchase of PT ASI’s shares and have made representations that inter- alia the deal would satisfy the due diligence to be conducted and the conditions set in the agreement and that adequate security would be provided by PT ASU towards the deposit paid by Protasco. Larry contends that he was not involved at all in the negotiations and signing/execution of SPA 1 whilst Adrian’s evidence that he was apparently informed that Protasco had entered into negotiation with PT ASU in relation to SPA 1 after he was appointed as a director of Protasco (which was 10.12.2012). These contentions by Larry and Adrian are easily debunked by the fact that SPA1 was only signed some 18 days after Adrian Ooi became a director and by the contents of contemporaneous email exchanges involving YY Chin of Global Cap (who acts under the advice of Adrian), Lim Yew Ting, Hooi Ling, Dr Cheng, Augustone Cheong, Jason Minos, Larry and Adrian from 08.11.2012 to late November 2012 which explicitly show both Larry and Adrian were actively involved in the discussions on the terms for SPA 1. This excerpt when Adrian Ooi was under cross-examination is telling:

> NOP Pg. 65 enc 700
>
> “PJS Thank you. And by this email, would you agree Larry is asking you to insert these terms into the draft SPA?
>
> OOI Yes.”

[70] Tjoe Yudhis testified that he was instructed to sign SPA 1 by Adrian Ooi, as well as SPA 2 and the PA . He was also instructed by one Lim Chye Guan, an employee of Larry and Adrian, to sign documents in relation to the opening of the bank account on behalf PT ASU with CIMB Bank Berhad’s Plaza Damansara branch. From the email found in En.555/p7-17, Adrian had

given instructions to staff of PT Inovisi and Global Cap to arrange for Tjoe Yudhis's trip to Kuala Lumpur for him to sign SPA 1, including to give him cash allowance for the trip and arranged for Tjoe Yudhis's flight and hotel accommodation.

[71] Although the diligence process was being conducted by Protasco's professional advisors appointed by Protasco, the evidence show backstage, Adrian and Larry instructed PT ASU on the due diligence requirements requested by Protasco despite Larry's protestation that he was not a director and therefore not involved; Adrian although a director protested he was not involved. Adrian's protestations are imploded by his own email for e.g. on 23.04.2013, in response to Protasco's solicitors Messrs Makarim & Taira requesting for office lease agreement of PT ASU for due diligence, Adrian had instructed Deny of PT Inovisi that "PT ASU's office lease agreement is not relevant for their DD process. Inform them that PT ASU is now waiting for the new office to be ready in Patra Jasa sometime in June 2013 and by then we will get the new office lease agreement with the landlord. For now, PT ASU is only temporarily using Anugrah office, which we had already informed them last week." Then on 30.07.2013, in response to Protasco's solicitors Messrs Makarim & Taira's request for power of attorney to be executed for Protasco to conduct court searches, Adrian had instructed Tjoe Yudhis to proceed with the signing of the power of attorney forwarded to him by Deny via email dated 29.07.2013. It is observed that the day before, Tjoe Yudhis had via email sent on 29.07.2013 requested for Larry and Adrian's instructions.

[72] Protasco's position is that the Blocked Shares forming the security were part of the inducement for Protasco to make the payments to PT ASU pursuant to SPA 1 and the Shareholder's Advance to PT ASI pursuant to SPA 2. The evidence lead at trial show that:

> 72.1 Adrian under cross- examination admitted that the securities and the legal opinion on enforceability and validity of the security is needed in order for Protasco to make payment of the deposit and was critical to Protasco making payment as payment was made even prior to the conduct of the due diligence;
>
> 72.2 It was Adrian who:
>
> > 72.2.1 instructed the Indonesian legal firm Messrs Risman Hutabarat & Rekan to provide the legal opinion to Protasco that the enforceability and dealing in the Blocked shares comply with the laws of Indonesia. The legal opinion expressly provides that the Instruction Letter would be good instructions to PT Brent for Protasco to deal with the shares provided it is signed by Acclaim;
> >
> > 72.2.2 3 days prior the signing of SPA1 and prior to the payment of RM50million deposit on SPA1, on 25.12.2012 provided to the board of Protasco and solicitors of Protasco, the aforesaid legal opinions obtained from Indonesian solicitors;
>
> 72.3 admitted under cross-examination, that both he and Larry had procured Acclaim to provide the securities.

[73] It is most puzzling that Dedi Francis, the purported owner of Acclaim when asked if he had heard of a company called Acclaim said "I think I've heard of it." The answer was not a but of course, I am the owner! Yet more puzzling still, he testified under cross-examination, that he was informed by Larry and Adrian that Acclaim provided the securities in the form of PT Inovisi shares for the transaction. Probed further, an admission was squeezed out from him that he was not the owner of Acclaim. I find that the evidence lead by Protasco has established, or at the very least, it is inherently probable that it only executed SPA 1 and SPA 2 as it was armed with the legal opinion that it would be able to call upon the securities if the payments made towards SPA 1 and SPA 2 were not returned pursuant to termination by Protasco. I have not overlooked

that the securities were not mentioned in SPA 1 but only in SPA 2, but by even Adrian's own evidence, the procurement of the securities was fundamental towards the payment of the RM50million deposit made by Protasco to PT ASU. This is underscored by: (i) Clause 1.4 of SPA 2, where PT ASU confirmed that the Blocking Letter shall continue to serve as the security and PT ASU agrees, undertook to cause the Security Provider Acclaim to sign, seal and deliver further documentation in the form of a share charge to protect Protasco's interest under the agreement; the same clause provide that the Secured Shares in the form of PT Inovisi were to be set aside as security for the repayment back of the purchase price by PT ASU to Protasco in the event of termination of SPA 2 pending the fulfillment of Conditions Subsequent as set out in Clause 3.1; (ii) the repayment back of the Shareholder's Advance of USD5million made by Protasco to PT ASI as set out in Clause 4.3(b); and (iii) the fulfilment of the Profit Guarantee as set out in Clause 8. There is more - by Clause 4.3(b) of SPA 2, it was agreed that a Shareholder's Advance of USD5million provided by Protasco to PT ASI for the reactivation of the wells is secured by securities of such number of additional shares provided by Acclaim equivalent to 130% of the value of the advance made by Protasco.

[74] Pursuant to SPA1, the conditions precedent therein were to be fulfilled by 28.06.2013. Protasco by letter to PT ASU on 08.05.2013 informed that it would be unlikely that all the Conditions Precedent in Clause 3 of the SPA 1 would be met by 28.06.2013 and requested from PT ASU a revised timetable on when the Conditions Precedent could be fulfilled. PT ASU by letter the very next day on 09.05.2013 acknowledged the delay and requested for Protasco's indulgence and consent to extend the due diligence period to 31.07.2013 and the fulfillment of the Conditions Precedent to 30.09.2013. Protasco and PT ASU then entered into the Supplemental Sale and Purchase Agreement on 28.06.2013 ("Supplemental Agreement") extending the time for compliance of the Conditions Precedent to 30.09.2013 and the due diligence period to 31.07.2013 ("1st Extension"). Later, PT ASU by letter dated 25.09.2013 sought another extension from 30.09.2013 to 31.03.2014 for all condition precedents and due diligence to be fulfilled ("2nd Extension").

[75] Tjoe Yudhis testified that he did not execute PT ASU's letter dated 09.05.2013, the Supplemental Agreement dated 28.06.2013 and PT ASU's letter dated 25.09.2013. He testified that the signatures on these documents ("disputed signatures") were not his. The Forensic Document Examiner, Lim Yok Chaw ["PW-4"] who had prepared an expert report after his examination and comparison of the disputed signatures in these documents with the specimen signatures of Tjoe Yudhis, had opined that the disputed signatures and the specimen signatures of Tjoe Yudhis are of different authorship. PW-4's opinion are relevant facts pursuant to section 45 of the Evidence Act 1950. Larry and Adrian did not adduce any expert opinion to rebut PW-4's opinion . Despite being cross- examined extensively by learned counsel for Larry and Adrian, PW-4 had maintained and stood by his opinion. I do not find his opinion 'obviously lacking in defensibility' and accept PW-4 's opinion.

[76] In regard to the extensions of time sought by PT ASU, Dedi Francis's evidence was most curious. In respect of PT ASU's letter dated 09.05.2013 relating to the 1st extension, in Q&A 41 of his witness statement, he testified that he had instructed Augustone to prepare the letter and Tjoe to sign the letter but in cross-examination, testified that he was informed about this letter by Larry and Adrian and that he instructed Tjoe Yudhis to execute PT ASU's letter through Larry and Adrian. When questioned on whether he has any evidence instructing Larry and Adrian, his answer was they met frequently in Jakarta at that time. Adding to the mystery, his testimony under cross examination show he did not have a clue why the 2 extensions were needed, nor

why the Supplemental Agreement was signed. His testimony under cross-examination is that the delay was caused by the revision in the purchase consideration and the number of shares to be purchased! His understanding of the Supplement Agreement was based on what was presented to him by Larry apparently via Larry's laptop. Dedi Francis testified under cross-examination, that he instructed Global Cap to instruct Tjoe Yudhis to execute the Supplemental Agreement. This evidence is in conflict with his evidence given in chief in Q&A 44 where he says he instructed Tjoe Yudhis to sign the Supplemental Agreement on behalf of PT ASU. These are only 2 examples of his testimony showing that he does not even have a passing familiarity with the contents of his own witness statement. On the 2nd extension sought by PT ASU's letter dated 25.09.2013, Dedi Francis gave the same answer that all the information he obtained in relation to extension was obtained from Global Cap and the instructions to execute the PT ASU letter was given through Global Cap. Dedi Francis further testified that all discussions and instructions to Global Cap were all done verbally without any written correspondences. Learned Counsel for Protasco was quick to point out that it betrays common sense for Dedi Francis who is based in Jakarta to be giving instructions to Tjoe Yudhis who is also based in Jakarta verbally via Larry and Adrian who are both based in Kuala Lumpur. There is also an appreciable absence of any written instructions at all from Dedi Francis whether to Tjoe Yudhis or for that matter Larry and Adrian from the inception of the transaction till it ended. Watching Dedi Francis give evidence throughout the trial, he appeared to me to be making up stories as he goes along. As manifested under cross-examination, his evidence through out the trial which follow which way the wind blows is to be taken with a pinch of salt. Juxtaposing Dedi Francis's evidence with (i) Larry's denial of any knowledge of the events in relation to the transaction prior to him being made a director on 10.03.2014 and (ii) Adrian's position that sometime in or around June 2013, he was 'belatedly informed by the Plaintiff that the 1st Defendant had sought for an extension of the Due Diligence' and for an extension to fulfil the Conditions Precedent, all 3 persons' evidence stretches credulity.

[77] Whilst on the subject of the Supplemental Agreement, prior its signing, DSC at a board of directors meeting on 27.05.2013, updated the board on the progress of the deal and had informed the board of the following: -

> 77.1 that the deal would be called off if the extension of the oil and gas concession which expires on 14.12.2014 could not be procured by PT ASU;
>
> 77.2 that the Indonesian authority would normally grant an extension of up to a further 10 years for the concession;
>
> 77.3 that the application for an extension of the concession was in progress;
>
> 77.4 that there were about 30 wells at the site at that time and it would require 1 to 1 ½ months to reactive the wells for oil extraction.

[78] DSC testified under cross-examination that he had informed the board of the matters in the preceding paragraph as he had been advised by Larry and Adrian that the extension would be granted normally for 10 years.

[79] At this juncture it is to be noted that the PMPA provided for a duration of 10 years from 14.12.2004 to 14.12.2014. When SPA 1 was executed, the PMPA had only 2 years more to go, and the due diligence was undertaken after the execution of SPA 1. The Supplemental Agreement signed on 28.6.2013 provides that the extension is granted for the compliance of the

due diligence to be completed by 30.09.2013 and PT ASU shall use its best endeavours to secure an extension of the PMPA on the best terms possible.

[80] Before SPA2 was signed on 29.01.2014, the following events are noteworthy:

80.1 Adrian Ooi had by 2 email to Kenny Chong, dated 03.09.2013 and 11.12.2013 respectively enclosed PT Haseba's application to Pertamina for an extension of 10 years, thus conveying the application for a 10-year extension was being made and the later mail enclosing Pertamina's field report where Pertamina states that they would extend the time period beyond 2014 as long as there is compliance with Pertamina's work requirements. Whilst he did not expressly in his emails say so, he appeared to give the impression that the 10-year extension will be obtained provided the wells are being reworked in accordance with Pertamina's work requirements;

80.2 RISC in its report prepared in December 2013 was of the opinion that on the assumption of the purchase of the oil field could be completed by the end of 2013, then first production from the redeveloped KST field can be expected only in early 2016. This entire process could only take place after the redevelopment of the oil wells;

80.3 At the board of directors' meeting on 18.12.2013, KPMG informed the board that the KST oil field might generate revenue in 3 to 5 years but the recovery of the investment cost might take a longer period; and

80.4 Adrian admitted under cross-examination that at the material time of December 2013, the extension of 10 years was critical to proceed with the acquisition.

[81] Hence, Clause 3.1(a) of SPA 2 signed the next month on 29.2.2014 expressly provides that the agreement was conditional upon the extension of the PMPA beyond its expiry on 14.12.2014 for a further 10 years to 14.12.2024.

[82] Dedi Francis, held out to be owner of PT ASU, states in his evidence in chief that he was informed by Augustone Cheong that the insertion of Clause 3.1(a) in SPA 2 was insisted upon by DSC even though this clause was not included in the original SPA.

[83] Adrian's evidence in chief stated that he has no knowledge of any specific reasoning for the insertion of Clause 3.1(a) into SPA 2 as he was not privy to the negotiations between PT ASU and Protasco is confounding when viewed against the matters stated in paragraphs 80.1 and 80.4. I agree with the Plaintiff that such evidence was designed to downplay his having made representations in relation to 10-year extension for the PMPA.

[84] Larry and Adrian took the position that the terms of SPA 1 and SPA 2 were negotiated between Kenny Chong and Augustone Cheong without their involvement. Adrian contends that he was merely instructed by Protasco after he became director to facilitate the deal in terms of communication with PT ASU based in Indonesia and that since the beginning of 2014, Protasco apparently gave less instructions for him to facilitate communication with PT ASU. He apparently had the impression that Protasco had meetings with PT ASU without his assistance. The evidence however says otherwise and points ot his active involvement:

84.1 Besides the email between Adrain and Kenny alluded in paragraph 80.1, on 23.12.2013 by letter to PT ASU, Protasco requested for rectification on material issues, informed of instances of non-compliance and due diligence queries raised by the consultants.

84.2 On 10.01.2014, Adrian emailed DSC enclosing PT ASU's letter dated 10.01.2014 responding to Protasco's letter dated 23.12.2013. The email speaks of the letter of PT ASU setting out the revised structure of the entire deal, including the new purchase price, the loan to PT ASI for USD5million and the revised profit guarantee. Adrian ends the email by stating

that he would like to call for a board of directors' meeting for 'the approval of this new deal structure and bring to the closure of this long protracted transaction*';*

84.3 On 14.01.2014, Adrian writes to DSC and enclosed a Protasco board paper for the revised deal for his review and circulation. Adrian then informed DSC of the need to have a Protasco 'BOD meeting early next week to approve' the revised deal before the CNY holidays;

84.4 On 16.01.2014, Kenny Chong emailed Adrian and Larry with a summary of the outstanding matters in relation to the revised deal.

84.5 On 21.01.2014, Adrian emailed Kenny Chong informing that as agreed, Protasco is to circulate the board resolution for all the members to approve it by the coming Thursday. Adrian encloses Protasco's draft board resolution. Adrian ends the email by informing Kenny Chong, *'Let's close this chapter before the CNY…'.*

84.6 On 22.01.2014, Kenny Chong emailed Adrian and Larry informing that DSC had gotten the green light on the value of the deal from the members of the board. Kenny Chong then requests Larry and Adrian to grant them some time to get the paperwork in order.

[85] From the various mail, it is demonstrably clear that DSC and Kenny Chong treated Adrian as if he was representing Protasco in dealing with PT ASU and he was not merely facilitating communication between Protasco's personnel and PT ASU as claimed by him. The revised structure of the oil and gas acquisition leading to the execution of SPA 2 was clearly the result of Adrian's dealing with PT ASU and he admits under cross-examination at the very least, that as far as the board of Protasco is concerned, he was the one dealing with the vendor, PT ASU.

[86] Dedi Francis's evidence in chief which attempts to prop Adrian's position by positing that PT ASU contacted the late Ho Chun Fuat and Kenny Chong in relation to settling theterms of SPA 2 went up in smoke when evaluated: (i) the late Ho Chun Fuat only joined Protasco on 07.01.2014 and SPA 2 was signed on 26.1.2014, 3 weeks later; (ii) there was zilch correspondence between PT ASU and Ho Chun Fuat; (iii) the

email show it was Adrian who was dealing with PT ASU in settling the terms in SPA 2; (iv) Dedi Francis was not involved personally at all in the negotiations leading upto the execution of SPA 2. He testified that it was Tjoe Yudhis and Global Cap who was dealing with the late Ho Chun Fuat and Kenny Chong leading up to the execution of SPA 2 and that Tjoe Yudhis had reported the product of the negotiations to Larry and Adrian who then report to him. According to Dedi Francis, his instructions were given to Global Cap (which is Larry and Adrian) and then it was Global Cap who instructed Tjoe Yudhis.

[87] Larry's position in his evidence in chief is essentially that: -

87.1 only after he was made a director of Protasco (10.03.2014), he discovered the manner of approval of SPA 1;

87.2 he became aware that the transaction was discussed at previous meeting;

87.3 he was left out of the discussions with regard to SPA 2 and hence not privy;

87.4 he only found out subsequently after joining the board about SPA 2 and its peculiar terms regarding the condition subsequent;

87.5 apparently, after he was appointed as a director, he 'observed the interactions of the directors present at the various board meetings and concluded that the negotiations were solely handled by CKP on behalf of the Plaintiff's board'.

[88] Larry's postulations however were shot to smithereens as the emails on SPA2 were copied to him, and all he could then muster under cross-examination was a feeble answer that he did not read the emails that were copied to him which I find does not beggar belief.

Was Protasco hoodwinked into making a Shareholder's Advance of USD 5 million to PTASI?

[89] Prior signing of SPA2, the following events transpired :

> 89.1 the representative of RISC Operations Pty Ltd ("RISC") had briefed the board at a board of directors' meeting on 18.12.2013, that based on the information gathered the oil wells had been abandoned for over 20 years since the last production in 1990/1991. RISC noted that about USD3million would be required in order to reactive the existing well whereas a new well would cost approximately USD4million.
>
> 89.2 On 10.01.2014, Adrian forwarded PT ASU's letter dated 10.01.2014 setting out the proposed revised structure to the entire deal. In the said letter, PT ASU had structured the revised total purchase consideration to USD27million paid by Protasco to PT ASU from which PT ASU would extend the shareholder loan to PT ASI for USD5million. This was then revised in SPA 2 for the purchase consideration to be USD22million with Protasco advancing USD5million to PT ASI to be utilized for the purpose of wells reactivation and construction of new wells (if necessary) for the purpose of extending the PMPA agreement.
>
> 89.3 Adrian represented that PT ASI requires USD5million for the reactivation of the wells. As shown in paragraph 84 above, Adrian highlighted the urgency of the matter by informing in his email that he would like to call for a BOD meeting the following week for the approval of a new structured deal.

[90] Adrian under cross-examination was vehement that the USD5million did not emanate from him but was based on the proposal from RISC. That is not true as RISC estimated approximately USD3million for reactivation of the existing wells whereas new wells would cost approximately USD4million. In the letter by PT ASU dated 10.01.2014 forwarded by Adrian, it was stated expressly that USD5million advance was needed for well reactivation and constructions of new wells for the sole purpose of extending the PMPA Agreement.

[91] There is more. Dedi Francis the supposed owner of PT ASU under cross- examination did not even know what the USD5million was for. When questioned on PT ASU's letter dated 10.1.2014 which was forwarded by Adrian to Protasco, he curiously testifies that 'As far as I remember, that USD5million sum was required or was needed by Protasco to purchase or to arrange the majority sales, shares. That's what I remember.'

[92] Protasco's Board had acted upon PT ASU's purported request as represented by Adrian. At Protasco's board of directors' meeting on 23.01.2014, the board agreed to the revised proposed acquisition which included the granting of the advance of USD5million to PT ASI. which is to be utilized by PT ASI solely for the purpose of exploration, wells reactivation and/or construction of wells. But this was not to be.

[93] The Shareholder's Advance of USD5million was paid by Protasco to PT ASI's CIMB Bank account on 04.02.2014. Unbeknownst to Protasco, Adrian made himself a sole cheque signatory of PT ASI's CIMB Bank account on 27.01.2014, 2 days prior to the execution of SPA 2 on 29.01.2014.

[94] On 10.02.2014, 6 days after USD5million was paid to PT ASI by Protasco on 04.02.2014, Adrian transferred the exact sum of USD5million (equivalent to RM16,250,000.00) from PT

ASI's CIMB Bank account to PT ASI's Permata Bank Account in Indonesia. He signed the remittance form himself. Adrian in his evidence in chief attempted to explain away his appointment as cheque signatory as follows:

> 94.1 As he was absent from the board meeting on 23.01.2014, he later learned from Mohd Farid (another director nominated by Larry) that Protasco's board had agreed to authorize him to manage, monitor and supervise the oil and gas business in Indonesia;
>
> 94.2 He was later told verbally by the late Ho Chun Fuat that he would be handling PT ASI's financial portfolio when the time came;
>
> 94.3 Hence in anticipation of the same, he was instructed by Protasco's board to make a request to PT ASI through PT ASU to allow him to be the authorized signatory of PT ASI's CIMB Bank account.

[95] Protasco's learned counsel pointed out that Adrian had instructed his solicitors to amend his draft witness statement from "I was later told by the Plaintiff that I would be handling PT ASI's financial portfolio when the time comes" to "I was later told **verbally by the late Ho Chun Fuat from** the Plaintiff that I would be handling PT ASI's financial portfolio when the time comes*."* Protasco's counsel thus submitted that the amended witness statement was filed after the passing of the late Ho Chun Fuat and was clearly designed to ensure that the late Ho Chun Fuat was not able to challenge his assertion in Court. I tend to agree as Adrian's evidence could not be reconciled with the total body of evidence including as follows.

[96] Firstly, the minutes of Protasco's board meeting on 23.01.2014 do not reflect that the Adrian was to be appointed as a signatory of PT ASI's bank account to receive the USD5million. When questioned on this, Adrian Ooi was evasive.

> "OOI: I am not aware.
>
> PJS: And you would agree that these minutes do not reflect that you were authorised to be a signatory of PT ASI's bank account to receive this USD5 million?
>
> **OOI: I was authorised at PT ASI's board resolution.**
>
> PJS: But not, but the money came from Protasco, Dato'. You were not authorised by Protasco, agree or disagree?
>
> OOI: Disagree.
>
> PJS: And you just told this Court, that's why I asked you and I took it down very carefully, that you were not able to take this role because you were not appointed as an officer in PT ASI –
>
> OOI: I was appointed –
>
> PJS: You were not able to take this role.
>
> OOI: I saw my appointment at PT ASI to be the signatory, that one I saw.
>
> **PJS: Dato', did you disclose PT ASI's resolution authorising you to be a signatory to Protasco?**
>
> **OOI: No, to the bank account.**

PJS: Dato', you need to answer my questions. Did you disclose PT ASI's resolution appointing you to be a signatory of their own bank account to Protasco?

OOI: I didn't get the question. I don't get your question. PJS: Did you disclose–

OOI: To who?

PJS: To Protasco that you were appointed as a signatory to PT ASI's bank account?

OOI: It was Ho Chun Fuat, who is a management of Protasco, who asked me to be the signatory. It came from Protasco because Ho Chun Fuat represented Protasco.

PJS: Dato', what you are saying, agree or disagree, is not reflected in the minutes of meetings, is not reflected in any documents before this Court?

OOI: I told you I disagree. I told you that.

PJS: Now, this whole thing about Ho Chun Fuat telling you, can I suggest to you is an afterthought?

OOI: No.

PJS: And you are only bringing Mr Ho Chun Fuat in this after his death, am I right?

OOI: No."

[97] Secondly, Adrian did not produce any evidence to back his claim that the instructions for him to be the cheque signatory came from Protasco's board of directors. Conversely, Tan Yee Boon a member of the board, gave evidence that Adrian was never authorized to be a cheque signatory of PT ASI's bank account.

[98] Thirdly, in Adrian's s.112 statement to the police made in January 2015, Adrian undertook to provide the police the minutes of meeting where the board had authorized him to become a cheque signatory of PT ASI's bank account. No such minutes in existence were produced.

[99] When confronted as such, Adrian vacillated by stating that as informed by the late Ho Chun Fuat at the board of directors' meeting on 24.02.2014, he had assumed that PT ASI had already been controlled by the management of Protasco. He testified:

"So I assumed that PT ASI had already been controlled by him and the management of this Protasco. So when the change of the, for the cheque signatory comes from PT ASI's management, which I assumed at that time is already under the control of Protasco. That's why I went on."

[100] I find Adrian's explanation to be eye-brow raising, self-serving and a disingenuous opportunistic posturing for when he made himself a cheque signatory on 27.01.2014, he could not have gazed into the crystal ball or consulted an astrologer on what the late Ho Chun Fuat will inform him at Protasco's board meeting a month later on 24.02.2014 that Protasco has taken control of PT ASI. Thus, Adrian's allegation on what the late Ho Chun Fuat informed him remained just that – an allegation, and a bare one at that.

[101] What in fact transpired was, at the Board meeting on 24.02.2014, the late Ho Chun Fuat had informed the board the following: -

101.1 that the advance of USD5million from Protasco to PT ASI for wells reactivation was to show commitment to Pertamina in granting the extension of the PMPA;

101.2 that Dato' Hanif and DSC would be appointed as members of the Board of Commissioners of PT ASI overseeing the function of the Board of Directors of PT ASI;

101.3 that the proposed PT ASI's Board would comprise of Adrian, Kenny Chong and a representative of PT ASU;

101.4 that the authorized signatories for PT ASI would also be changed accordingly in due course.

[102] Adrian was present at this Board meeting. He kept quiet and did not disclose he had made himself a cheque signatory 2 days before SPA2 was signed and that he had on 10.2.2014 already transferred away the USD5million. In any case, common sense dictates that there was no need for a change of authorized signatory as what was informed to the board by the late Ho Chun Fuat if it was within the board's knowledge that Adrian was already the cheque signatory of PT ASI's account.

[103] Adrian's testimony that he was never made a signatory to PT ASI's bank account in Indonesia and therefore according to him he had no control over the USD5million and that Protasco was in control of PT ASI pursuant to SPA 2 is not credible at all for firstly his testimony raised the burning question why would he transfer the USD5million of Protasco's fund to another account outside Malaysia which he has no control over? Second, his testimony blithely ignored the fact Protasco was not in control of PT ASI pursuant to SPA 2 as the transfer of shares from PT ASI to Protasco only took place on 24.03.2014 by which time, the USD5M had long disappeared through Adrian's very own action.

[104] That to the knowledge of the board of Protasco, the signatories to PT ASI's account were never changed was also made clear at the board of directors' meeting on 25.07.2014 where Adrian was present as well as the late Ho Chun Fuat (by invitation). In respect of the USD5million, the following statements were made by board members:

104.1 2 board members, Dato' Mohd Bin Ibrahim bin Mohd Noor and Dato' Hanif had expressed deep concern over the USD5million Shareholder's Advance granted to PT ASI;

104.2 DSC informed the board that due to KITAS (Indonesian working visa) problem, Protasco was not able to effect the change of bank signatories for PT ASI and thus not able to manage the USD5million advance. DSC had demanded for a detailed report on the utilization of the USD5million advance.

[105] Adrian kept up the pretense and did not see it fit to rebut DSC and remind him of his alleged appointment as signatory since it was his stand that he was instructed by the board to become a bank signatory of PT ASI. Neither did Adrian see it fit to remind the late Ho Chun Fuat that he had instructed Adrian to handle PT ASI's financial portfolio.

[106] The weight and effect of the sum total of the evidence points to only one obvious conclusion - that Protasco was deceived into making the USD5million Shareholder's Advance .

Larry and Adrian's actions from the time Protasco sought to terminate SPA1 and SPA2 and to seek a refund of the Purchase Consideration and refund

[107] A revisit of the salient terms of SPA 2 include the following: -

107.1 Clause 1.1 – instead of the initial acquisition of 76% of PT ASI, Protasco now acquire 63% of PT ASI from PT ASU for a reduced consideration of USD22million instead of USD55million;

107.2 Clause 2.1 – the revised purchase consideration will be satisfied by setting off the deposit of RM50million paid by Protasco pursuant to SPA 1 as part payment towards the purchase consideration under SPA 2. Pursuant to Clause 2.1(ii), a sum of USD5,659,437.00 (equivalent to RM18,393,170.00) was paid to PT ASU on 29.01.2014 and 30.01.2014 being the difference between the purchase price of USD22million and RM50million deposit paid

107.3 Clause 4.3(b) – a Shareholder's Advance of USD5million (equivalent to RM16,250,000.00) was paid to PT ASI on 04.02.2014 to be utilized solely for purposes of exploration works, well-reactivation and/or construction of wells;

107.4 Clauses 1.4, 1.5, 4.3(b) and Recital F – payments made by Protasco to PT ASU and PT ASI are to be securitized. PT ASU to procure Acclaim, the security provider to provide security in the form of blocked shares in PT Inovisi. PT ASU agrees, undertakes and covenants to sign, seal and deliver and cause the security provider, Acclaim to sign, seal and deliver the share charge in order to give rise to protection of Protasco's interest;

107.5 Clause 3.1 (a), Clause 3 – the agreement was conditional upon the extension of the PMPA beyond its expiry on 14.12.2014 for a further 10 years to 14.12.2024; the conditions subsequent are to be fulfilled within 6 months of its execution i.e. by 28.07.2014;

107.6 Clause 3.6 - Protasco was entitled to terminate SPA 2 by delivery of notice of termination to PT ASU whereupon PT ASU was obliged to refund the full purchase price to Protasco within 14 days from the date of the issuance of the notice of termination in default of which Protasco is entitled to deal with the Blocked Inovisi Shares at its absolute discretion by requesting the escrow agent/broker to dispose of the secured shares and the sale proceeds therefore be released and paid to Protasco as refund to the purchase price.

[108] It is common ground that the conditions subsequent were not fulfilled by 28.07.2014. That Protasco was thus entitled to terminate the agreement and to recover the purchase consideration of USD22million was agreed by Adrian during cross-examination.

[109] On 04.08.2014:

109.1 at Protasco's board of directors' meeting, the board deliberated PT ASU's numerous requests for extension of time and instructed Management to issue a letter informing PT ASU that Protasco agrees to extend provided PT ASU and Acclaim fulfilled 2 key conditions and requested PT ASU to revert by 4.00pm on the same day. The board meeting adjourned at 10.00am to resume at 4.00pm to discuss on PT ASU's reply letter;

109.2 Larry (at 3.01pm) emailed Augustone and Lim Chye Guan and copied Adrian and instructed on the contents of PT ASU's letter in reply to Protasco's letter dated 04.08.2014;

109.3 At Protasco's resumed board meeting at 4.25pm to discuss the contents of PT ASU's reply letter dated 04.08.2014 proposing 2 options i.e. (i) Option 1 was further extension of time to expire on 30.11.2014 subject to the PT ASU's agreement to perfecting the charge document on the PT Inovisi's blocked shares; (ii) Option 2 was the immediate termination of SPA 2 with PT ASU having a call option to buy back the Blocked Shares at a fixed value of USD 27 million within 24 months from the date of termination. The Board deliberated, found that the proposals from PT ASU were not acceptable and, resolved to terminate the deal and instructed Management to issue a termination letter to PT ASU;

109.4 Protasco exercised its right to terminate SPA 2 via Notice of Termination and demanded for a full refund of USD22million; with a copy emailed to Tjoe Yudhis by Chow Siew Meng (Protasco's Corporate Affairs Director) at 7.38pm;

109.5 Larry (at 11.15pm) emailed Adrian instructing on the contents of PT ASU's letter in reply to Protasco's Notice of Termination dated 04.08.2014;

109.6 Adrian (at 11.25pm) emailed Augustone and Larry, copied to Lim Chye Guan to instruct Augustone to prepare a reply to Protasco.

[110] On 05.08.2014:

110.1 Protasco emailed Tjoe Yudhis (at his real email address) all the previous correspondences between Protasco and PT ASU;

110.2 PT ASU wrote to Protasco rejecting unilateral termination from Protasco and will only accept mutual termination based on Option 2 as proposed by PT ASU via letter dated 04.08.2014.

[111] On 07.08.2014, Tjoe Yudhis visited Protasco's office. Tjoe Yudhis signed a statutory declaration in Kuala Lumpur.

[112] On 11.08.2014 at Protasco's IC meeting an Investigation Report No.IR 1/110814 dated 11.08.2014 prepared by the Management was circulated and deliberated by the IC.

[113] On 14.08.2014, Protasco issued a revised termination letter to PT ASU attentioned to Tjoe Yudhis's real email address and the same was acknowledged by Tjoe Yudhis on 19.08.2014 ("Revised Termination Letter").

[114] Prior the termination events of 4.8.2014 and 14.8.2014, on 16.07.2014, Protasco wrote to PT ASU for the attention of Tjoe Yudhis reminding PT ASU on the expiry date of the fulfilment of the conditions subsequent and enquired on the status of the extension of the PMPA. Chow Siew Meng as Protasco's Corporate Affairs Director at that material time emailed the letter of 16.7.2014 to Augustone Cheong, with the message that 'We seek a written reply from PT ASU on matters raised in the attached letter'.

[115] As the evidence unfolded:

115.1 Augustone the same day emailed Larry and Adrian for instructions on how to respond to the said letter. On the same day, Larry emailed Adrian and Augustone giving his instructions for PT ASU to reply to Protasco's letter dated 16.07.2014 and to state that it was Protasco's own fault for the delay:

"You may add and tune the dates etc, the tone has to beclear - it's Protasco's own fault for their own delay, and ASI shall stay strong to take legal action if new contract is not obtained.

…Reply and slap on the company face as we wish. If wantpaper, this is paper. Else we do as we plan on corporate:

Get my ass into listco Exec Directorship… Key points in the reply. 1st …It is the delay of Protasco in honoring the contract transaction process, and delay of funding to implement Pertamina approved work plan, that all the plan has been delayed until precedence condition are met, and upon met, have to be resubmitted…

2nd. In oil & gas industry, oil contracts are awarded, traded, and financed, usually within days or weeks without much Due Diligence to be made, as most oil field are pre Due Diligence done by Pertamina before awarded. Haseba and Pertamina despite Protasco lack of experience in this industry, have tolerated repeatedly delayed such industry practice, and questioned Pertamina's integrity in awarding oil contract. Such distrust to Pertamina's contract practice is rare and Pertamina has no obligation in giving priority to fasten the new work plan approval.

5th. In Pertamina perspective, the contract is valid until 31 Dec 2014. It is Protasco's own stupidity/self-proclaimed-

commercial- call in setting own deal line in hope of Pertamina or vendor/ASI to fit Protasco's own perceived time line. Legally Pertamina and nor the vendor/ASI, would need to entertain Protasco own deadline.."

115.2 On 17.07.2014, Adrian emailed Augustone Cheong (Enc 555 p 198) as follows:

'Bro,

Reply as per his points mentioned below, but in a lighter tone and business like. We will run through it together when your draft is out."

115.3 PT ASU then issued a letter dated 21.07.2014 to Protasco adopting all the key points given by Larry as set out above. The letter asserted it is Protasco's fault for the delay/failure in the fulfilment of the Conditions Subsequent, in particular the extension of the PMPA. In the said letter, PT ASU according to Protasco for the first time informed Protasco that Pertamina will only grant a maximum of 3 years' extension. PT ASU also requested for a further extension of time until 14.12.2014 to comply with the Conditions Subsequent. PT ASU further stated that they were confident that the Conditions Subsequent can be met before 14.12.2014 particularly with the impending conclusion of the Indonesian Presidential election.

[116] It is pivotal to note:

116.1 Tjoe Yudhis testified he did not sign the letter and has testified that the signature on the said letter is not his;

116.2 Dedi Francis as purported owner of PT ASU was not party to all the email exchanges; he testified that he has delegated Augustone Cheong to take care of PT ASU's letter dated 21.07.2014 and that he has no personal knowledge of what is set out in the said letter;

116.3 Larry during cross-examination on Protasco's letter dated 16.07.2014, at the outset completely denied knowledge of the letter and that the letter was not sent over to him. When confronted with his email on the same day Protasco's letter was received giving instructions on how to reply to the said letter, Larry gave 2 inconsistent answers. First, Larry said that he asked the owner, then the owner asked him to reply, so he gave his comments. He said he was angry when he replied to the letter because according to him he was cheated by DSC. He then said Augustone told him that there was a letter from Protasco and they wanted to terminate. Clearly, Larry was economical with the truth as the letter did not mention anything about termination but rather asked about the status of the compliance of the Conditions Subsequent. Larry then incredulously said that he did not read the letter but only gave his advice to Augustone, and then Augustone and *"*his boss*"* responded to the letter.

116.4 Adrian when cross-examined on his email giving instructions to Augustone Cheong on how to reply to Protasco's letter, distanced himself, that he was not the author of the letter. He also testified:

"Until today, I just want to clarify, whatever, **I don't know why Dato' Larry sent an email to me** which I am not privy of. Whatever that he said to me, until today, I couldn't fully comprehend what he is saying – "

[117] Inescapably, the evidence adduced show that Larry and Adrian either through themselves or through their agents, servants and/or nominees were in fact the real authors of PT ASU's letter dated 21.07.2014.

[118] The charade continued. Adrian then attended the AC meeting on 25.07.2014 as a member of the AC. At this meeting, the AC was informed that the SC and Bursa had made numerous enquiries to the management with regard to the proposed acquisition, in particular whether there was in existence a related party transaction between the directors and the proposed acquisition. Bursa had requested information on the vendor PT ASU and the details of the security provider for the block securities and its relationship with PT ASU. Bursa further

demanded information on when the proposed acquisition was to be completed, the status of the conditions for completion, and whether it was Larry who brought the deal to Protasco. SC had advised that in order to ensure compliance with good corporate governance, Protasco should secure statutory declarations from all directors declaring that they were not connected with the proposed acquisition. To this, Adrian had suggested that Larry and Dato' Mohd Ibrahim bin Mohd Nor should be exempted from executing the statutory declaration since both of them were only appointed after the proposed acquisition was brought into Protasco.

[119] The AC meeting discussed PT ASU's letter dated 21.07.2014. Tan Sri Hadenan and Dato' Hanif had requested that the meeting record their dissatisfaction over the contents of the said letter which was deemed to be untrue and issued in bad faith and demanded that PT ASU retract the said letter. Adrian informed the meeting that the vendor had been actively looking for the extension of the PMPA from Pertamina since the execution of SPA 2. Adrian further informed the meeting that it was very common for Indonesian to put the blame on others and shared the view of the meeting over the contents of the letter. The AC including Adrian as reflected by the minutes resolved to recommend to Protasco's board of directors inter-alia the following: -

to form an IC to conduct the investigation on the parties/companies related to the proposed acquisition and submit the audit report to SC and Bursa;
that all board members execute a statutory declaration declaring their interest, if any, in the proposed oil and gas acquisition;
that management shall provide no further extensions to the proposed acquisition;

to insist that the vendor retract the letter dated 21.07.2014 which the AC was of the view that the said letter was untrue and issued in bad faith.

[120] On account of Larry and Adrian's involvement in the very issuance of PT ASU's letter of 21.07.2014, no clearer picture of deceit or at the very least, dishonesty can be described of Larry and Adrian's conduct behind the scenes and Adrian's conduct at the said AC meeting. The contemporaneous documentary evidence points conclusively that both Larry and Adrian's conduct is completely at odds with the duties expected of them as directors of Protasco. More of this same conduct as concerns PT ASU's letter dated 04.08.2014 to Protasco later.

[121] I should say a few words about dishonesty and on the tort of deceit.

[122] The essence of a tort of deceit was set out in the landmark House of Lords case *William Derry, J. C. Wakefield, M. M. Moore, J. Pethick, And S. J. Wilde Appellants; And Sir Henry William Peek, Baronet Respondent. (1889) 14 App.Cas. 337:*

> "In an action of deceit the plaintiff must prove actual fraud. Fraud is proved when it is shewn that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false."

[123] LP Thean JCA in *Panatron Pte Ltd & Anor v Lee Cheow Lee & Anor* [2001] 3 SLR 405, at [14] explained the tort requires the Plaintiff to prove:

(i) there must be a representation of fact made by words or conduct;

(ii) the representation must be made with the intention that it should be acted upon by the Plaintiff;

(iii) the Plaintiff had acted upon the false statement;

(iv) the Plaintiff suffered damage by so doing; and

(v) the representation must be made with knowledge that it is false; it must be wilfully false, or at least made in the absence of any genuine belief that it is true.

[124] The Court of Appeal in *Victor Cham & Anor v Loh Bee Tuan* [2006] 5 MLJ 359 cited Panatron with approval:

> "[13] Fraudulent misrepresentation comes under the tort of deceit. To succeed in his claim, the respondent in this case need to establish that he had acted in reliance on the fraudulent misrepresentation and that the representation was false. He further needs to establish that the first appellant had made those statements knowingly or recklessly without caring whether it was true or false. And that as a result of reliance on such representation, the respondent had suffered damage. For the elements of the tort of deceit, see *Panatron Pte Ltd v Lee Cheow Lee* [2001] 3 SLR 405."

[125] As for what constitutes dishonesty, this is set out in the judgment of Lord Nicholls in the decision of the Privy Council in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378; [1995] 3 All ER 97; [1995] 3 WLR 64 where he said:

> **"…Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. Further, honesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct. Carelessness is not dishonesty.** Thus **for the most part dishonesty is to be equated with conscious impropriety.**
>
> However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual. …
>
> "All investment involves risk. **Imprudence is not dishonesty**, although **imprudence may be carried recklessly to lengths which call into question the honesty of the person making the decision.** This is especially so if the transaction serves another purpose in which that person has an interest of his own."
>
> "…Ultimately, in most cases, **an honest person should have little difficulty in knowing whether a proposed transaction, or his participation in it, would offend the normally accepted standards of honest conduct."**

[126] It is also useful to refer to s. 17 of the Contracts Act 1950 ("the Act") where it defines 'fraud' as follows:

> "Fraud' includes any of the following acts committed by a party to a contract or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contracts:
>
> (a) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;
>
> (b) the active concealment of a fact by one having knowledge or belief of the fact;
>
> (c) a promise made without any intention of performing it;
>
> (d) any other act fitted to deceive; and
>
> (e) any such act or omission as the law specially declares to be fraudulent."

[127] Case laws suggest that the evidence required to prove an allegation of dishonesty, stands on the same footing as an allegation of fraud, which in most cases, would depend on circumstantial evidence to prove the allegation. In *Ng Pak Cheong v Global Insurance Co Sdn Bhd* [1995] 1 CLJ 223; [1995] 1 MLJ 60; [1994] 3 AMR 2663 (HC), Mohamed Dzaiddin J (as he then was) dealt with the reception of circumstantial evidence in proving fraud. The learned judge said, "...it is not the law of evidence that every step in the allegation of fraud had to be

proved by calling live and admissible evidence nor is it the law that fraud cannot be inferred in the appropriate case. The inference, however, should not be made lightly; **the circumstantial evidence must be so compelling and convincing** that bearing in mind the high standard of proof the inference is nevertheless justified...".

[128] In *CGU Insurance Berhad v Asean Security Paper Mills Sdn Bhd* [2006] 3 MLJ 1; [2006] 2 CLJ 409 (CA) Gopal Sri Ram JCA said,

> "…While mere suspicion is insufficient, it is not the law that a litigant who alleges fraud must unravel each and every act of the person accused of fraud. Like any other fact, fraud may be inferred from circumstantial evidence with the added proviso that **there must be a foundation of evidence and not mere suspicion."** (Emphasis added)

[129] Larry and Adrian's conduct throughout the entire saga will give good clues as to whether they are acting honestly and transparently or in a dishonest fashion. Lord Blackburn in **Brogden v Metropolitan Railway Company (1876–77) LR 2 App Cas 666** *HL(E)* had occasion to say:

> "…is trite law that the thought of man is not triable, for even the devil does not know what the thought of man is...

Board of Directors' Meetings on 25.07.2014 and 04.08.2014

[130] At the board of directors' meeting on 25.07.2014 following the AC meeting, the board (including Larry and Adrian) had accepted the recommendation from the AC set out in paragraph 119 above with no objection. Consequently, all the directors had executed statutory declarations affirming that inter-alia*:*

130.1 PT ASU is not a party related (as defined under the Main Market Listing Requirement) to them or any person connected to them (as defined under CA);

130.2 None of the director of PT ASU or its shareholders (including ultimate shareholders) is a party related (as defined under the Main Market Listing Requirement) to them or any person connected to them (as defined under CA);

130.3 that they are not aware of any matter which require the transaction to be approved by the shareholders of Protasco.

[131] The minutes of the board of directors' meeting on 25.07.2014 reflect that:

131.1 the board had deliberated on PT ASU's letter dated 21.07.2014 and had without exception 'expressed its dissatisfaction over the content of the letter which was deemed to be untrue and issued in bad faith and demanded the Vendor to retract the letter';

131.2 Larry had made the following statements to the board: -

131.2.1 that he was disappointed on the delay in completing the proposed acquisition and the manner the deal was managed;

131.2.2 that had he joined the board earlier, the deal would have been already completed;

131.2.3 that issues relating to oil and gas are national issues in the Republic of Indonesia;

131.2.4 that if it was Pertamina's practice and / or policy to grant a 2 to 3 years contract, and that was good and acceptable to him; that Protasco should notwithstanding the terms of the SPA 2, not make demands that was outside the norm of Pertamina;

131.2.5 that the proposed acquisition was a good deal for Protasco;

131.2.6 that Protasco should be putting in a concerted effort to salvage the acquisition rather than attempting to call it off;

131.2.7 that from Pertamina's perspective, the proposed acquisition was considered completed; and

131.2.8 that Protasco should not be insisting on the completion of the Conditions Subsequent as set out in SPA 2.

[132] Protasco's counsel submitted that Larry's vigorous defence of PT ASU's position was clearly not in good faith and in the best interest of Protasco as Protasco was entitled to terminate SPA 2 for the reasons aforementioned. I agree.

[133] Protasco's counsel further argued that whilst it is the pleaded case of Larry and Adrian that Pertamina could not have granted the extension sought as Protasco had failed to perform its obligations and prevented PT ASU from carrying out its obligation to secure the extension, no evidence was led by Larry and Adrian during the trial to establish their pleaded defence. This point he asserted, was not put to Protasco's directors who gave evidence at the trial. Protasco's counsel suggested not without basis that the reason for this is quite simple:

133.1 Pursuant to SPA 2, Protasco had paid USD5million to PT ASI for the reactivation of the oil wells.

133.2 Adrian unknown to Protasco, had made himself a sole cheque signatory to PT ASI's bank account which received the said USD5million as testified by himself.

133.3 Surely Adrian would be in the best position to inform this Court as to what happened to the USD5million.

[134] Larry when he was questioned during cross-examination that he was aware prior to the 25.7.2014 Board meeting that PT ASU had failed to comply with the terms of SPA 2, he simply responded "I do not know". When Protasco's counsel challenged him that he had however expressed his disappointment in the delay in completing the proposed acquisition and the manner in which the deal was managed, he answered *"*I totally cannot remember. I was very disappointed at that time…I was very shocked. How can they mismanage this project in such a way…*".*

[135] Viewed against what he and Adrian did behind the scene as alluded earlier, both Larry and Adrian's testimony are not honest.

[136] The minutes of meeting minuted that DSC expressed that he and the board had been advised and relied on Adrian who possessed local knowledge in Indonesia in dealing with matters relating to the deal. Adrian did not at the Board meeting rebut this statement. Adrian testified during cross-examination that he did not interject as there was an argument going on between DSC and Larry at the meeting. When challenged that Adrian had in fact the opportunity during the meeting to rebut DSC's statement, his evidence was as follows:

"JUDGE: You have opportunity then to rebut, right. And what's the answer?

OOI: It was not necessary for me to rebut to that statement, My Lady."

[137] The Board minutes reflect that at the end of the meeting, DSC proposed that PT ASU and Acclaim to perfect the charge documents and return the USD5million advance with Adrian being instructed to communicate the same to PT ASU and revert to the board accordingly. In this regard, Adrian testified that he allegedly had a teleconference with Dedi Francis and was told that they were unable to issue any official response to Protasco's request for the perfection of the charge documents and the refund of the Shareholder's Advance due to the festive season in Indonesia. However, Dedi Francis under cross- examination testified that he did not have any conversation with Adrian in respect of Protasco's demand for a refund of USD5million. Dedi Francis testified that he has no knowledge of the USD5million.

[138] At Protasco's board of directors' meeting on 04.08.2014, Adrian informed the board that he was told by PT ASU that they were still pursuing the application for the extension and therefore PT ASU had requested for extension of time for getting the concession extended. He also informed the board that in view of the festive season in Indonesia, the board of PT ASU was not able to meet and to issue any official letter in response to Protasco's request on the refund of USD5million and the perfection of charge document.

[139] In this regard, Prostaco's counsel was not wrong to argue that Adrian had simply lied to Protasco's board and continued his deception as the evidence adduced at trial revealed that there was never any previous need for a board meeting by PT ASU to deliberate on issues pertaining to the transaction since the board of PT ASU consisted of Dedi Francis as Commissioner *(Komisaris)* and Tjoe Yudhis as the President Director. As adverted earlier, Dedi Francis did not receive any call from Adrian, and Tjoe Yudhis was not in the loop.

[140] Larry at this board said meeting stated that he has no objection to the termination of the deal but advised the board not to make any rush decision before PT ASU had responded to the company. Larry proposed for a mutual termination to be done amicably.

[141] The board meeting was then adjourned for Protasco to issue a letter to PT ASU.

[142] Protasco then by letter dated 04.08.2014 issued to PT ASU informed that Protasco is willing to consider an extension of time for PT ASU to fulfil the Conditions Subsequent conditional upon PT ASU agreeing and undertaking to sign, seal and deliver and cause Acclaim to sign, seal and deliver the charge on the secured shares and to procure PT ASI to refund the USD5million advance.

[143] Pausing here, it is to be noted that the charge on the secured shares was in fact a term of SPA 2 which PT ASU had yet to comply as at the date of the letter, i.e. 04.08.2014.

[144] After the board had adjourned and Protasco had issued the letter of 4.8.2014, unbeknownst to the board, Larry emails Augustone Cheong and Lim Chye Guan and copied Adrian Ooi at 3.01pm with instructions on how to respond to Protasco's letter. PT ASU then by way of letter dated 04.08.2014 on the instructions of Larry responded as follows: -

144.1 PT ASU proposed the following 2 options.

(a) The first option is that PT ASU be granted an extension of time till 30.11.2014 in order to meet Clause 3.1(a) of SPA 2 in consideration of PT ASU causing Acclaim to sign, seal and deliver the third- party charge on the PT Invoisi secured shares; OR

(b) The second option is immediate termination of SPA 2. PT ASI's 67% shares to be transferred back to PT ASU or its assignee. PT ASU shall have a call option to buy back the secured PT Inovisi shares at a fixed value of USD27million within 24 months of the termination date. In return, PT ASU shall provide and/or procure Acclaim to charge the secured PT Inovisi shares as third party security for Protasco's benefit. In the event the call option expired without it being exercised, the secured PT Inovisi shares shall be automatically transferred to Protasco;

(c) Protasco shall be provided with a call option exercisable within 24 months of the termination of SPA 2 to buy back PT ASI shares at USD27million in the event PT ASU is unable to obtain a new contract with Pertamina for a further period of 10 years.

144.2 If Option 2 is accepted, PT ASU undertakes to forgo any claims to recover the opportunity losses due to the delay.

[145] Protasco's counsel postulated that PT ASU's letter dated 04.08.2014 issued on the instructions of Larry reveals the breadth of the fraud committed on Protasco by Larry and Adrian. Learned counsel correctly pointed out:

145.1 Under Option 1, Protasco was to grant an extension of time to PT ASU and in return PT ASU is to perform what it was already obligated to do under SPA 2 without any refund of the USD5million advance;

145.2 Under Option 2(a) and (b), Protasco had already paid USD27million towards the transaction but USD22million was for the purchase consideration for PT ASI's shares and USD5million was paid as Shareholder's Advance for the reactivation of the wells. If the Advance has not been spent to reactivate the wells, then the USD5million should be returned to Protasco in any event. It should not have been lumped in with the purchase consideration for PT ASI's shares;

145.3 This letter also debunks Adrian's entire evidence that he did not know what happened to the USD5million because Protasco had control over PT ASI. If indeed Protasco had control of PT ASI and had control over the USD5million, then the burning question is why is PT ASU agreeing to refund the USD5million together with the purchase consideration of USD22million? Clearly Larry and Adrian had control over the USD5million and the same was never spent on any reactivation of the wells as represented;

145.4 Under Option 2, it sets out should Protasco terminate SPA 2 and Protasco transfer back the shares of PT ASI to PT ASU, PT ASU will have a call option to buy back the secured PT Inovisi shares for USD27million within 24 months from the date of termination. Which means, Protasco transfers the PT ASI's shares back to PT ASU, Protasco in the meantime cannot deal with the secured PT Inovisi shares and PT ASU is given a call option which it may or may not exercise to buy back the secured shares within 24 months. And in return, PT ASU will cause Acclaim to charge the secured PT Inovisi shares (which in any event it was obligated to do under SPA 2). In the event the call option expires without exercise, apparently the secured PT Inovisi shares will be automatically transferred to Protasco (which is after 24 months);

145.5 Finally, Protasco upon termination is given a call option exercisable within 24 months to buy back PT ASI's shares at USD27million in the event PT ASU is able to secure the extension to the PMPA with Pertamina. The purchase consideration which Protasco paid was USD22million. The USD5million was paid as an advance for wells reactivation. Under this option, should Protasco exercise the call option, Protasco will be paying a USD5million premium for the purchase PT ASI's shares!

[146] Learned Counsel for Protasco drew this Court's attention to Black's Law Dictionary (9th Edition) which defined a call option as "an option to buy something (esp. securities) at a fixed price even if the market rises; the right to require another to sell." A call option operates as an 'option' but not an obligation. Meaning PT ASU under option 2, has the option if it chooses to exercise it, to buy back the secured PT Inovisi shares for USD27million.

[147] Weighed objectively, these terms could not be said to be in Protasco's interest at all.

[148] Tjoe Yudhis has testified that he did not sign PT ASU's letter dated 04.08.2014 and the signature on the said letter was not his. He has no knowledge of the same.

[149] Larry when cross-examined on his email instructing on the contents of PT ASU's letter dated 04.08.2014, answered inter alia as follows: -

149.1 that "Of course, I have to think on behalf of my friend's company. One side is my friend's oil and gas company and another side is my company";

149.2 that "I was acting on good intention to protect my company Protasco";

149.3 that "This is the responsibility as the investor and also director of Protasco. Also for the responsibility as introducer of the oil and gas company";

149.4 that "I'm the advisor for Chong Ket Pen and also advisor for the oil and gas company".

[150] Protasco's counsel's argument was not unattractive when he postulated that:

150.1 Larry in his own words has admitted that he was acting in breach of his fiduciary duties *inter-alia* in acting in bad faith and not in the best interest of Protasco and had permitted his personal interest to conflict with his duties to Protasco. No disclosure was made by Larry to Protasco that he was instructing PT ASU's response to Protasco's letters. In any event his evidence is at variance with his own testimony: -

(i) Q&A32 where he testifies that *"In any event, CKP cut me off from advising both himself and the 1st Defendant in relation to the PT ASI share deal right after I bought over the Stake in the Plaintiff. Hence I limited my advisory role to purely secretarial and non- deal matters";* and

(ii) Q&A53 where he testifies that *"No, because after I bought over the Stake in the Plaintiff, CKP instructed me not to advice both himself and the 1st Defendant in relation to the Plaintiff's proposed share acquisition in PT ASI…I did not advise the 1st Defendant on both SPA 1 and SPA 2."*

150.2 Consel therefore submits that Larry was clearly willing to tailor his answers to suit any given situation.

[151] As for Adrian, under cross-examination he distanced himself by saying he was not the author of the letter, but he was unsure as he may or may not have contributed to the contents of the letter.

[152] Dedi Francis confirmed under cross-examination that there were no discussions with him on the contents prior to the issuance of the said letter dated 04.08.2014.

[153] Protasco's board found that the proposal by PT ASU was not acceptable. The minutes reflect that Adrian attempted to stall the termination by advising Management to seek advice from an external auditor on the financial impact to Protasco following termination.

[154] Protasco's board at the said meeting resolved to terminate the deal with PT ASU and management was instructed to send the termination letter to PT ASU accordingly. It bears mention that Larry and Adrian were party to the decision of the board to terminate the deal with PT ASU.

[155] Protasco by letter dated 04.08.2014 informed PT ASU that the proposal provided in PT ASU's letter dated 04.08.2014 was not acceptable. Pursuant to the terms of SPA 2, Protasco terminated SPA 2 with immediate effect and demanded a refund of the purchase

consideration of USD22million within 14 days from the date of issuance of the said notice of

termination. Protasco's letter dated 04.08.2014 was emailed by Chow Siew Meng to Tjoe Yudhis's email address on the same day at 7.38pm.

[156] On the same day at 11.15pm, unbeknownst to Protasco, Larry emailed Adrian setting out his instructions on PT ASU's response to the said notice of termination. Adrian, 10 minutes later at 11.25pm emailed Augustone Cheong and instructs him to prepare a response to Protasco stating that the termination between the two parties can only be based on the exact conditions stipulated under Option 2 of PT ASU's letter dated 04.08.2014. Adrian instructed that PT ASU is not acceptable to unilateral termination as set out in Protasco's letter.

[157] Premised on Larry and Adrian's instructions, PT ASU by letter dated 05.08.2014 to Protasco rejected any unilateral termination by Protasco and informed that they were only able to accept a mutual termination based on the exact terms as proposed under Option 2 of PT ASU's letter dated 04.08.2014.

[158] It must be mentioned that Dedi Francis in his evidence in chief states that he had instructed Augustone Cheong to prepare the letter dated 05.08.2014 but the email exchange as alluded above show that it was Larry and Adrian who instructed Augustone Cheong. Dedi Francis was not even in the email loop. When queried about these email exchange, Larry simply avoided answering the question whilst Adrian maintained that he was merely communicating the decision of PT ASU to Augustone Cheong which plainly conflicted with Dedi Francis's evidence that he was the one who instructed Augustone Cheong to issue the said letter.

[159] Tjoe Yudhis testified that he did not sign PT ASU's letter dated 05.08.2014 and the signature on the said letter was not his. He has no knowledge of the same.

[160] Protasco posits that the actions of Larry and Adrian as detailed above had denied and deprived Protasco of its rights to recover the purchase consideration and the Shareholder's Advance paid pursuant to SPA 1 and SPA 2; and that these acts alone committed by Larry and Adrian are sufficient by themselves to make both of them liable in respect of the USD27million paid by Protasco towards the transaction.

[161] Protasco had by letter dated 14.08.2014 issued a revised notice of termination to PT ASU demanding for a return of a total sum of USD27million and setting out the Conditions Subsequent that were not fulfilled by PT ASU.

[162] PT ASU did not respond to Protasco's revised termination letter dated 14.08.2014. In this regard,

> 162.1 Despite Dedi Francis's testimony in relation to PT ASU's earlier letters dated 09.05.2013, 25.09.2013, 10.01.2014, 21.07.2014, 04.08.2014 and 05.08.2014, he did not seem to be able to remember Protasco's said letter dated 14.08.2014 when shown the same under cross- examination as he said it was addressed to Tjoe Yudhis and not him. But Protasco's previous letters 08.05.2013, 31.07.2013, 30.09.2013, 23.12.2013, 16.07.2014, 24.07.2014, 04.08.2014, 05.08.2014, 14.08.2014, to PT ASU were also addressed to Tjoe Yudhis!
>
> 162.2 Dedi Francis also appeared at sea on the sum demanded by Protasco. He testified to his knowledge, only the purchase consideration of USD22mililion was demanded by Protasco and not the USD5million Shareholder's Advance. He was not able to shed any light on the utilization and the whereabouts of the USD5million apart from insisting that it was Protasco's duty to reactive the oil wells.

Larry and Adrian's Further Actions that were not in the interest of Protasco

[163] Clause 3.6 of SPA 2 provides that should PT ASU fail to refund the purchase consideration within 14 days from the date of issuance of the notice of termination, Protasco is entitled to deal with the secured PT Inovisi shares at its absolute discretion by requesting the broker to dispose the secured shares and the sales proceed to be released and paid to Protasco as refund of the purchase price.

[164] Protasco by letter dated 29.08.2014 to PT Brent effected the Instruction Letter on 29.08.2014 which was purportedly signed by Lim Sue Fern of Acclaim to cancel the Blocked Inovisi Shares and to sell the said shares and to remit the proceeds to Protasco. This was exercised in accordance with Protasco's right pursuant to Clause 3.6(ii) of SPA 2.

[165] Protaso's management led by the late Ho Chun Fuat had visited PT Brent's office on 29.08.2014 to attempt to effect the sale of the Blocked Inovisi Shares pursuant to the duly executed Instruction Letter which was signed by Acclaim and Protasco. However, Protasco's management was unable to reach one Mr Riky Chainadi of PT Brent despite numerous attempts. The management could only leave a photocopy of the Instruction Letter at PT Brent's office on 29.08.2014. Protasco did not receive any response from PT Brent on the Instruction Letter dated 29.08.2014.

[166] Protaso also attempted to notify Acclaim on its intention to exercise its rights to deal with the blocked PT Inovisi secured shares ("Notice to Acclaim"). However, the Notice to Acclaim was returned by the courier service company as the location of Acclaim was unknown.

[167] Protasco then appointed solicitors in Jakarta, Messrs Johnny Situwanda & Partners to serve the original copy of the Instruction Letter to PT Brent and to follow up with PT Brent with regard to the dealing of the blocked securities in the form of PT Inovisi shares.

[168] Mr Johnny Situwanda, Protasco's appointed solicitors in Jakarta, testified at the trial [PW-9] that he had on 22.09.2014 attended to the office of PT Brent and met with the director of PT Brent, one Mr Riky Chaniadi.

168.1 Mr Johnny Situwanda handed over a copy of the Instruction Letter to Mr Riky Chaniadi and requested him to sign and acknowledge the receipt of the said letter from Protasco to PT Brent for the sale of the 297,142,900 shares in PT Inovisi dated 29.08.2014 and the Instruction Letter for Cancellation of Blocking of Shares in PT Inovisi dated 29.08.2014.

168.2 Mr Riky Chaniadi was willing to accept the letter from Protasco dated 29.08.2014 and acknowledged receipt of the same by signing on the said letter. However, Mr Riky Chaniadi refused to sign the Instruction Letter for Cancellation of Blocking of Shares in PT Inovisi dated 29.08.2014.

168.3 Mr Riky Chaniadi revealed his email communications on 09.09.2014 with Lim Sue Fern who purportedly had requested PT Brent not to effect the sale on the Blocked Inovisi Shares as Lim Sue Fern had purportedly claimed that she did not sign any Instruction Letter and that the signature on the said Instruction Letter was not hers.

[169] Protasco's unsuccessful attempt through Johnny Situwanda to get Mr Riky Chaniadi to testify at this trial, that the Financial Services Authority (OJK) had on 13.02.2018 revoked the business license of PT Brent; that PT Brent was declared bankrupt on 22.03.2021 pursuant to a decision of the Central Jakarta Commercial Court; and PT Brent is no longer listed as a member of the Indonesia Stock Exchange (IDX) has been adverted to earlier.

[170] Counsel for Larry and Adrian had suggested during the cross- examination of Mr Johnny

Situwanda that the duly executed Instruction Letter provides that once the said letter is signed by Acclaim (Lim Sue Fern) and counter-signed by Protasco (DSC) constitutes good instruction to PT Brent to cancel the blocking and effect the sale of the Blocked Inovisi Shares without further reference to Acclaim. This contention as was pointed out by Protasco's counsel ignores: (i) the fact that according to Mr Riky Chaniadi, Lim Sue Fern had expressly denied executing the Instruction Letter in the first place; and (ii) Messrs Risman Hutubarat & Rekan who provided the legal opinion on the validity of the Instruction Letter had opined that the Instruction Letter would be good instructions to PT Brent for Protasco to deal with the shares provided it is signed by Acclaim. The dispute by Acclaim of not having executed the Instruction Letter in the first place drew the spotlight on the validity and enforceability of the said Instruction Letter that was procured by Larry and Adrian.

[171] Lim Sue Fern was at all material times a sole director of Acclaim who was the 3rd party that provided the securities in the form of PT Inovisi shares for the transaction between Protasco and PT ASU. Lim Sue Fern is the wife of one, See Poh Yee (also known as "Andrew See") who is a long time partner and associate of Larry. Protasco's attempt to serve the subpoena and secure the attendance of Lim Sue Fern of Acclaim to testify at this trial were unsuccessful.

[172] The evidence adduced show that again behind the scenes, Larry and Adrian acted to prevent Protasco from selling the secured PT Inovisi shares:

> 172.1 Augustone Cheong on 19.09.2014 at 10.37am emailed Larry and copied Adrian, Lim Chye Guan, On Yong Chieh and Aida. In the said email, Augustone Cheong attached a draft PT ASU's response letter dated 19.09.2014 that was requested by Larry. The said letter drafted on Larry's instructions expressly states as follows:
>
> > "We are writing to reiterate that **we reject any unilateral termination** from Protasco and reserve ourrights to take further action, including legal redress to protect our interest."
> >
> > **"**We noted that you have made attempts to sell theBlocked Shares provided by the Security Provider, Acclaim Investments Ltd. You have no right to sellthe Blocked Shares **and** we shall continue to take steps to prevent such sale and/or to procure the Security Provider to do so, in order to protect our interest."

[173] When cross-examined on the draft letter that was prepared based on Larry's instructions as suggested in Augustone Cheong's email dated 19.09.2014, Larry claimed that the email was apparently sent to him for his comments after Augustone Cheong had purportedly discussed with his boss presumably the said Dedi Francis. According to Larry, he was not able to give his comments to him. Larry evaded answering by simply stating that "I cannot answer the question because I do not know about the details."

[174] Plainly, Larry was not truthful as Larry did in fact respond in his email to Augustone Cheong sent on the same day, 19.09.2014 at 5pm which was copied to Adrian Ooi, Lim Chye Guan and Aida. Larry expressly instructed Augustone Cheong as follows:

> "Hi Augus,
>
> **As per my points given**, I need this letter to be "peaceful", seeking proper departure options, while due to force major which DIRECT RELATES to ASU being all the while fulfilled allagreement terms". Means indirectly hinted P is the one that break agreement putting up public information defame ASU of"not fulfilling precedence/terms".
>
> ….

ASU is not going to "transfer to P's name the 3rd party charged asset, means stays is it in 3rd party charges. ElseDSC will do like he's doing now – on his own decision, bang the wall selling shares.

Alternatively if no answer from P in a peaceful discharge, ASUshall not seek *3rd party charges to provide such security.

Highlight that "P already OWNED the ASI shares (which is"legally owned the asset"), there is no need for 3rd party charge. Which means this is only ASU's generous courtesy to offer P good discharge**.**

And, word it as ASI shares which "belongs to P already", if wanted to find new investor, ASU shall provide assistance.

… Meaning:

> Either option 1 above, or option 2 above, shows that **ASU is being "KIND AND GENEROUS" to help P flip and contain/retain as much customers as possible**, **and highlight P actually "owned ASI shares already, dealcompleted**, accounting wise has no problem to record as intrinsic/goodwill value/asset".

…

Tune again and standby the weapon – wait for either ME or Adrian's instruction to strike. **We do not send to P, just wait until P's BOD meeting is done next week**. Anytime nextweek onward we will send this.

… Conclusion:

> Looking at P's self-closed actions, it's rude and reckless without even negotiate. **We need these weapons ready ASAP by coming Monday, before P's BOD meeting next week. Anytime, if needed, may need to use**.

Send both drafts to me & Adrian these 2 days.

TQ. Lry"

[175] In the same email, Larry attached a draft press release to Augustone Cheong for the issuance by PT ASU. Larry in his email explained that the press release is meant to *inter-alia* explain that:

> "3. **And stress that ASU being an experience industry player, ALREADY SPENT all their money to 2 new projects**, and in the midth of raising new funding of just US$5mil likely from Australia stock exchange (**above will slap on P's face of seeking cash-back from ASU**, and ASU being an exploration company, buy/sell oil block is "industry norm")"

[176] Protasco's counsel pointed out that the draft press release that was attached by Larry to Augustone Cheong contained several false statements in relation to the oil and gas transaction between PT ASU and Protasco. They include inter-alia the following:

176.1 "PT ASU being new to market is ran by reputable and experience retirees in the industry";

176.2 "We are unaware of sudden request by Malaysia group to ask for early issuance of new contract";

176.3 "we could not remember who introduce us to Malaysia group";

176.4 "During Aldilfiltri, we were told the Malaysia group has some complication in giving such letter";

176.5 “We do not want to take opportunity to simply terminate our agreement, we try to hold on our guarantor and awaits malaysia group reply”;

176.6 “At least we fulfill as per agreement by giving Malaysia group time to slowly digest.”;

176.7 “we were advised to terminate the SPA as Pertamina latest changes may alter SPA terms even though deem force majeure due to policy changes risk, we still awaits amicable reply from Malaysia group”.

[177] Confronted with such clear evidence of his instructions to Augustone Cheong in relation to the letter to be issued by PT ASU and the press release, Larry evaded providing any explanation to the court on the contents of his email and press release and maintained his unconvincing position that he was merely providing general comments.

[178] It is not difficult to conclude from PT ASU’s letter which was drafted upon Larry’s instructions and Larry’s own email on 19.09.2014, that Larry and Adrian were aware that Protasco was attempting at the material time to unblock the secured PT Inovisi shares and to sell off the same. The PT ASU’s draft letter and email further reveal that Larry and Adrian were actively at the material time preventing Protasco from doing the same.

Board of Directors’ Meeting on 22.09.2014

[179] The IC that was set up by Protasco to investigate the transaction presented its findings of the investigation and its investigation reports to Protasco’s board of director meeting on 22.09.2014. The board at this meeting resolved to proceed with legal action against PT ASU, Larry and Adrian to recover the purchase price of USD22million and the Shareholder’s Advance of USD5million.

[180] Larry’s own email on 19.09.2014 shows that he was anticipating Protasco’s directors meeting on 22.09.2014, and both he and Adrian had expected that Protasco were going to take legal action against the both of them in relation to the total sum of USD27milion paid towards the oil and gas acquisition and instructed Augustone Cheong to prepare PT ASU’s letter and press release to be used as a response to outcome of the Board meeting. Their contending at trial that the board meeting was conducted despite their absence as they were away on a family vacation and that they were belatedly informed of the outcome of the Board meeting do not add to their defence at all.

The IC Investigation

[181] As alluded earlier at paragraph 115 and 125, the IC was formed by the board on 25.07.2014 after the board accepted the recommendation of the AC to form an investigation committee to investigate the parties related to the proposed acquisition. It bears repetition that Adrian was a party to the decision of the AC and both Larry and Adrian were members of the board that agreed to form the IC. As shown above, the premise of the IC investigation was to address the queries made by the Securities Commission and Bursa which are listed out in the AC minutes itself which include *inter-alia*:

181.1 Whether the proposed acquisition has been completed. If not, when will it be expected to complete as it was coming to two years;

181.2 What are the status of the conditions that had yet to be met for completion? What will happen if the Proposed Acquisition would be called off?

181.3 Who is Acclaim Investments Ltd that provided the security to Protasco for the Acquisition and why?

181.4 Will the oil concession be extended?

181.5 Did Tey Por Yee bring in the deal to Protasco?

181.6 What is Tey Por Yee's position/role in Protasco?

181.7 Why was the revised purchase consideration being reduced from the original USD55million?

[182] The IC found inter alia the following:

(i) Larry had brought the proposal for this transaction to Protasco through his vehicle Global Capital Limited;

(ii) The President Director of PT ASU, Tjoe Yudhis , had acted at all times as a nominee of Larry and Adrian ; he had taken instructions from them in respect of all matters pertaining to PT ASU; Tjoe Yudhis had only signed SPA 1 and SPA 2 in relation to the proposed acquisition. The other correspondences to Protasco by PT ASU purportedly signed by Tjoe Yudhis did not in actual fact bear his signature

(iii) TjoeYudhis had not received any of Protasco's letters during the negotiations leading up to the execution of SPA1 and SPA2; the purported email address of the Tjoe Yudhis which was used by management to correspond with him was not his real email address and hence never reached him;

(iv) Larry and Adrian were and remain the effective beneficial owners of PT ASU, PT Inovisi, Acclaim Investment Limited etc. Notwithstanding this, they had not disclosed their personal interests in PT ASI to Protasco as required by law;

(v) Tjoe Yudhis had not received the letters issued or transmitted to him vide email because the email address given was the same as the address for another company known as Nextnation Communication Berhad where Larry and Adrian are the substantial shareholders;

(vi) Larry and Adrian or through their agents had authored and forged the signatures of Tjoe Yudhis on the PT ASU letters issued in reply to Protasco's letters;

(vii) Lim Sue Fern the director of Acclaim, as the third party that had provided security for the repayment of the deposit of RM50 million who signed the Letter of Instruction is the spouse of Andrew See Poh Yee. See is a director and shareholder in 24 companies linked to Larry;

(viii) See, Larry and Adrian are the partners of Global Capital Limited that had first introduced the transaction to Protasco;

(ix) PT ASU, PT ASI, Acclaim, PT Green Pine and PT Goldchild and PT Inovisi are owned, related or the alter- ego of Larry and Adrian.

[183] Larry and Adrian's position is that the entire IC investigation was a sham, with no proper investigation, no minutes of meetings nor inquiry being conducted by the IC.

Larry and Adrian's web of companies

[184] I next deal with the companies PT ASU, PT ASI, Acclaim, PT Inovisi, and PT Green Pine said to be controlled or beneficially owned by Larry and Adrian.

[185] Pursuant to s .122A of Companies Act 1965 (s. 197 CA 2016), a body corporate is deemed to be connected with a director if it, or its directors, are accustomed to act in accordance with the directions, instructions or wishes of that director or that director and persons connected with him, are entitled to exercise, or control the exercise of, not less than fifteen percent of the votes attached to voting shares in the body corporate.

PT ASU and PT ASI

Tjoe Yudhis acted at all material times as a nominee of Larry Tey and Adrian Ooi

[186] Tjoe Yudhis testified that:

186.1 he was appointed as the President Director of PT ASU by Larry;

186.2 Larry and Adrian were his bosses in respect of PT ASU and other entities known as PT Goldchild Indonesia Sukes ("PT Goldchild");

186.3 Larry and Adrian were to his knowledge, owners of PT ASU, PT ASI, PT Goldchild, PT Inovisi, PT Green Pine and PT Nusantara Rising Rich ("PT NRR");

186.4 he takes instructions from Larry and/or Adrian on all matters concerning PT ASU and PT Goldchild;

186.5 he was instructed by Larry and/or Adrian to sign SPA 1, SPA 2 and the Power of Attorney;

186.6 he was also instructed by one Lim Chye Guan, an employee of Larry and Adrian to sign documents in relation to the opening of the bank account on behalf of PT ASU with CIMB Bank Berhad's Plaza Damansara branch;

186.7 he was not involved in any negotiations leading to the signing of SPA 1 and SPA 2;

186.8 he was not kept informed or briefed on matters related to SPA 1 and SPA 2;

186.9 he did not sign the letters dated 09.05.2013, 25.09.2013 and 10.01.2014 issued by PT ASU. He did not issue these letters and the signatures contained therein are not his;

186.10 he did not sign the Supplement Sale and Purchase Agreement dated 28.06.2013;

186.11 he did not open any bank account on behalf of PT ASI.

[187] Tjoe Yudhis had affirmed statutory declarations on 07.08.2014, 18.08.2014, 29.08.2014 and 26.09.2014 in Kuala Lumpur alluding to the matters set out in the preceding paragraph. As proof that Tjoe Yudhis had at all times taken instructions from Larry and Adrian with regards to PT ASU, he exhibited email exchanges in his statutory declaration dated 26.09.2014 (Exhibit P75).

[188] Tjoe Yudhis's testimony as set out above is consistent with and is corroborated by the other evidence adduced at trial.

Tjoe Yudhis's rol e in PT ASU

[189] Tjoe Yudhis was appointed as Chief Executive Officer (CEO) of PT Fantasi Artis Media Entertainment ("FAME") by Larry. Tjoe Yudhis was requested to sign a Confidentiality Agreement in respect of his appointment as CEO of FAME.

[190] Sometime in the year 2012, Tjoe Yudhis was approached by Larry and offered a position to source for business opportunity and project in the oil and gas industry for Larry. This was due to Tjoe Yudhis's purported contacts within the Indonesian administration.

[191] On the instructions of Larry, Tjoe Yudhis was instructed to sign a Consultancy & Service Agreement which purportedly appointed him as a consultant to help secure business in Indonesia. The said agreement was emailed to Tjoe Yudhis with Larry's instructions for him to execute the same. The said Consultancy & Service Agreement was executed on 27.06.2012 between Tjoe Yudhis as the Consultant and PT Goldchild represented by its Managing Partner, Tey Por Yee (Larry) and Partner, Ooi Kock Aun (Adrian).

[192] The said Consultancy & Service Agreement expressly provides that Tjoe Yudhis (Consultant) 'shall report directly to the Client's top management including Managing Partner (Advisor) Larry Tey, followed by Partner (Group CEO) Adrian Ooi, or any Client's assigned reporting person subject to project needs, on a regular basis. Day to day project progress reporting, Buyer or Seller or Suppliers or Consultant contacts shall be directly to Adrian Ooi on timely basis, project filtering and selecting process shall be discussed with Larry OR Adrian Ooi directly'.

[193] In the email exchange between Tjoe Yudhis, Jason Minos who has a Global Cap email domain, Suriany who also has a Global Cap email domain and Larry using a risingrich email domain on 06.09.2012, which is the same day PT ASU was incorporated, reveals that Tjoe Yudhis was instructed to execute several documents in relation to incorporation of an entity called Whisperdusk Finance Corporation which was purportedly incorporated for purposes of being involved in the oil and gas industry. The documents Tjoe Yudhis was asked to sign included his consent to act as director and resolution approving the change of name and authorized capital.

[194] Tjoe Yudhis had expressed hesitancy in executing the documents as he was unaware of what the documents were related to until being instructed to do so by Larry in his email sent on 06.09.2012 at 5.59pm. Larry explains to him that the company in question was for an oil and gas project and once the project was secured, it was to be transferred to a listed company and Tjoe Yudhis will be discharged. Larry further informed him that he will forward his data to Dedi Francis to process. Prior to Larry's instructions, Tjoe Yudhis had expressed thanks to Larry and referred to him as *'THE CEO of the group'.*

[195] PT ASU was incorporated under the laws of Indonesia on 06.09.2012. As of 06.09.2012, Dedi Francis was the Commissioner *(Komisaris)* and Tjoe Yudhis was the President Director of PT ASU. Dedi Francis holds 1,249,999,999 shares of Rupiah 100 each in paid up capital of PT ASU whereas Tjoe Yudhis holds 1 share. As of 28.12.2012, PT ASU holds 99.99% of the equity interest in PT ASI. As of 24.03.2014, the Director of PT ASI is one, Edward Farolan.

[196] On 07.09.2012, Larry writes to Dedi Francis and instructs him that Tjoe Yudhis's salary will be paid from PT NRR. Dedi Francis was instructed to transfer Rupiah 10million monthly to

Tjoe Yudhis. Larry further instructed Dedi Francis that Tjoe Yudhis will be handling '2 project nominee now, 1 in batu 1 in oil field bidding'. Larry had also instructed Dedi Francis to let Tjoe Yudhis use the office at Bellagio Jakarta (CBD32/En.555/p170).

[197] The abovementioned email conversation does not suggest as contended by Larry in his evidence in chief that the email was sent in relation to the advisory services that he was providing to PT ASU. The drift of the email were clearly in the form of instructions. Larry's assertion that this email sent in September 2012 were advisory services he provided to PT ASU is in conflict with his s. 112 statement given to the police dated 27.01.2015 where Larry said he only knew about PT ASU after the agreement between PT ASU and Protasco was executed. Larry made no mention at all in his s. 112 statement to the police about his purported advisory role as a consultant to Dedi Francis and his prior relationship with PT ASU and PT ASI which were raised at the trial.

[198] In a later email on 25.10.2012, Larry informed Tjoe Yudhis that his KTP (Indonesian Identity Card) had expired. Tjoe Yudhis was instructed to email an updated copy to Larry. Tjoe Yudhis was reminded by Larry Tey that "We are holding new migas company shares under 2 persons name – you and Dedi. Focus."

[199] On 26.10.2012, Tjoe Yudhis was also instructed by Larry Tey to provide information requested for the oil and gas project (migas) as the project needed the profile of "real person" and not anyone "on the street". In response to Tjoe Yudhis's email, Larry Tey had on 27.10.2012 informed Tjoe Yudhis "No dangerous", Tjoe Yudhis is "holding my $" in the companies just like how corporate did in which Larry named Adrian and Dedi Francis. According to Larry, he had only appointed 10 people as nominees in corporate.

[200] It can irresistibly inferred that Larry's emails to Tjoe Yudhis and Dedi Francis were in the form of instructions and not advice and that they treat Larry as a superior in the organization.

[201] Tjoe Yudhis testified that he was instructed by Larry and Adrian to execute SPA 1, that he flew down to Kuala Lumpur to execute SPA 1 at the end of November 2012 and he subsequently flew down to Kuala Lumpur again to open a bank account on behalf of PT ASU.

[202] Although SPA 1 is dated 28.12.2012, DSC testified that in order to show good faith to Larry Tey as per his request, DSC had signed SPA 1 in advance before 28.12.2012. This is corroborated by the email sent by Messrs Teh & Lee on 29.11.2012 where the solicitors of Protasco states that DSC intends to sign the SPA 1 the next day at 11am.

[203] The email exchange from 17.04.2013 to 23.04.2013 and 10.06.2013 between Adrian, Deny, Augustone Cheong, Larry and Tjoe Yudhis, reveals that Tjoe Yudhis and Dedi Francis were not involved in giving instructions on the due diligence involving PT ASU undertaken under SPA 1. The instructions emanated from Adrian.

[204] Tjoe Yudhis's position as a nominee is manifestly evident in the email exchange between Deny, Larry, Lauren Gunawan and Tjoe Yudhis on 04.04.2013:

> 204.1 Tjoe Yudhis informed Deny that Larry told him that before he signs any documents, those documents should be copied to Larry.

204.2 Deny responded to Tjoe Yudhis on the same day informing him that the group never intends to harm nominees ('grup tidak pernah bermaksud membahayakan nominee').

204.3 Deny further informs Tjoe Yudhis that there are 2 principles, firstly, group need nominees and nominees need group ('grup butuh nominee dan nominee butuh grup') and secondly, group trust nominees and nominees trust the group ('grup percaya nominee dan nominee percaya grup').

204.4 It is manifestly obvious from this email exchange that Tjoe Yudhis is a nominee for Larry and Adrian and not Dedi Francis as Dedi Francis was not even in the email loop.

[205] The email exchanges between 29.07.2013 and 30.07.2013 between Adrian, Larry, Deny and Tjoe Yudhis, shows that Tjoe Yudhis had emailed Larry and Adrian to request their consent for him to execute a power of attorney to Messrs Makarim & Taira granting them authority to check on court cases involving PT ASU. As is obvious in the email exchange, Adrian on 30.07.2013 at 4.32am instructed Tjoe Yudhis that it was "Ok to proceed".

[206] Tjoe Yudhis's testimony that he did not sign the letters dated 09.05.2013, 25.09.2013, 10.01.2014, 21.07.2014, 04.08.2014 and 05.08.2014 issued by PT ASU and did not sign the Supplement Sale and Purchase Agreement dated 28.06.2013 is corroborated by the evidence given by the Forensic Document Examiner, Lim Yok Chaw [PW-4] who had opined that the signature in the aforesaid documents is of different authorship from the specimen signatures of Tjoe Yudhis.

[207] On 30.10.2013, Larry instructed Tjoe Yudhis via email sent at 11.34am to "Come office before 12 noon, finish up this part today. Project is waiting."

[208] On 23.04.2013, Deny (PT Inovisi's staff) had emailed Tjoe Yudhis, copied to Larry and Adrian, to inform Tjoe Yudhis that his signature was needed for the execution of office lease agreement of PT ASI and PT PIL. The email exchange between Qimie (also known as Faizatul Ikmi binti Abdul Razak) of Global Cap and other personnel of Global Cap on 18.12.2013 reveals that flight arrangements were made for Tjoe Yudhis to fly down to Kuala Lumpur on Adrian's instructions in relation to the opening of PT ASU's bank account in Kuala Lumpur. Qimie is an employee within the Nexgram group of companies. According to Aida (PW10) who works as a legal officer in the Nexgram group together with Qimie, Qimie reports to Larry.

[209] Tjoe Yudhis apart from being instructed to execute the power of attorney, SPA 1 and SPA 2, was not involved at all at any stage of the transaction between Protasco and PT ASU. He was not involved in the correspondence between PT ASU and Protasco leading up to termination of SPA 2 and thereafter. Tjoe Yudhis just like Dedi Francis was not in the email loop between Larry Tey, Adrian Ooi and Augustone Cheong in drafting PT ASU's response letters dated 21.07.2014, 04.08.2014 and 05.08.2014. Tjoe Yudhis testified he only became aware of the said PT ASU's letters dated 21.07.2014, 04.08.2014 and 05.08.2014 when he came down to Kuala Lumpur to meet with Protasco's personnel on 07.08.2014.

[210] After Tjoe Yudhis's visit to Kuala Lumpur and having received the revised termination letter dated 14.08.2014 from Protasco, Tjoe Yudhis had called Larry to inform him that he had in his possession Protasco's termination letter. Larry had instructed Tjoe Yudhis to give the said letter to Adrian for Adrian to handle the rest of the matter. Tjoe Yudhis then emailed the letter to Adrian via email on 24.08.2014. In the said email, Tjoe Yudhis stated clearly that he has no idea

and no information of what has happened between PT ASU and Protasco. As pointed out by Protasco's counsel, Adrian's response is telling when he states, "We are expecting this letter already".

[211] At a meeting on 09.10.2014 held at Ritz Carlton Hotel Jakarta, Indonesia between Larry, Adrian, Dedi Francis, Tjoe Yudhis, Hendra Setiawan (Tjoe Yudhis's brother-in-law) and 2 of Hendra's friends who were also lawyers. The following transpired.

211.1 Adrian told Tjoe Yudhis:

(i) that he is only a nominee director and no way they (means Protasco) can touch him personally. Adrian further told Tjoe Yudhis that both he and Larry were friends with Tjoe Yudhis for so long and will not put Tjoe Yudhis in a position that will jeopardise him.

(ii) that he is supposed to be a side player but has become a main player by signing all the statutory declarations in Kuala Lumpur.

211.2 Adrian and Larry wanted Tjoe Yudhis to unwind what he had declared and then he can come down as a director. Larry also said that they will put a very strong man as a director to replace Tjoe Yudhis.

211.3 Larry when asked by Hendra Setiawan as to who he was, he replied that he is Tjoe Yudhis's "boss".

211.4 Hendra Setiawan had raised the issue, whether Tjoe Yudhis's signature had been forged in company documentation. Larry's response was that it did not matter as Tjoe Yudhis was just a nominee in the company, like an actor who signed up who should just follow the scripts.

211.5 Larry informed Tjoe Yudhis that if he wanted to resign as a nominee, he could go ahead and Larry will get somebody much smarter .

211.6 Larry further told Tjoe Yudhis that Tjoe Yudhis had a script to follow, and he had already agreed to everything and because Tjoe Yudhis was not a "good actor", Larry will find another "actor" to replace Tjoe Yudhis. Adrian also said that they do not simply put someone from the street. The reason why they put Tjoe Yudhis is because they trust him.

211.7 When Hendra Setiawan raised the issue as to whether Tjoe Yudhis's signature had been forged, Larry said that all the bosses in Indonesia use nominees.

211.8 Tjoe Yudhis told Larry and Adrian that he just wanted to resign from all the companies including Anglo Slavic Petrogas, PT ASU and Green Pine. Tjoe Yudhis reminded Larry and Adrian that they still owe him Rupiah 200million or 250million as reimbursement for his expenses incurred for work done by Tjoe Yudhis as director of Anglo Slavic Petrogas.

[212] It is pertinent to observe that although Dedi Francis was present at the meeting, Tjoe Yudhis was requesting for reimbursement for expenses incurred as a director of Anglo Slavic Petrogas from Larry and Adrian, but not from Dedi Francis.

[213] After the meeting on 09.10.2014, Larry informed Tjoe Yudhis that he would like to meet Tjoe Yudhis personally. Both Larry and Tjoe Yudhis then met on 15.10.2014 at the JW Marriott Hotel Jakarta, Indonesia. The following transpired:

213.1 At the said meeting, Larry explained to Tjoe Yudhis for the first time his version of events leading up to the transaction between PT ASU and Protasco. Larry's version of events to Tjoe Yudhis shows that Larry was desirous to get this deal completed as quickly as possible and he felt cheated by DSC for stalling the deal.

213.2 Larry informed Tjoe Yudhis that he put Tjoe Yudhis's name as a director and nominee for his companies. Larry also

referred to his email to Dedi Francis on 07.09.2012 which was copied to Tjoe Yudhis where Dedi Francis was instructed by Larry to pay Tjoe Yudhis a consultancy fee of Rupiah 10million for handling 2 projects as a nominee.

213.3 Larry further informed Tjoe Yudhis that Tjoe Yudhis is just a nominee and as a nominee, the company can always get even a driver *(supir)* to sign documents for Tjoe Yudhis.

213.4 Larry also informed Tjoe Yudhis that once Tjoe Yudhis became a nominee, he already surrendered his rights and being a nominee is ok for other people to sign on his behalf as even an office boy and driver (supir) can sign for Tjoe Yudhis.

213.5 To Tjoe Yudhis's question on why Larry gave orders to fake his signature, Larry did not deny the same but instead tried to explain to Tjoe Yudhis why his signature was forged. Larry informed Tjoe Yudhis that he was always not contactable and "because no time".

213.6 When Larry was asked by Tjoe Yudhis as to why Larry did not tell Tjoe Yudhis anything about the transaction between Protasco and PT ASU, Larry said because Tjoe Yudhis never read what he signed. Larry further said that because Tjoe Yudhis is just a nominee, Tjoe Yudhis is not supposed to know every detail as it is secret. When asked by Tjoe Yudhis as to why he forged his signature, Larry tried to justify that he can do that because Tjoe Yudhis is just a nominee.

213.7 Larry said that he was the one who asked Tjoe Yudhis to run FAME.

213.8 Larry also said he will instruct Dedi Francis to be present at the time when Tjoe Yudhis will revoke the statutory declaration the following day. Counsel for Protasco was quick to point out that by this statement made by Larry Tey, it is clear that Dedi Francis act under Larry's direction and/or instruction.

[214] The audio recordings are consonant with the fact that Tjoe Yudhis is a mere nominee of Laryy and Adrian. When cross-examined on the transcript of the meetings on 09.10.2014 and 15.10.2014, Larry was mainly evasive. When asked a simple question whether Larry would agree that in the conversation with Tjoe Yudhis, he was asking Tjoe Yudhis to revoke his statutory declaration, he answered:

"TEY: I shall reiterate, at that point of time, I do not evenknow what is this legal SD is. So, suddenly Yudhis wentand make up a fake SD. For the corporate knowledge that I know, this is company's matter. He doesn't want to suffer then there's no need for him to suffer all these lame things. Because when I talked to Dedi, Dedi can also appoint a professional to just replace him. Like TikTok US also engaged a very clever CEO to go and fight US Government.

How did I know Chong Ket Pen can only catch this onlyTjoe Yudhis to use his mouth only to create all these things, and then can use this legal case to drag on until now?...

PJS: Dato' Tey, you are not answering my questions. You're going here, there and everywhere, and that is why we're taking up so much time with this. If you carryon like this, I cannot finish today. And there is no email in the bundle of documents before this Court where Tjoe Yudhis emails Dedi Francis. All the conversations are with you, you understand?

TEY: Stop twisting the facts. I'm saying in email, he knows that he reports to Dedi Francis. I didn't say he, don't twist the fact and say that he wrote the letter to Dedi Francis. I shall reiterate again, Teh Hong Piow willnever reply your email, even though he's the owner of Public Bank. The question you asked me just now wasa twist of fact, therefore, I don't know how to answer you.

PJS: …He is your employee. He is your nominee. That's why you say, "I'm his boss". Correct?

TEY: Totally wrong. Company engaged me as advisor, the people down there of course I say they are the boss. Public Bank engaged me as consultant, so it is very common for me to say the people down there are my bosses."

PJS: …Now, Dato' Tey, basically, you were complainingto Tjoe Yudhis that Dato' Sri had stalled the injection ofthe oil and gas project into Protasco, that is your complaint. That was your complaint to Tjoe Yudhis.

TEY: I disagree.

PJS: Why you disagree, Dato'?

TEY: Firstly, I cannot remember whether I said all this to Tjoe Yudhis. Secondly, Chong doesn't even allow meto go inside Protasco, how do I know how does the dealwork? So, if I'm in Protasco, then maybe he doesn't need to hurt me, hurt Protasco or hurt Indonesian anymore. Chong Ket Pen only thinks of himself, therefore he had drag me in, drag Indonesian and alsodrag the Protasco in. The contents of this transcript is a fact. But however, whether I mentioned all this to Tjoe Yudhis or not, I cannot remember.

PJS: Again this shows, what I've just highlighted to youhere, this shows that you were the one pushing this dealthrough. That's why you said, "Then come January 2014, I was very angry." And, "I said, come on, you promise us to finish up. Why you take so long? Ok?" You were pushing this deal through. You were insistingthat this deal be completed and you were very well aware of the progress of this deal.

TEY Totally disagree. I pushed him is because I was wondering why he doesn't want to make me the director.

PJS: …But this shows, and whatever I've shown you, this meeting shows that you are Tjoe Yudhis' boss. Youare the one that instructs him in PT ASU.

TEY Luckily, I have read the entire transcript. When didI instructed him? I'm just merely telling him the things which I know, if I know. And you conveniently said thatI gave instruction, so which paragraph shows the instruction? I'm not even having the power and authority. If I can give instruction, would have given him instruction not to meet Chong Ket Pen in August.

[215] Adrian under cross-examination on the transcript of the meetings merely disagreed and repeatedly answered, "I cannot confirm". When asked about Tjoe Yudhis's statutory declaration which set out the events that took place at the said meetings, Adrian merely responded that he was not very sure, and he disagreed. When asked if he had gone through the statutory declarations affirmed by Tjoe Yudhis in 2014 which Adrian had knowledge of since November 2014 as committal proceedings were commenced against Gideon Tan, Larry Tey and Adrian Ooi, Adrian merely replied "I wouldn't say I've gone through it".

[216] Whilst in the main, Adrian and Larry's responses under cross- examination were that they disagreed or could not confirm the statements attributed to them at the meetings, Larry under re-examination attempted to provide an explanation of his own of what was said in the recordings but did not attempt to clarify the answers given by him under cross- examination.

[217] As alluded earlier in this judgment, it bears repetition that the accuracy of the transcripts that were transcribed by the transcriber, Ms Manpreet Kaur [PW-6], was never challenged by Larry and Adrian and there is no issue of tampering of the audio recordings being raised by Larry and Adrian.

[218] Tjoe Yudhis had contemporaneously signed a statutory declaration in relation to the events that transpired at the meetings on 09.10.2014 and 15.10.2014 in Jakarta. His statutory declaration also set out in summary:

218.1 Larry and Adrian requested Tjoe Yudhis to reverse his earlier statements signed in Kuala Lumpur by signing a new

statutory declaration which was given to him through Pak Jan Adam Tangkilisan at the Sushi Tei Restaurant on 16.10.2014;

218.2 Larry and Adrian assured Tjoe Yudhis that they will get him out from this problem provided Tjoe Yudhis revoke the statutory declarations he made in Kuala Lumpur;

218.3 Larry informed Tjoe Yudhis that if Tjoe Yudhis were to sign a statutory declaration that Larry was comfortable with, then Larry will let Tjoe Yudhis resign from PT ASU, Anglo Slavic Petrogas and PT Green Pine;

218.4 At the meeting on 17.10.2014, Larry disagreed with the draft prepared by Tjoe Yudhis together with Hendra Setiawan and Heriyanto. Larry asked Tjoe Yudhis to just sign the draft statutory declaration that was given to him at the Sushi Tei Restaurant. Larry informed Tjoe Yudhis that if he did not execute the statutory declaration Larry wanted, Larry will come after Tjoe Yudhis and sue him.

[219] Tjoe Yudhis's testimony of events that took place at the meetings on 16.10.2014 and 17.10.2014 were corroborated by Hendra Setiawan (PW7) and Heriyanto (PW8), both are lawyers practicing in Indonesia. Hendra Setiawan is the brother in law of Tjoe Yudhis and Heriyanto was at the material time a partner of Hendra Setiawan.

PT ASU and PT AS I's A dd ress es

[220] Protasco adduced evidence at the trial to show PT ASU and PT ASI shared a common address with, Global Cap, PT NRR, PT Inovisi, PT Green Pine, PT Goldchild, Telecity Investments Limited ("Telecity"), Nutox Limited ("Nutox") and Fast Global Investments Limited ("Fast Global") as follows:

220.1 Global Cap and PT NRR have the same address as PT ASU and PT ASI at Menara Anugrah, 19th Floor, Kantor Taman E3.3, Lot 8.6-8.7, Kawasan Mega Kuningan, Jakarta;

220.2 PT Inovisi, PT Green Pine and PT Goldchild have the same address as PT ASU at Patrajasa Office Tower, 21st Floor, Kuningan Timur Setiabudi, Jl Gatot Subroto, Kav 32-34 Jakarta;

220.3 PT NRR, Telecity, Fast Global and Nutox have the same address as PT ASU at 18, Jalan Bayu Segar 4, Bayu Segar, Cheras 56100 Kuala Lumpur.

Ownership of PT Inovisi / PT Green Pine / Acclaim

[221] The corporate and shareholding structure of PT Inovisi at the material time in 2012 and 2013 were as follows: -

221.1 PT Green Pine owns 60.25% shares in PT Inovisi;

221.2 Acclaim owns 8.3% shares in PT Inovisi;

221.3 PT Inovisi owns 60.0% shares in PT Goldchild;

221.4 PT Inovisi owns 100% shares in Code Wireless Pte Ltd. Code Wireless Pte Ltd owns 100% shares in Abamon Technology Sdn Bhd;

221.5 PT Inovisi owns 100% shares in PT Cakra Daya Energy.

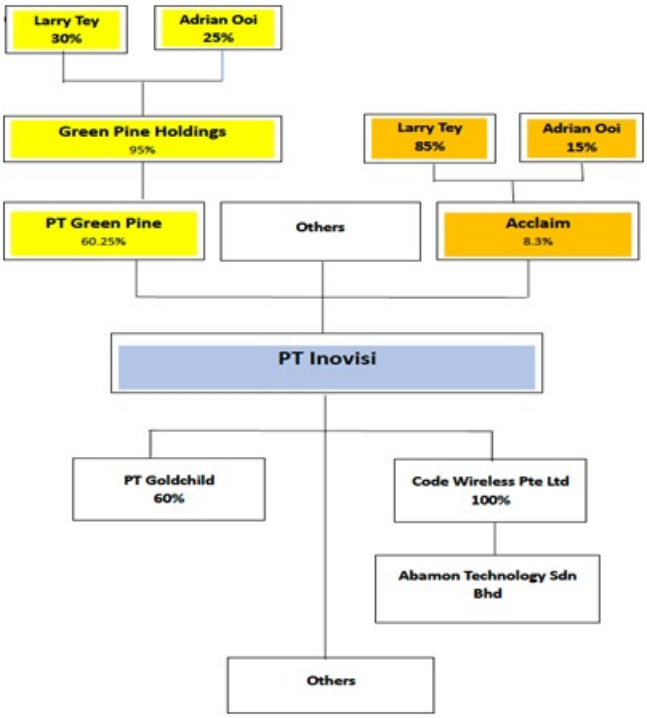
[222] When Adrian became a directorof Protasco on 10.12.2012, it was announced by Protasco that Adrian was the Finance Director/Chief Finance Officer of PT Inovisi. Adrian's wife, one Adeline Teoh Geok Poh was at all material times the Commissioner of PT Inovisi.

[223] The pleaded defence of Larry and Adrian was that they are not the beneficial owners of PT Inovisi, PT Green Pine and Acclaim. They pleaded that "It is ludicrous" for Protasco to allege that Larry and Adrian are owners of PT Inovisi which is a public listed company in the Indonesian stock exchange with a market cap close to USD1billion.

[224] Under cross-examination, Adrian testified that Dedi Francis and his friend, one, Anton partly own PT Inovisi. Larry under cross- examination testified that PT Inovisi is a public listed company and it was absurd to say that Adrian and himself werein control of PT Inovisi. Dedi Francis however disputed he had control over PT Inovisi. He said "I purchased this share but it's a public listed company in Jakarta" and he does not have control over PT Inovisi.

[225] As for Acclaim, Adrian testified in his evidence in chief that he was told by Dedi Francis that Acclaim was controlled by him and his local Indonesian business associates. Larry in his evidence inchief testified that Acclaim is owned by Dedi and Dedi's associate. Under cross-examination Larry and Adrian maintained that they do not own, and control Acclaim and Acclaim was Dedi Francis's company.

[226] Both Larry and Adrian had repeatedly maintained under cross- examination that there was no need at all material times during the pendency of the transaction for them todeclare any interest in PT ASU, PT ASI and Acclaim as the said entities were not related parties to them. But the evidence adduced at trial however revealed that Larry and Adrian were in fact the controlling shareholders of Acclaim, PT Inovisi and PT Green Pine.



[227] On 04.11.2013 at 11.49am, Qimie emailed Grace Chin, the Assistant Manager of Vistra Corporate Services (SEA) Pte Ltd ("Vistra") ('Subject: Transfer of shares – Green Pine Holdings

Ltd and Acclaim Investments Limited') instructing for the transfer of the shares of Acclaim and Green Pine Holdings Limited to Larry and Adrian. When questioned under cross- examination, Adrian admitted that the transfer of shares in Acclaim and Green Pine Holdings were for himself and Larry in November 2013. In the said email, Grace Chin was requested to:

227.1 transfer the current shareholding of Green Pine Holdings Limited to:-

(i) Existing shareholder will hold 45%

(ii) Mr Tey Por Yee – 30%

(iii) Mr Ooi Kock Aun – 25%

227.2 Transfer the current shareholding of Acclaim Investments Limited to:

(i) Mr Tey Por Yee 85% (transfer from Lim Sue Fern)

(ii) Mr Ooi Kock Aun – 15%

[228] On 08.11.2013 at 4.40pm, Grace Chin wrote to Qimie informing her that they have updated the Register and proceeded with the request (by Qimie) to procure the Certificate of Incumbency (COI) and Certificate of Good Standing (COGS).

[229] On 12.11.2013 at 2.04pm, Qimie wrote to Grace Chin requesting for a copy of the COI and COGS to be provided urgently as she has been chased for the same by the Management.

[230] On 12.11.2013 at 2.50pm, Qimie wrote to Adrian informing him that she has yet to receive the COI and COGS from theregistered agent.

[231] On 12.11.2013 at 3.09pm, Adrian Ooi in reply to the same email thread with the title 'Subject: Transfer of shares – GreenPine Holdings Ltd and Acclaim Investments Limited' instructed Qimie to get the COI and COGS out by tomorrow as the documents were needed "very urgently for submission to our bank". Adrian admitted that he was instructing Qimie to getthe transfer of shares documents of Acclaim and Green Pine Holdings urgently for the purpose of submission to the bank.

[232] On 13.11.2013 at 2.37pm, Lim Hui Ting from Vistra emailed Qimie and copied Adrian Ooi and Grace Chin, enclosing a certified copy of COI, COGS, Register of Directors and Register of Members of Acclaim Investments Limited. A perusal of the COI enclosed in the said email shows that Acclaim is 100% owned by Larry Tey and Adrian Ooi holding 85% and 15% respectively. A perusal of the Register of Director attached in the email showed that Lim Sue Fern is a director of Acclaim. The Registers of Member attached showed that Larry Tey and Adrian Ooi are shareholders of Acclaim holding 85% and 15% respectively in November 2013 as transferred from Lim Sue Fern.

[233] Aida [PW-10] was an ex-employee of the Nexgram Group of companies handling legal matters for Larry and Adrian and she reported to Larry and Adrian whom she referred to as her "bosses".

[234] On 28.01.2014 at 10.37pm, Adrian Ooi instructs Aida to immediately remove himself and Larry Tey as shareholders of Acclaim. Adrian Ooi instructed Aida that all 100% shares are to be transferred to Lim Sue Fern and the said share transfer is to be backdated to 13.01.2014.

Clearly this instruction was issued because SPA 2 was to be executed the very next day (29.01.2014). Adrian Ooi plainly was aware of the prohibition of related party transactions because in the said email he informed Aida that "As Acclaim is providing the collateral INVS shares to Protasco, we do not want it to be an RPT transaction".

[235] Protasco's counsel pointed out that Dedi Francis the purported owner of Acclaim was not involved in the instructions given to change the shareholdings of Acclaim. Neither was the purported nominee of Dedi Francis, the said Lim Sue Fern's consent sought for the transfer of shares. Lim Sue Fern was not involved in the email loop for the change of shareholdings in Acclaim.

[236] Whilst Larry and Adrian had attempted to explain away the instruction for the change of shareholding from Lim Sue Fern to them on 12.11.2013 and then back to Lim Sue Fern on 28.01.2014 (backdated to 13.01.2014) by claiming that there was a request by Dedi Francis for a fund raising exercise, there was no explanation proffered for the change in Green Pine Holdings' shareholdings which appeared in the same email thread from 04.11.2013 to 13.11.2013 (which Adrian Ooi was copied). There was no explanation as to why the emails record that Green Pine Holdings is 55% owned by Larry (controlling 30%) and Adrian (controlling 25%).

[237] Adrian when confronted with these emails under cross- examination merely responded that "I was not privy to thisemail". However, Adrian Ooi forgot that his email sent to Qimieon 12.11.2013 at 3.09pm (which is in relation to transfer of shares in Green Pine Holdings Ltd and Acclaim Investments Limited) is in response to the email thread starting from 04.11.2013 bearing the same title "Re: transfer of shares – Green Pine Holdings Ltd and Acclaim Investments Limited".

[238] Adrian testified in his evidence in chief that on or about the beginning of 2013, Dedi Francis had apparently informed him that the sole shareholder and director of Acclaim at the time was Lim Sue Fern, who held the share on trust for Dedi Francis. Adrian knew Lim Sue Fern as the wife of his colleague in Global Cap, Andrew See Poh Yee. Adrian did not disclose the fact of this relationship to Protasco as he purportedly was informed that Dedi Francis is the beneficial owner of Acclaim.

[239] SPA 1 was dated 28.12.2012. Adrian testified he had procured the securities and the blocking letters in December 2012 itself. Protasco's counsel posed a striking question: If Dedi Francis had only informed Adrian inthe beginning of 2013 that he in fact is the owner of Acclaim, it does beg the question who did Adrian think own Acclaim when he procured the securities and the blocking letters in December 2012?

[240] Adrian and Larry in an attempt to explain away themselves as registered shareholders of Acclaim as evident from the above email exchange, testified that the reason for them appearing as registered shareholders of Acclaim is that they were apparently requested to be nominee shareholders of Acclaim for the sole reason of raising funds from an International Financial Institution using PT Inovisi's shares that were owned by Acclaim at the material time. According to Adrian due to his professional qualification and regional financial experience, "it would be more effective for him (rather than Dedi Francis who was a businessman without much corporate and banking exposure) to approach the regional financial institutions and private equity firms to raise funds for Acclaim using PT Inovisi shares. According to Adrian, these funds

were raised in both Singapore and Hong Kong". Larry and Adrian further testified that after the fund-raising exercise for Acclaim completed, their names were removed as shareholders of Acclaim. But there are material inconsistencies in the evidence led by Adrian and Larry in respect of the purported fund-raising exercise for Acclaim:

240.1 Under examination in chief, Adrian testified that his name was removed as the shareholder of Acclaim after the fundraising exercise was successful.

240.2 Under examination in chief, Larry testified that he had declined to provide his services to Dedi Francis for the fundraising to avoid the potential conflict of interest with his other client, DSC.

240.3 However, under cross-examination Larry Tey testifiedthat he became a shareholder to raise financing but the fundraising was not successful.

[241] Dedi Francis in his evidence in chief in his witness statements said that he is the beneficial owner of the shares in Acclaim and Lim Sue Fern was holding the shares on his behalf but testified under cross- examination that he was in actual fact not the owner of Acclaim. Dedi Francis further stated under cross-examination that he would not be able to testify on the business dealings of Acclaim from 2012 to 2014. In re- examination, he was not asked to explain the inconsistencies between his evidence in chief and the answer he gave in his cross-examination when he unequivocally stated that he is not the owner of Acclaim.

[242] An email exchange between one Jan Adam Tangkilisan (also known as Pak Jan, a Non-Affiliated Director in PT Inovisi), Jerry, Adrian and Larry from 23.05.2014 to 26.05.2014 relate to a legal case involving PT Green Pine, which is PT Inovisi's largest shareholder. The email shows Adrian instructing PT Inovisi's personnel on the conduct of the legal suit and Adrian setting the amount of fees payable to the expert witnesses. Adrian by email on 04.06.2014 sent at 5.30pm by him to Lim Chye Guan and On Yong Chieh, Adrian records the advance of Rupiah 200million personally made by him to PT Green Pine for the legal fees to be incurred by PT Green Pine for the legal case. Adrian was also entrusted with pre- signed blank cheques in relation to PT Green Pine's funds as made evident by an email exchange on 20.06.2014 between Adrian and Jerry. Another email exchange between Adrian, Jerry, Pak Jan Adam Tangkilisan, Lim Chye Guan and Tyty on 02.06.2014 and 03.06.2014 further revealed that Adrian was in control of the finances of PT Green Pine. These evidence suggest Larry and Adrian had control over PT Green Pine and PT Inovisi.

PT Goldchild

[243] Besides the Consultancy & Service Agreement which provides that Tjoe Yudhis is to report directly to Managing Partner (Advisor) Larry, followed by Partner (Group CEO) Adrian, Adrian being a cheque signatory of PT Goldchild, there are also email showing Larry and Adrian giving instructions on PT Goldchild's coal project and Larry instructing of what the commission would be for a successful project involving PT Goldchild that suggest plainly both Larry and Adrian had control over PT Goldchild. PT Goldchild also shares the same address as Global Cap, PT Inovisi and PT Green Pine.

Evidence of Dedi Francis (DW -2)

[244] Larry and Adrian's pleaded case contend that they do not have any interest in PT ASU, PT ASI and/or Acclaim. Larry and Adrian plead that Dedi Francis is the owner of PT ASU and at all material times, Tjoe Yudhis is answerable to Dedi Francis as the Commissioner (Komisaris) of PT ASU. Tjoe Yudhi's evidene has debunked this.

[245] Larry and Adrian contend that Dedi Francis is the owner of Acclaim. Lim Sue Fern is Dedi Francis's nominee in Acclaim. Acclaim owns 8.3% in PT Inovisi; that PT Green Pine is controlled by Dedi Francis and his local Indonesian associates. PT Green Pine owns 60.25% in PT Inovisi; Dedi Francis as such owns approximately 68.55% of PT Inovisi; and Fast Global is one of Dedi Francis's investment companies.

[246] Dedi Francis however testified under cross-examination that he does not own Acclaim. He also testified that PT Green Pine is not one of his companies and he does not control PT Inovisi which conflict with Larry and Adrian's evidence.

[247] Pursuant to the decision of the Court of Appeal in *Lim Guan Eng v Public Prosecutor* [1998] 3 MLJ 14; at p 47; [1998] 3 CLJ 769 at p 788, it is well established that a party is bound by the evidence of witnesses whom he calls in proof of his case and this rule is enforced with full rigour in civil cases.

[248] In *Kheam Huat Holdings Sdn Bhd v The Indian Association, Penang* [2000] 7 MLJ 74; [2000] 1 LNS 355, Abdull Hamid Embong J (as His Lordship then was) applied the principle in Lim Guan Eng's case and held that the plaintiff was bound by the evidence of its witness, even if it is damning in some parts.

[249] In my opinion, the evidence of Dedi Francis when analysed and weighed up show he does not seem to have much of a clue about SPA1, SPA2, why the Supplemental Agreement dated 28.06.2013 was entered into, why the purchase price for PT ASI shares was reduced, why the USD5million advance was needed from Protasco, what happened to this advance, he does not even know PT ASU and PT ASI had a bank account in Kuala Lumpur, does not know sum of USD5million was transferred from PT ASI's CIMB Bank account in Kuala Lumpur to PT ASI's account with Permata Bank in Jakarta; does not remember whether PT ASI had a bank account at Permata Bank in Jakarta; does not know why the transaction was terminated and how much Protasco was demanding as refund. He had a proclavity to contradict himself and for the most part, his answers were either liberally peppered with "I left it to Global Cap", "I was advised by Global Cap", "I left it to Augustone Cheong", "I left it to Larry Tey and Adrian Ooi", "I don't remember" or was unintelligible. His evidence I find in fact does not assist Larry and Adrian one whit. Far from it.

The money flow on the USD27million paid by Protasco

[250] Protasco has proven that it has paid USD27million to PT ASU and PT ASI as follows:

> 250.1 deposit amount of RM50million to PT ASU ASU's Account No. 14610001187109 with CIMB Bank Berhad on 28.12.2012 via Protasco's RHB Bank Berhad cheque no. 884012 ("1st Tranche");
>
> 250.2 the balance purchase consideration of USD5,659,437 (equivalent to RM18,393,170.00) into PT ASU's account with CIMB Bank Berhad (Account No. 14610001363109- i) on 29.01.2014 and 30.01.2014 ("2nd Tranche"); and
>
> 250.3 the amount of USD5,000,000.00 (equivalent to RM16,250,000.00) into PT ASI's account with CIMB Bank Berhad (Account No. 8600288860) on 04.02.2014 ("3rd Tranche").

[251] On 27.10.2014, Larry via his corporate vehicle, Kingdom Seekers commenced an action in Kuala Lumpur High Court Suit No.22NCC-407- 10/2014 against DSC, Kenny Chong, RS Maha Niaga and its directors and Protasco ["Derivative Action or "Suit 407"]. Protasco was the

7th Defendant in the suit. In paragraph 27 of the said Amended Statement of Claim, Larry pleaded inter alia that PT ASU, PT NRR, Fast Global and Telecity are all related and associate companies accustomed to dealing with each other.

[252] Larry was hoisted by his own petard when at a press conference on 28.10.2014, in a press statement annexed with a chart showing the money trail of RM50million paid by Protasco to PT ASU and from PT ASU to PT NRR, Fast Global and onwards to Telecity, ultimately with RM10million paid to RS Maha Niaga. The chart exhibited by Larry Tey further details that a sum of RM16million paid by Protasco's subsidiary to PT Goldchild thereafter flowed to PT NRR, Fast Global and ultimately to Telecity. Larry revealed and provided some supporting documentation of the following: -

252.1 Protasco's RM50million paid via Protasco's RHB Bank Berhad cheque no. 884012 was deposited into PT ASU's CIMB Bank's account;

252.2 from the RM50million deposited with PT ASU, a sum of RM9,868,000.00 was paid out to an entity called Fast Global;

252.3 from the RM50million deposited with PT ASU, a sum of RM5,642,000.00 was paid out to an entity called PT NRR; and

252.4 that from Protasco's monies of RM5,642,000.00 that was received by PT NRR from PT ASU, a sum of RM4,980,000.00 was paid out to an entity called Telecity.

[253] As regards the money trail chart, Adrian despite having made a police report on 27.10.2014 stating that he was informed by PT ASU of the payments made as detailed in the chart changed his position under cross-examination to say that he got the information from his previous counsel, Gideon Tan and Larry who obtained the same from PT ASU.

[254] Larry testified that it was Dedi Francis that provided the chart showing the money trail to him for his use in the press statement. According to Larry, the chart was created by Augustone Cheong who was Dedi Francis's advisor. Larry later back tracked to say he did not know who created the chart but it was Dedi Francis who have given him the money trail chart. Dedi Francis when cross-examined on the chart attached to Larry's press statement testified that he did not make the chart and did not supply all the information contained in the chart to Larry and Adrian. According to Dedi Francis, he only supplied information in relation to PT ASU and PT NRR. Dedi Francis had no clue as to why PT ASU, Fast Global, PT NRR and Telecity are related and associated companies and the purpose of the various payments made between entities that are supposedly owned by him. In any case, the money trail in the chart is completely at odds with Dedi Francis's statement to the police that the USD22million was used to pay off suppliers and investors and he left the payments of monies out of PT ASU totaling USD22million to Tjoe Yudhis. This exceprt when he was under cross-examination is revealing:

"JUDGE: If you don't mind, I just want to clarify something. PJS: Sorry.

JUDGE: Is it usual in Indonesia that they give instructions, multi- million dollar instructions orally? Biasanya?

PJS: Pak Dedi, Judge is asking you a question.

DEDI: My Lady let me answer you, since we already have a contract with Global Cap, wherein I believe in Global Cap, I fully believe in Global Cap to run a proper transaction, to run a proper company. Usually, I don't like have a

discussion using emails. I prefer to meet in person because all have been based on contract. That's why I did that orally, verbally My Lady.

PJS: So if the instructions to the consultants are verbal, how does he keep a record?

DEDI: I have a small note myself wherein I have my own staff who can get me help.

PJS: So-

DEDI: I was questioned by Your Lady just now whether it is normal to do transaction verbally, I am not saying, in fact in Indonesia it is not normal but here my case, because I have trusted my consultant, any communication, verbal communication I gave I made a small note for own self. Here to answer the question raised by Pak Peter, how can I can trace, record or keep I have a small note and assisted by my staff.

PJS: So he says he makes his own notes, is it?

JUDGE: Mr Peter, he said at least two times, he makes a small note and he's got a staff to assist him.

PJS: Alright. I heard that.

JUDGE: Dua kali, he said.

PJS: He makes a small note and he's got a staff to assist him. Is he able to produce any of those notes for us? Very important, Pak Dedi.

DEDI: My staff held the small note and it had been long time, and I don't know where my staff is now. This business has been done. **I don't have any records with me because share has been paid, has been transferred so I don't have any record with me anymore."**

Payments by PT ASU to PT NRR

[255] Based on the documents given by Larry during press conference, it was revealed that PT NRR received a sum of RM5,642,000.00 from PT ASU after Protasco made the payment of RM50million on 28.12.2012. The breakdown is as follows:

255.1 On 02.01.2013, PT ASU paid RM1,300,000.00 to PT NRR [En.554/p324]. The exact sum of RM1,300,000.00 was paid out by PT NRR to Larry 's margin account with JF Apex Securities [En.554/p323]. Dedi Francis does not remember the purpose of making such payment to JF Apex but testified that he was involving in giving instructions for such payment as he signed it.

255.2 On 29.01.2013, PT ASU paid RM792,000.00 to PT NRR [En.554/p742]. The exact sum was paid out by PT NRR to CIMB Investment Bank Berhad. Dedi Francis does not remember the purpose of such payment to CIMB Investment Bank . Larry denied that this payment was made to CIMB Investment Bank under the instructions and for the benefit of himself and Adrian.

255.3 On 04.02.2013, PT ASU paid RM2,050,000.00 to PT NRR [En.554/p329]. The exact sum was paid out by PT NRR to CIMB Investment Bank Berhad [En.554/p14]. Dedi Francis testifies that this payment was made for share investment but he does not remember which shares were bought at that time . The said sum was made to CIMB Investment Bank Berhad to purchase Hytex Integrated Berhad's ("Hytex") shares by Dedi Francis/PT NRR wherein Larry Tey was a substantial shareholder of Hytex at the material time.

255.4 On 06.02.2013, PT ASU paid RM1,500,000.00 to PT NRR.

255.5 When questioned on the purpose of each payment paid out by PT NRR, Dedi Francis brandished the same banal answers **'**I don't remember', 'I really forgot, it's been along time', 'I forgot, I don't remember'.

[256] Based on the documents given by Larry during the press conference, PT NRR received a sum of RM4,980,000.00 from PT Goldchild on 06.02.2013. This payment made by PT Goldchild originated from the payment made by Protasco's subsidiary on 05.02.2013. The exact sum received by PT NRR was paid out to Telecity on 07.02.2013.

256.1 When questioned as to why PT Goldchild (a company not owned by Dedi Francis) transferred RM4,980,000.00 to PT NRR, Dedi Francis answered, 'I forgot this. I don't know'. Dedi Francis agreed that he does not remember because he was not involved in giving instructions for this payment.

256.2 When questioned on the said payment by PT NRR to Telecity, Dedi Francis at first said **'**It's a form of the yield of my investment to other company' then he said he **'**may not remember'. When pressed further as to why PT NRR paid Telecity to make investment and why can't PT NRR make the investment itself, Dedi Francis said 'I may not remember the detail of Telecity Investment for instance, to Dato' Chong, I may not remember the details'. When questioned by me on what he meant, Dedi Francis said 'Dato' Chong investment is a pinjaman'. He further said 'That is one of the examples if you ask me the form of the investment. Because the money I lent to Dato' Chong was not from this money'. This is but one of the many instances of Dedi Francis being incoherent in answering relatively simple questions in the face of objective evidence placed before the court and casts considerable doubt in my mind as to the veracity of his evidence.

[257] PT ASU after receiving RM50million paid by Protasco on 28.12.2012, on 30.01.2014, transferred a sum of RM3million and RM5million to PT NRR .

257.1 Dedi Francis under cross-examination testifies that he 'may agree' that this sum of RM8million originated from Protasco's monies.

257.2 The same exact sum of RM3million and RM5million was then transferred by PT NRR to Telecity on 30.01.2014. When questioned as to why PT NRR make such transfer of RM8million in total to Telecity (which Dedi Francis said is also his company), Dedi Francis said there is no certain reason as to why can't PT ASU pay directly to Telecity, nothing wrong to transfer from one company to his another company.

Payment by PT ASU to Abamon

[258] On 28.12.2012 and 31.12.2012, PT ASU transferred a sum of RM4.3million and RM4.6million respectively to Abamon [En.554/p498- 497]. This total sum of RM8.9million paid out by PT ASU to Abamon was after PT ASU received the RM50million from Protasco on 28.12.2012.

258.1 Dedi Francis cannot remember and had no idea about Abamon. When questioned as to why PT ASU transferred RM8.9million to Abamon a company which he cannot remember and has no idea about, Dedi Francis answered 'I handed over PT ASU to my consultant, Augustone. Augustone could collaborate with Yudhis. The signature there was Yudhis, so whatever Augustone recommended it was done by Yudhis. My purpose to invest was I put my money, I trust it to the consultants, and I want to earn a profit. Regarding the flow, all are provide for by my consultants.'

258.2 When questioned would he agree that he has no involvement in giving instructions for the payment of funds from PT ASU to Abamon, Dedi Francis said 'I was informed by my consultant, and I would respond, I would tell my consultant do the best as to how I could earn profit'.

258.3 When further questioned if the consultant informed him the purpose of PT ASU making such payment to Abamon, Dedi Francis said 'I cannot remember what the purpose of the payment was, but I instructed them what to be paid have to be paid.'

258.4 As to why Abamon paid RM8.9million to Telecity (which he claims is his company), he admits that he was not involved in the payment because Abamon is not his company.

258.5 Under cross-examination, Larry agreed that he heard of Code Wireless Pte Ltd which was a subsidiary of Nexgram before being sold to PT Inovisi. Code Wireless Pte Ltd is the sole shareholder of Abamon.

258.6 However, when shown to Larry that Mohd Zamzuri bin Zakaria ("Mohd Zamzuri") is the husband of Qimie (who reported to Larry according to Aida) was one of the directors in Abamon as of July 2014, Larry replied 'I am not her wife. I don't know, at which point of time which people they want to use. I don't know. Why ask me?'.

258.7 Mohd Zamzuri informed the police in his s.112 Statement that he is not aware of Abamon's bank account, not aware of being appointed as the cheque signatory of Abamon, never signed any cheque for Abamon except being appointed as director of Abamon. Mohd Zamzuri further informed the police in his s. 112 statement that he only heard of the name Larry Tey Por Yee and Adrian Ooi Kock Aun but has never dealt with them before. Mohd Zamzuri only dealt with Qimie on matters relating to Abamon.

258.8 When shown to Larry the s.112 statement made by Mohd Zamzuri to the police, Larry despite being the boss of Qimie (according to Aida), denied strenuously that Qimie is his subordinate who reported to him and that Abamon is another entity owned and controlled by him through Qimie. [NOP/En.699/p313]

[259] On 07.01.2013, Abamon transferred the exact sum of RM8.9million to Telecity [En.554/p146,499,494].

259.1 Dedi Francis claims he is the owner of Telecity despite he was never appointed as a director or cheque signatory for Telecity. Dedi Francis have not met the 2 registered account holders of Telecity namely, Mohd Ablynisyam bin Abdullah ("Mohd Ablynisyam") and Teh Yee Peng. However, Dedi was kept informed of the movement of funds of Telecity by his consultants, Larry and Adrian.

259.2 Dedi Francis do not have knowledge as to why Telecity received RM8.9million from Abamon after Abamon received the exact sum from PT ASU.

259.3 When asked as to how Dedi Francis give instruction to Mohd Ablyhisham (whom he said he did not meet and deal directly), he answered he received suggestions from his consultants, Larry and Adrian.

259.4 Protasco argued that Larry and Adrian have control over the bank account of Telecity for reason as follows: -

(a) Dedi Francis does not seem to know the details of the transactions and left it all to Larry and Adrian.

(b) Mohd Ablynisham in his s.112 statement [En.584/648-649] informed the police that he works in Nextnation Communication Berhad (now known as Nexgram Holdings Berhad) and his boss is Larry.

(c) Mohd Ablynisham further informed the police that he does not know about the bank account, transactions of the account and the cheque signatory of Telecity's bank account.

259.5 There was a change of cheque signatory of Telecity to On Yong Chieh in 2012 [En.554/p142-145]. On Yong Chieh in his s.112 statement informed the police that he agreed to be the cheque signatory of Telecity without getting paid by Telecity however he received payment from Larry in cash as his fees [En.583/p660- 661].

(a) When questioned on On Yong Chieh's statement to the police that he was paid by Larry as he does freelance work to handle banking matters of Larry, Larry agreed in part as he claimed that On Yong Chieh also does provide some advisory services to Dedi Francis.

(b) When questioned that Larry was the one who paid On Yong Chieh for being cheque signatory of Telecity, Larry replied 'I wish to reiterate here there are two separate issues here. I indeed engaged him, asked him to do some works to pay him. Pertaining to the transaction of this company, he reported to Pak Dedi. So, how Dedi pays his salary has got nothing to do with me. This 112 statement was created by you, a trap to trap him. You created this for the police.'

(c) I tend to agree with Protasco that Larry's contention cannot be true as Dedi Francis had only heard of On Yong Chieh (as On but not the full name). Dedi Francis does not even remember instructing on the change of cheque signatory of Telecity to On Yong Chieh.

[260] The evidence adduced at trial revealed that after Telecity received the sum of RM8.9million from Abamon on 07.01.2013, a sum of RM191,715.00 was paid out by Telecity to Larry and Adrian respectively on 15.01.2013. It is clear that the said sum of RM8.9million received by Abamon was transferred by PT ASU on 28.12.2012 and 31.12.2012 which originated from the RM50million paid by Protasco on 28.12.2012.

[261] The evidence adduced also revealed that Telecity acquired shares in Asdion Berhad where Larry was a major shareholder and Adrian was holding a minority stake of 1.5million shares. Dedi Francis does not know why Telecity purchased shares in Asdion Berhad. He does not know why PT NRR invested in Asdion Bhd. He does not remember details about Asdion Bhd and did not know that Larry was a shareholder of Asdion Berhad.

Payments from PT ASU to Telecity

[262] After Protasco made the payments of RM50million on 28.12.2012 and USD5,659,437.00 on 28.01.2014 and 30.01.2014 to PT

ASU, PT ASU then made the following payments to Telecity: -

262.1 the sum of RM8million on 30.01.2014 [En.554/p157-158]

262.2 the sum of RM2.3million on 30.01.2014 [En.554/p159- 160]

262.3 the sum of RM90,000.00 on 05.06.2014 [En.554/p191-192]

[263] Dedi Francis had no clue of the aforementioned payments and he said 'it should be asked to my consultant' which is Augustone. Dedi Francis said Augustone will report the inflow of funds to him regularly. He contradicted himself when he first testified on 31.05.2022 that all instructions to Augustone was done through Larry and Adrian and he never instructed Augustone directly. He changed his position to say that 'for some cases I first informed or consulted Larry but for other cases, I sometimes directly instruct Augustone.'

[264] According to Dedi Francis, "it is ok for me to transfer funds from one company to my other own company."

"DEDI: I have no purpose because the flow of the 1 money should be like that. I think it is something correct.

PJS: No, why should the flow of the money be like that?

DEDI: There was no certain reason.

PJS: Alright.

JUDGE: What was the last few words? No certain reason?

PJS: Certain reason, yes.

TRANSL: There was no –

JUDGE: No certain reason."

Payments made by Telecity to other entities

[265] After receiving monies from PT ASU, Telecity then made the following payments: -

265.1 The sum of RM4.6million to Nutox on 27.01.2014 [En.554/p152-153];

265.2 The sum of RM1million to Nutox on 12.02.2014 [En.554/p166-167];

265.3 The sum of RM4.05million to Kellminster Group Inc on 27.01.2014 [En.554/p150-151];

265.4 The sum of RM2.46million to Zoomic Technology (M) Sdn Bhd on 27.01.2014 [En.554/p154];

265.5 The sum of RM4.05million to Fast Global on 28.01.2014 [En.554/p155-156];

265.6 The sum of RM7.3million to Active Run Securities Limited on 30.01.2014 [En.554/p161-162];

265.7 The sum of RM11million to Active Run Securities Limited on 30.01.2014 [En.554/p63-164];

265.8 The sum of RM509,430.00 to PT Green Pine on 05.02.2014 [En.554/p165];

265.9 The sum of RM4million to its own CIMB Bank Berhad's account on 17.02.2014. Telecity subsequently made a payment of the same sum of RM4million to RHB Investment Bank Bhd on 17.02.2014. [En.554/p168- 169]

265.10 The sum of RM2,650,000.00 to Goodunited Limited on 24.02.2014. Goodunited Limited is a substantial shareholder in Asdion holding 17.74% shares as at August 2014 where Larry was also a major shareholder in Asdion. [CBD36/En.677/p285]

265.11 cash in a sum of RM3.5million to Telecity's own CIMB Bank Berhad's account on 24.02.2014 [En.554/p174- 175]. Telecity subsequently made a payment of the same sum of RM3.5million to TA Securities Holdings Bhd on 24.02.2014.

265.12 cash in a sum of RM3million to Telecity's own CIMB Bank Berhad's account on 14.03.2014. [En.554/p178- 179]. Telecity subsequently made a payment of the same sum of RM3million to KAF Investment Bank Bhd on 14.03.2014.

265.13 Telecity made a payment of RM2,300,000.00 to Fast Global on 24.03.2014 [En.554/p183-184]

265.14 Telecity made a payment of RM3,680,000.00 to Fast Global on 25.03.2014 [En.554/p185-186].

[266] Protaso submitted that the aforementioned payments from Telecity to other entities were made under the instructions and for the benefit of Larry and Adrian for reasons as follow: -

266.1 When asked why is PT NRR his investment holding company incorporated in Indonesia but Telecity is incorporated in BVI, Dedi Francis answered "I don't know why, because it did exist there." He said he was advised by Larry and Adrian to incorporate Telecity in BVI.

266.2 Telecity had made payments to Goodunited Limited for purchase of shares in Asdion in which Larry was a major shareholder. Goodunited Limited was also a shareholder in Wintoni Group Berhad in which Larry was a shareholder since May 2013.

266.3 Telecity had made payments to KAF Investment Bank Berhad, RHB Investment Bank Berhad and TA Securities Holdings Berhad for the benefit of Larry and Adrian.

266.4 When questioned as to why Dedi Francis transferred a total sum of RM18.3million to Active Run Securities Limited which he agreed to be a considerable sum of money, Dedi Francis said he cannot remember and that he left it to his consultant in Telecity, Adrian and Larry.

266.5 Dedi Francis testified that he has never heard of Nutox

266.6 Dedi Francis when asked as to why Telecity made payments to Nutox (a company he never heard of), he does not seem to remember the details and merely disagreed that he was not involved in giving instructions for these payments. When asked as to what is the relationship between Telecity and Nutox, Dedi Francis replied 'I don't remember, I really do not remember'.

266.7 Faizatul Ikmi (Qimie) has informed the police in her s.112 that she takes all instructions regarding the transaction, the appointment of director and other matters relating to Nutox from Dedi Francis. This statement cannot be true as Dedi Francis testified that he does not remember Faizatul Ikmi and there is also evidence of him giving instructions to Faizatul Ikmi.

266.8 The only conclusion that can be made is clearly Faizatul Ikmi (Qimie) who reports to Larry has been handling matters in relation to Nutox on the instructions and for the benefit of Larry and Adrian.

[267] The evidence at trial revealed Larry was a substantial shareholder in Asdion, Fast Global, Telecity, Nutox, PT NRR, Telecity, Goodunited Limited, and Qimie was also a shareholder in Asdion.

Payments by Telecity to JF Apex Securities Berhad

[268] After receiving monies from PT ASU which originated from Protasco's monies paid to PT ASU, Telecity had since March 2014 till June 2014 make the following payments in the sum of RM3,821,730.02 to JF Apex: -

268.1 The sum of RM190,352.20 was made by Telecity to JF Apex for the purposes of Larry share trading [En.554/p180]. This sum is reflected in Larry's JF Apex Statement of Accounts as at 31.03.2014 wherein the sum of RM190,352.20 was paid on 25.03.2014 [En.584/p314]. Larry did not deny receiving the said sum but insisted that he does not know the source of the money;

268.2 Telecity made a payment of RM2,650,000.00 to JF Apex. This payment is made by Telecity to JF Apex for the purposes of Larry's share trading [En.554/p189- 190]. This sum is reflected in Larry's JF Apex Statement of Accounts as at 31.05.2014 wherein the sum of RM2,650,000.00 was paid on 28.05.2014 [En.584/p307].

268.3 Further payments were also made by Telecity to JF Apex:

(a) a sum of RM240,623.49 [En.554/p181]

(b) a sum of RM95,754.33 [En.554/p182]

(c) a sum of RM20,000.00 [En.554/p193]

(d) a sum of RM440,000.00 [En.554/p194]

(e) a sum of RM185,000.00 [En.554/p195]

[269] The aforementioned payments were made by Telecity to JF Apex were clearly for the purposes of Larry's share trading. Dedi Francis was not involved in giving instructions for these payments to be made.

Payments by PTR ASU to Fast Global

[270] Larry's own documents given during the press conference revealed that Fast Global received a sum of RM9,868,000.00 from PT ASU after Protasco made the payment of RM50million on 28.12.2012 as follows: -

270.1 04.01.2013 – RM1.6million [En.554/p435]

270.2 09.01.2013 – RM2million [En.554/p436]

270.3 25.01.2013 – RM1.3million [En.554/p444-445]

270.4 29.01.2013 – RM2.04million [En.554/p446]

270.5 06.02.2013 – RM2,928,000.00 [En.554/p448-449]

[271] The evidence adduced at trial reveals that:

271.1 The registered account holder of Fast Global is Faizatul Ikmi (Qimie) She is the sole director and cheque signatory of Fast Global ;

271.2 Faizatul Ikmi (Qimie) reports to Larry;

271.3 Whilst Dedi Francis claimed that Fast Global is his company, the evidence clearly shows that he was not involved in giving instructions on the payments relating to Fast Global and he does not even remember Faizatul Ikmi;

271.4 When questioned on the said payment, Dedi Francis first said that the payments were for three things, for supplier, for purchase of shares and for return of investment. Dedi Francis testified that Fast Global is not a supplier to PT ASU, Fast Global did purchase some shares in Malaysia and Fast Global is just one of the companies that do the return of investment.

271.5 Clearly, Dedi Francis has very little to no knowledge of the payments and was not seen to be involved in giving instructions for these payments.

271.6 Dedi Francis's testimony that he has authorized his consultant, Augustone to make payments and Augustone was to collaborate with Tjoe Yudhis is obviously untrue as the evidence led at trial revealed that Tjoe Yudhis was never involved in PT ASU's banking transactions.

Payments made by Fast Global to other entities

[272] After Fast Global received the sum of RM9,868,000.00 from PT ASU, Fast Global paid:

272.1 RM6.08million to Nutox on 06.02.2013 [En.554/p450- 451];

272.2 RM5.02million to Telecity on 07.02.2013 [En.554/p452];

272.3 RM3.5million to Telecity on 18.02.2013 [En.554/p453- 454];

272.4 RM1.5million to PT ASU on 27.02.2013 [En.554/p456- 457]

[273] The aforesaid payments were clearly made under the instructions and for the benefit of Larry and Adrian as made evident by Dedi Francis's testimony that he instructed his consultants, Larry and Adrian on transactions in relation to Fast Global to Nutox or Fast Global to Telecity.

Payments made by Fast Global to CIMB Investment Bank

[274] After receiving monies from PT ASU, Fast Global had since January 2013 till March 2013 make the following payments in the sum of RM6,820,000.00 to CIMB Investment Bank: -

274.1 The sum of RM1,680,000.00 on 25.01.2013 for the purposes of Larry's share trading [En.554/p443] borne out by the fact that Fast Global had on 25.01.2013 acquired 14million shares of Hytex Integrated Berhad in which Larry was a substantial shareholder [CBD36/En.677/p9-10].

274.2 a payment of RM1million on 09.01.2013 [En.554/p437];

274.3 a payment of RM1.5million on 11.01.2013 En.554/p441];

274.4 a payment of RM1,680,000.00 on 25.01.2013 [En.554/p443];

274.5 a payment of RM2,040,000.00 on 29.01.2013 En.554/p447];

274.6 a payment of RM200,000.00 on 20.02.2013 [En.554/p455];

274.7 a payment of RM400,000.00 on 28.03.2013 [En.554/p458]

[275] Dedi Francis when questioned on the aforesaid payments simply does not remember the purpose of such payments and stated that he instructed Larry and Adrian to make these payments but produced no evidence showing his instructions to Larry and Adrian on these payments..

Other payments made by Fast Global

[276] From monies received from PT ASU, Fast Global also made the following payments: -

276.1 a sum of RM13,440.00 to Adrian on 11.01.2013 [En.554/p440]. Adrian admits receiving the said sum;

276.2 a sum of RM22,720.00 to Jason Minos Anak Peter on 10.01.2013 [En.554/p438]. Dedi Francis testified that he does not remember who is Jason Minos and does not remember the purpose of the payment made to Jason Minos;

276.3 a sum of RM47,040.00 to Lim Chye Guan on 10.01.2013 [En.554/p439]. Dedi Francis testified that he does not remember whether he has dealt with Lim Chye Guan and does not remember the purpose of making such payment to Lim Chye Guan;

276.4 a sum of RM500,000.00 to Faizatul Ikmi binti Abdul Razak on 21.01.2013 [En.554/p442]. Dedi Francis testified that he never dealt directly with Faizatul Ikmi. When questioned why Fast Global paid RM500,000.00 to Faizatul Ikmi, he answered 'All the communication from Fast Global to any person whomsoever, all I have left it to Global Cap as my consultant…In reality Global Cap suggested me it is I who made the decision whether its ok or not'.

[277] Dedi's evidence when analysed entirely reveal he hardly has any knowledge or understanding of the transactions nor has control over the companies involved in these transactions. His evidence appears to be calculated to support Larry and Adrian's case rather than provide this court with frank disclosure. It is demonstrably clear that the central figures were the bosses of Global Cap - Larry and Adrian. The payments were obviously made for the benefit

of Larry and Adrian. Dedi Francis's own evidence in court nailed the lie in his s.112 statement that the USD22milliion was used to pay off suppliers.

[278] Besides the above sums, evidence adduced further show of the monies originating from Protasco, a total sum of RM9,931,715.00 was paid directly into Larry's personal margin and bank accounts and a sum of RM205,155.00 was paid directly into Adrian's personal bank account.

[279] Larry in his s.112 statement and under cross-examination admits that he personally received a total sum of RM9,931,715.00 through various entities namely, PT NRR, Nutox, Telecity, Fast Global, Firstlogix, Evodus Mobility, Mikhail Euro and Abamon Technology with breakdown as follows: -

279.1 On 02.01.2013, PT ASU paid RM1,300,000.00 to PT NRR. The exact sum was paid into Larry's margin account with JF Apex Securities [NOP/En.701/p283- 287]: Larry in his s. 112 statement when questioned, admits receiving the sum of RM1,300,000.00 but he informed the police that he did not know the source of money. However, under cross- examination after being shown his own statement of account with JF Apex Securities which Larry admits is his, he attempted to explain that apparently, he borrowed the fund from one of Dedi Francis's investors in order to invest in the property market in Indonesia. According to Larry, he is not aware as to where Dedi Francis's investors have taken the fund from. Larry testified that the monies used by him to purchase the 27.11% block in Protasco was apparently borrowed from Dedi Francis's investors.

> "PJS: Alright. Now, you will see you were questioned about, the same cheque, 28.01.2012 for the sum of RM1.3 million. And you told, your statement to the police was you admitted that the sum of RM1.3 millionwas banked into your JF Apex trading accounts. But you said you did not know the source of the money.
>
> TEY: Who said I did not know the source of money? Drop from... because I got property in Indonesia invest to him, **so I asked Dedi's investor, Dedi's boss to borrow, to lend me money**. Of course, I know the origin of money. As a businessman the funder gave me money, of course, **I receive, how do I know fromwhere, how do I know they contra in business. And in accounting we call it net off and how do I know they net off in accounting**. This is the daily doing of investment trading every day. And he took it to createstories.
>
> PJS: Dato' Tey, what you just told us is not what you told the police in your 112 statement, am I correct?
>
> TEY: It's entirely the same. It's stated here I used the money for investment, right? So, from where youobtained this 112 statement?
>
> PJS: Dato' Tey, it's in the affidavit which you have filedin Court. You have filed in Court. "Saya tidak ingat sumber wang yang masuk ke dalam akaun ini." So, you are saying you do not know the source of the funds for the RM1.3 million which was paid into your account. You admit receiving it, but you don't know thesource of the funds.
>
> TEY: Absolutely disagree. You misinterpreted. **I said, of course, I know the origin of money my source**. So, as far as that cheque is concerned, **that TT from which account was it, I do not know**. Full stop. Thisis exactly what I meant."

279.2 On 29.01.2013, PT ASU paid RM2,040,000.00 toNutox Limited. The exact sum was paid into Larry's margin account with JF Apex Securities [NOP/En.701/p369 – 373]: Larry in his s.112 statement when questioned, admits receiving the sum of RM2,040,000.00 and he informed the police that he used it for shares investment. When shown his statement of account with JF Apex Securities, he replied "How could I still remember, where, from where did the investors pay me, how is it possible for me to ask them?". Larry repeats the same story that he had borrowed money from investors, but he does not know from where the investors paid him. Under cross-examination, Larry agreed that he utilized the money for the purchase of shares but disagree the said money was utilized for his own / personal investment:

"TEY: I have said it many times already and you keepon asking the same question. **I borrow money from Indonesian, from whichever account they pay me as long as it is the legitimate account, I just accept**.

PJS: Mr Leong, we can't hear you, Mr Leong, sorry.

TEY: I have my Rupiah money to pay them, lend off money, accounting, do you understand? I have my Indonesian, I have my Rupiah Indonesian account to net off the funder in Ringgit. So where did the funderscame from, I never ask. No matter it is money changer, international trading, they are all using net off. Do youunderstand? **When I deal with my funders, they usewhichever account, we will never ask one**. The foreign investor in Bursa Malaysia, they entirely come like that. Again, out of context you are getting the facts wrong to fulfil your theory of conspiracy. Your salary also Protasco paid, Indonesian money.

….

PJS: So, now would you agree that you utilised the money, the RM2,040,000 for your own investment, for your personal investment.

TEY: I disagree entirely.

PJS: No, why do you disagree?

TEY: If you are saying like that then I am also Chong Ket Pen's nominee, purchased Protasco's shares. Asinvestor I can help people invest. Ok. Before I even know Chong Ket Pen, I have already started trading shares. **At that time I invested a lot of shares. Someof them I purchased myself, some of them are not.**That time it was boom market, at that point of time. Investor Indonesian asked me to purchase some lot ofshares on their behalf, you know? In share transactionstatement, there are so many transactions statements, you are pulling out a little bit, you are pulling out just one row in order to just fulfil your conspiracy theory. Where is your duty of conduct?"

279.3 PT ASU paid RM2,600,000.000 to Mikhail Euro. The exact sum was transferred to Larry's Maybank Bank account [NOP/En.701/p379-380]: Larry in his s.112 statement when questioned, admits receiving the said sum from Mikhail Euro who might be one of his suppliers. When asked during cross-examination as to what business dealings he had with Mikhail Euro in 2013, Larry simply answered he does not remember.

279.4 PT ASU paid RM2,200,000.00 to Evodus Mobility. The exact sum was transferred to Larry's Maybank Bank account [NOP/En.701/p381]: Larry in his s. 112 statement when questioned, admits receiving the said sum from Evodus Mobility but does not know the source of the money. When asked during cross- examination as to what business dealings he had with Evodus Mobility, Larry said he dealt with Dedi and he does not know which associate Dedi Francis used to bank in the money to him. Larry emphasized that he has clearly stated to the police in his statement on his borrowing arrangement with Dedi Francis. Dedi Francis testified that he has never heard of Evodus Mobility.

279.5 PT ASU paid RM1,600,000.00 to Firstlogix. Theexact sum was transferred to Larry 's AllianceInvestment Bank Bhd [NOP/En.701/p388]. Larry testified that he heard of Firstlogix. Larry Tey when questioned by the police, admitted receiving the said sum paid into his margin account with Alliance Investment Bank which he used to purchase shares. Larry does not remember what business dealing he had with Firstlogix and the purpose of the payment into his margin account. Dedi Francis testified he does not know of Firstlogix.

279.6 Telecity paid RM191,715.00 to Larry. He attempted to justify this payment of RM191,715.00 as part of his fees for advisory work done. Larry produced a document purportedly from Telecity dated 05.07.2012 purportedly appointing him as a broker and advisor, purportedly signed by one, Mohd Ablynisyam bin Abdullah for and behalf of Telecity. Mohd Ablynisyam is listed as the "nominee director" and Dedi Francis as "company secretary". Mohd Ablynisyam bin Abdullah however informedthe police in his s. 112 statement that he is not familiar with Telecity. Dedi Francis (who claims that Telecity is his company) under cross-examination testified that he has not met nor dealt directly with Mohd Ablynisyam, that he did not instruct Mohd Ablynisyam to sign the purported agreement and further denied that he is the company secretary for Telecity; and he does not remember what Larry has done for Telecity.

[280] From the evidence, for all these payments made into his personal marginand bank accounts through PT NRR, Nutox, Telecity, Fast Global, Firstlogix, Evodus Mobility, Mikhail Euro and Abamon Technology, Larry repeats the story that all these funds were borrowed from Dedi Francis's investors who apparently originally funded his purchase of the 27.11% block in Protasco. Dedi Francis however said he has never heard of these companies.

[281] When Larry was asked that if indeed the monies was from Dedi Francis and his investors, the monies could come straight from PT ASU instead of going through several companies, he was evasive and simply replied "Very good question. You need to go and ask Dedi."

[282] Adrian in his evidence in chief admits receiving a total sum of RM205,155.00 through various payments by Telecity and Fast Global, allegedly as payment made by Dedi Francis for his consultancy services and reimbursement.

282.1 Under cross-examination, Adrian claims that RM191,715.00 was paid by Dedi Francis through Telecity for the financial consultancy services rendered by him to Telecity through A&A Associates. When questioned as to why there is a need for Telecity since Adrian as advisor for Global Cap has been providing advice to Dedi Francis, he simply replied "Global Cap is not a legal entity that we use for billings, alright. So, all the billings are done through Telecity or Fast Global…Global Cap, I do not have a legal and official, I told you from day one, I don't derive any income or any fees at all ever from Global Capital Limited".

282.2 When shown his own s.112 statement given to the police in which he informed the police that the payment of RM191,715.00 was issued by Telecity to him as a loan and there was no loan agreement was a different story from what he testify now in Court, Adrian Ooi replied "I made a mistake then".

282.3 When questioned that he did not provide this loan agreement with Telecity dated 01.06.2013 to the police on 15.09.2015 and had told the police a different story that it was a loan, Adrian Ooi again replied "I made a mistake then".

282.4 When questioned whether he knows On Yong Chieh who was instructing on the banking transactions for Telecity, Adrian replied he met On Yong Chieh and On Yong Chieh takes advice from him. However, Adrian denied instructing On Yong Chieh throughout all the material time.

282.5 Under cross-examination, Adrian claims that RM13,440.00 was paid by Dedi Francis through Fast Global for reimbursement of hotel, food and beverages.

282.6 When shown that Faizatul Ikmi binti Abd Razak (who Adrian know as Qimie) is the sole director and cheque signatory of Fast Global, Adrian testified that he was not too sure at the time when he received the payment. He is not sure of Qimie's payroll but he know Qimie does services for Larry . Adrian further testified that Qimie do not take instructions but advice from him and Larry .

[283] On 16.04.2013, On Yong Chieh sent an email to Lim Chye Guan, Adrian Ooi and Augustone Cheong. The email reads:

"[Private & Confidential] Hi All,

Attached is the list of fund movement in ASU and GIA CIMB Bank."

[284] On Yong Chieh in his s.112 statement to the police, states that he takes instructions from Larry regarding Telecity, Fast Global, Nutox, PT ASU and PT NRR.

[285] Aida [PW-10] testified that On Yong Chieh works closely with Lim Chye Guan and was

always seen working in the same office as her in the Nexgram group. Aida further testified that Lim Chye Guan is the Chief Financial Controller of Nexgram.

[286] Larry himself under cross-examination admitted that Lim Chye Guan is his colleague and an employee within the Nexgram Group looking after the accounts, who also reported and take instructions from himself.

[287] On Yong Chieh's email details the flow of funds into and from PT ASU which includes the sum of RM50million paid by Protasco as at 16.04.2013. The outflow of funds include the following sum: -

287.1 FLXT is Firstlogix Technology Sdn Bhd – RM1.6million

287.2 MEA is Mikhail Euro Associates Sdn Bhd – RM 2.6million

287.3 Evodus SB is Evodus Mobility Sdn Bhd – RM2.2million

287.4 Abamon SB is Abamon Technology Sdn Bhd – RM8.9million

287.5 PT NRR is PT Nusantara Rising Rich – RM5,642,000.00

287.6 TIL is Telecity Investments Limited – RM9,245,909.00

287.7 FGIL is Fast Global Investments Limited

– RM13,691,000.00

287.8 NL is Nutox Limited – RM2,985,000.00

287.9 Kenanga Invest (For Heah) – RM5million

287.10 Heah – Blank Cheque – RM1,537,500.00

287.11 PT CDE-Mandiri (USD1.5m) – RM4,679,250.00

287.12 Xu Yan, TM. Selvan, Lee Kong Toh – RM206,955.00

287.13 PT GP-Permata, ICBC (USD4.442m) – RM12,881,566.00

287.14 Vision Eagle-CIMB – RM3.2mil.

[288] Larry under cross-examination when shown this email dated 16.04.2013 in particular on the exact same payments of RM1.6million by Firstlogix, RM2.6million by Mikhail Euro and RM2.2million by Evodus Mobility which he admitted receiving but Larry repeated the same banal "I don't know", "How can I agree".

[289] On Yong Chieh's email also detailed the RM16million that was paid to PT Goldchild by Protasco's subsidiaries. The email further details the payments out of PT Goldchild to Fast Global and PT NRR.

[290] Significantly, Dedi Francis as the purported owner of PT ASU was not in this email loop in

respect of the inflow and outflow of the funds. The email revealed that the RM50million refundable deposit paid by Protasco pursuant to SPA 1 in December 2012 was already paid out by PT ASU to various entities as of date of the email in April 2013.

[291] Adrian who at the material time was a director of Protasco, admitted that he was aware that as of April 2013, the RM50million paid by Protasco to PT ASU was already paid out to third parties but he however explained that there was no need for him to disclose this fact to Protasco as in his words "this money belongs to Dedi". Unsurprisingly, Larry feigns ignorance and testified that he had no idea about On Yong Chieh's email dated 16.04.2013. Larry simply states that Augustone Cheong is engaged by Dedi Francis.

[292] On 17.05.2014, On Yong Chieh sent another email to Larry, Adrian, Augustone Cheong and Lim Chye Guan. The email reads: -

> ***"[Priv a t e & Con f ide n tia l]***
>
> ***Hi all,***
>
> ***Enclosed the Cash Flow for Share A/C & Summary of fund usage @ 16-May-14."***

[293] This May 2014 email sets out the outflow of fund from PT ASU as at 16.05.2014 after SPA 2 was executed on 29.01.2014. The email details the inflow of fund into PT ASU which includes the differential sum of USD5,659,437.00 that was received by PT ASU from Protasco on 30.01.2014 pursuant to SPA 2. The email also set out that on 04.02.2014, PT ASI received a sum of USD5million paid by Protasco pursuant to SPA 2 for the reactivation of the oil wells. The email show that on 10.02.2014, PT ASI had transferred the USD5million to its own account with Permata Bank in Jakarta. The email also set out the summary of the cash flow paid out from 01.02.2014 to 15.05.2014 and revealed that PT ASU had paid out the monies received from Protasco for the benefit of various third parties including Larry and Adrian. Both Larry and Adrian at the material time were directors of Protasco but they did not reveal to Protasco that these sums were already paid out to other parties including for their own benefit.

[294] Adrian as a recipient of the email attempted to distance himself by testifying that: -

> **"PJS: So, why is Mr On sending this to you?**
>
> **OOI: I don't know. You got to ask him.**
>
> **PJS: Dato', you are saying you didn't read this?**
>
> **OOI: I didn't analyse the details of the attachment, because it's not in my business to look at other people finances.**
>
> **...**
>
> **OOI: I did open up the email but I didn't go through the analysis. It was very detailed.**
>
> PJS: So, what exactly did you do then? When you opened up the email, what exactly did you do?
>
> **OOI: I just disregard it.**

PJS: So, you opened up the email and didn't read the contents?

OOI: I didn't read, I didn't analyse the movement of funds.

PJS: How would you describe your perusal of the email then?

OOI: I just looked at the headings and also I glanced through the attachment.

PJS: So, you looked at the heading and then the attachment you glanced through?

OOI: Yes, that's why there was no action from me."

[295] Larry when shown the email in which he was copied, was completely evasive and merely responded that he did not know the details stated in the email.

"PJS: And the email sets out the flow of funds from PT ASU as at 16/05/2014, would you agree?

TEY: How do I know? I cannot involve also. Chong Ket Pen's son, Kenny Chong sent us the pre-signed agreement. He cc'ed to me. The presigned agreement for this Protasco deal, pre-signed. It's –

PJS: Dato', that's a different issue lah. I am talking about this particular email, let me finish. This particular email that shows the flow of funds out of PT ASU as at 16/05/2014 which he is a recipient 1 of. So, can we just discuss about this?

TEY: Correct, they have cc'ed to me. Protasco cc'ed to me. Dedi Francis cc'ed to me but as I said, whatever issues touching on Protasco, I will not go and read. That's all. Period.

PJS: Dedi Francis is not involved in this email lah, Dato' Tey, isn't it?

TEY: Augustone Cheong work for him. Boss need to work meh? Is it necessary for Chong Ket Pen himself to torture me? No need. So he engaged Peter Skelchy to do it."

[296] On Yong Chieh's email of 17.5.2104 sets out amongst others:

296.1 Monies were paid to Adrian directly through A&A Associates and through his margin account. When payments were made to Adrian, they are listed as "AO".

296.2 Payments were also made for credit card expenditure of Lim Sue Fern and for PT Green Pine;

296.3 Payments were also made to Kong Chin Lam who works within Nexgram group/Global Cap and take instructions from Larry;

296.4 Payments made to Larry's margin account with JF Apex Securities and to Nutox Limited's margin account with RHB/OSK for the purchase of Nexgram's shares. Where the payments were made to Larry, it is listed as "LT";

296.5 Payments made to Larry's margin account with Public Investment Bank for the purchase of Nexgram's shares. The payment is listed as "LT-PIBB Top-up for N shares";

296.6 Payments made to Andy Yong c/o Fairfield in relation to the work done by Fairfield leading up to the execution of Investment Agreement alluded to earlier were paid out from the tranche of fund which included the monies originated from Protasco;

296.7 Payments made to Larry ‘s margin account with Alliance Investment Bank Berhad for the purchase of Protasco’s shares. The payment is listed as “LT AIBB Margin a/c- cross P share”;

296.8 Payments made to Alliance Investment Bank Berhad to serve interest on Larry ‘s margin account with Alliance Investment Bank Berhad. The payment is listed as “LT AIBB Margin Interest”;

296.9 Payments made to TA Securities Holdings Berhad for Goodunited Limitied for private placement of Winsun shares (now known as Wintoni);

296.10 Payments made to KAF Investment Bank Berhad for private placement of R&A Telecommunication Berhad’s shares in which Larry was a substantial shareholder;

296.11 Payments made to Asdion Berhad for increase of authorised share capital where Larry was a substantial shareholder;

296.12 Payments made to JF Apex Securities for Telecity, Nutox and Fast Global’s purchase of MQ Technology Berhad’s shares where Larry was a shareholder;

296.13 Payments made to JF Apex Securities for Telecity, Nutox and Fast Global’s purchase of Nexgram’s shares where Larry was a substantial shareholder;

296.14 Payments made to JF Apex Securities where Telecity was servicing the interest payment of Larry ‘s margin account. The payment is listed as “LT-Margin Int Feb’14”;

296.15 Payments made to Larry ‘s margin account with SJ Securities for rollover fees payment. The payment is listed as “LT SJ-1% rollover fees”;

297.16 Payments made to JF Apex Securities for Fast Global’s purchase of Nexgram’s shares where Larry was a substantial shareholder;

296.17 Payments were made to JF Apex Securities where Larry used Telecity to serve interest and rollover fees due to JF Apex Securities pursuant to RM10milllion loan by DSC. The payment is listed as “DC JF margin interest Jan 2014”;

296.18 Payments made to PT FAME for factoring interest and for Dedi;

296.19 Payments made to PT Cakra Daya Energy (which is subsidiary of PT Inovisi) for PT Cakra Daya Energy’s March 2014 salary payment;

296.20 Payments made to Bidang Lagenda Sdn Bhd, a substantial shareholder of Negxram while Larry was still CEO and MD of Nexgram;

296.21 Payments made to PT Green Pine for factoring interest, salary and others.

[297] Adrian when cross-examined on 08.11.2022 agreed that payments listed in the email that was paid to A&A Associates would relate to him. During continued cross-examination the next day on 09.11.2022, he recanted knowledge and repeated “I cannot confirm”.

[298] Larry was evasive in cross-examination on the details of payments listed the email and repeatedly answered “don’t know”, “I don’t know”, “how do I know”, interspersed sometimes with “I don’t know and I also I disagree” and “don’t know, also cannot remember”.

[299] Apart from Larry’s own press statement, the evidence adduced at trial laid bare that Larry

and Adrian had personally benefited from the money received by PT ASU and PT ASI from Protasco.

Did Larry and Adrian breach their fiduciary and statutory duties?

[300] The Federal Court in *Board of Trustees of the Sabah Foundation & Ors v Datuk Syed Kechik bin Syed Mohamed & Anor* [2008] 5 MLJ 469 at [30] has adopted Millet LJ 's definition of a fiduciary in *Bristol and West Building Society v Mothew (t/a Stapley & Co)* [1998] Ch 1 at p 11 as follows:

> A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary.

[301] The law is clear that a director of a company is in fiduciary relationship with his company and as such he is precluded from acting in a manner which will bring his personal interest into conflict with that of his company - per Saleh Abas LP in *Avel Consultants Sdn Bhd & Anor v Mohamed Zain Yusof & Ors* [1985] 2 MLJ 209 SC.

[302] In Ford's *Principles of Corporations Law* in Chapter 8 at para [8.050] at p 312, a director is subject to the fiduciary's duty of loyalty and the duty to avoid conflicts of interest. Walter Woon *on Company Law* states that:

> Firstly, a director must act in what he honestly considers to be the company's interests and not in the interests of some other person or body. This is a director's main and overriding duty at common law; Secondly, a director must employ the powers and assets that he is entrusted with for proper purposes and not for any collateral purpose; Thirdly, a director must not place himself in a position whereby his duty to the company and his personal interests may conflict.

[303] Sections 132(1) and 132(1A) of the Companies Act 1965 set out the statutory duties owed by a director to a company. Section 132(1) provides:

> … A director of a company shall at all times exercise his powers for a proper purpose and in good faith in the best interest of the company;
>
> Section 132(1A) provides:
>
> > A director of a company shall exercise reasonable care, skill and diligence with:
> >
> > (a) The knowledge, skill and experience which may reasonably be expected of a director having the same responsibilities; and
> >
> > (b) Any additional knowledge, skill and experience which the director in fact has.

[304] In *Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals* [2012] 3 MLJ 616 at p 654 the Court of Appeal held that ss 132(1) and 132(1A) do not alter the law in this area but enhance the common law duty of care and equitable fidicuary duties. The Court of Appeal said at para 233:

… The prior provision of s 132(1) requires a director to act honestly. The current s 132(1) of the Act, requires a director to act in good faith in the best interests of the company. It is accepted that for all intents and purposes, the scope of the directors' duties to act honestly under the old s 132(1) and the new s 132(1) are the same. Thus the old case law relating to the duty to act honestly continues to be relevant (see *Cheam Tat Pang v Public Prosecutor* [1996] 1 SLR 541).It is also recognised that the duty to act in the best interests of the company means different things, depending on the factual circumstances.

[305] Section 131 of the CA 1965 mandates disclosure where a director is in any way whether directly or indirectly interested in a transaction with the company. The learned author Dato' Loh Siew Cheang in 'Corporate Powers Accountability' explained the no-conflict and underlying fiduciary principle as follows:

"**14-4 The no-conflict principle embodies two fundamental themes.**

First, directors cannot engage in 'self-dealings' or enter into transactions with a company in which they are directly or indirectly interested. Second, directors cannot make improper use of their office, company's property or information to make profits for themselves directly or indirectly. This is commonly known as the no-profit rule. There are many ways in which directors may misuse their office to benefit themselves-from usurpation of corporate opportunities, receiving bribes or commission and misapplying company's property. The rule prohibiting undisclosed self-dealings and secret profits is a positive rule.

14-5 The underlying fiduciary principle against the abuse of office is well established. In Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals, the Federal Court said:

> [69] **It is trite law that a person in a fiduciary position is not entitled to make a profit and he is not allowed to put himself in a position where his interest and duty are in conflict**. In *Boardman v Phipps* [1966] 3 WLR 1009 Lord Hodson explained the rule as follows:
>
> > Whether this aspect is properly to be regarded as part of the trust assets is, in my judgment, immaterial. The appellants obtained knowledge by reason of their fiduciary position and they cannot escape liability by saying that they were acting for themselves and not as agents of the trustees. Whether or not the trust or the beneficiaries in their stead could have taken advantage of the information is immaterial, as the authorities clearly show. No doubt it was but a remote possibility that Mr Boardman would ever be asked by the trustees to advice on the desirability of an application to the Court in order that the trustees might avail themselves of the information obtained. Nevertheless, even if the possibility of conflict is present between personal interest and the fiduciary position the rule of equity must be applied. This appears from the observations of Lord Cranworth LC in Aberdeen Railway Co v Blaikie 1 Macq 461, 471.
>
> In the later case of *Bray v Ford* [1896] AC 44 Lord Herschell ... said:
>
> > It is an inflexible rule of a Court of Equity that a person in a fiduciary position, such as the respondent's is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule. But I am satisfied that it might be departed from in many cases, without any breach of morality, without any wrong being inflicted, and without any consciousness of wrong-doing. Indeed, it is obvious that it might sometimes be to the advantage of the beneficiaries that their trustee should act for them professionally rather than a stranger, even though the trustee were paid for his services. [Emphasis added]

14-6 In Furs Ltd v Tomkies, the High Court of Australia explained the rationale as follows:

No director shall obtain for himself a profit by means of a transaction in which he is concerned on behalf of the company unless all the material facts are disclosed to the shareholders and by resolution in a general meeting approves of his doing so, or all the shareholders acquiesce. An undisclosed profit which a director so derives from the execution of his fiduciary duties belongs in equity to the company. It is no answer to the application of the rule that the profit is of a kind which the company could not itself have obtained, or that no loss is caused to the company by the gain of the director. It is a principle resting upon the impossibility of allowing the conflict of duty and interest which is involved in the pursuit of private advantage in the course of dealing in a fiduciary capacity with the affairs of the company. If, when it is his duty to safeguard and further the interests of the company, he uses the occasion as a means of profit to himself, he raises an opposition between the duty he has undertaken and his own self interest, beyond which it is neither wise nor practicable for the law to look for a criterion of liability. The consequences of such a conflict are not discoverable. Both justice and policy are against their investigation. [Emphasis added]"

[306] On related or connected party transactions, Section 132E of the CA 1965 provides:

"132E. Substantial property transaction by director or substantial shareholder

(1) Subject to subsection (2) and section 132F*, a company shall not carry into effect any arrangement or transaction where a director or a substantial shareholder of the company or its holding company, or a person connected with such a director or substantial shareholders—*

(a) *acquires or is to acquire shares or non-cash assets of the requisite value, from the company; or*

(b) *disposes of or is to dispose of shares or non-cash assets of the requisite value, to the company.*

(2) An arrangement or transaction which is carried into effect in contravention of subsection (1) shall be void, unless there is prior approval of the arrangement or transactions—

(a) *by a resolution of the company at a general meeting; or*

(b) *by a resolution of the holding company at a general meeting, if the arrangement or transaction is in favour of a director or substantial shareholder of its holding company or person connected with such director or substantial shareholder.*

(3) The resolution of the company or its holding company at the general meeting of the company or its holding company to consider the arrangement or transaction shall be subject to the director, substantial shareholder or person connected with such director or substantial shareholder, as the case may be, abstaining from voting on the resolution whether or not to approve the arrangement or transaction.

(4) Where an arrangement or transaction is carried into effect by a company in contravention of subsections (1) and (2) that director, substantial shareholder or person connected with such director or substantial shareholder and any director who knowingly authorized the arrangement or transaction shall, in addition to any other liability, be liable—

(a) *to account to the company for any gain which he had made directly or indirectly by the arrangement or transaction; and*

(b) *jointly and severally with any person liable under this subsection, to indemnify the company for any loss or damage resulting from the arrangement or transaction...*

……

(7) For the purposes of subsection (1) –

"person connected with a substantial shareholder" shall have the same meaning as that assigned to a "person connected with a director" in section 122A *save that all references therein to a director shall be read as a reference to a substantial shareholder;.."*

[307] Pursuant to s.122A of the CA 1965, a “person connected” in relation to a director or major shareholder of a company means an associate or partner of that person. Pursuant to s. 122A(3)(a), a body corporate is associated with a director if inter alia the body corporate is accustomed or is under an obligation, whether formal or informal, or its directors are accustomed, to act in accordance with the directions, instructions or wishes of that director.

[308] In the instant case, Adrian served as a director of Protasco from 10.12.2012 to 27.11.2014. His statutory and fiduciary duties as a director including his duties of disclosure under Section 131 of the CA 1965 existed throughout his tenure as a director. Larry on 26.11.2012 became a substantial shareholder of Protasco by purchasing the 27.11% block and he became a director of Protasco on 10.03.2014.

[309] Adrian’s duty to disclose his interest in the oil and gas transaction is mandated by ss. 131, 132 and 132E as he was a director of Protasco at the material times and further was a person connected with PT ASU. The evidence adduced at trial suggest he and Larry are partners within the definition of Section 122A of Companies Act 1965. Both Larry and Adrian are persons connected. At all material times they were common shareholders Nexgram, Asdion, Ire-Tex and Protasco.

[310] Larry’s duty to disclose his interest in the oil and gas transaction is mandated by Sections 131 and 132E as he was at all material times a substantial shareholder of Protasco, a person connected with PT ASU and a director of Protasco from 10.03.2014.

[311] On the evidence adduced, PT ASU, PT ASI and Acclaim are body corporates accustomed or under and obligation, formal or informal, or its directors are accustomed to act in accordance with the directions, wishes or instructions of Larry and Adrian. Larry and Adrian were also effectively shadow directors of PT ASU, PT ASI and Acclaim within the definition of Section 132E read together with Section 4 of CA 1965. In this regard, Tjoe Yudhis as the President Director of PT ASU acts under the instructions of Larry and Adrian in relation to all corporate matters of PT ASU; he has testified to his knowledge , Larry and Adrian were the owners of PT ASU, PT ASI, PT Inovisi and PT Green Pine; email correspondences show Larry and Adrian Ooi were the decision makers and superiors in PT ASU, PT ASI, Acclaim, PT Green Pine and PT Inovisi ; Adrian , without the knowledge of Dedi Francis was able to cause himself to be made a cheque signatory of PT ASI and to cause a transfer of USD5million from PT ASI’s CIMB Bank account in Malaysia to another PT ASI’s bank account with Permata Bank in Jakarta; Adrian had the authority to instruct for a change of shareholdings and Acclaim and PT Green Pine (Green Pine Holdings) and his instructions were acted upon and carried out by the relevant company’s personnel; Larry and Adrian were the ones dictating the contents of PT ASU’s letters of response to Protasco; these behind the scene conduct and machinations put together, are not conduct loyal to Protasco when both of them were placed in a position of confidence and trust. An intelligent and honest man in the positions of either Larry and Adrian could not , in the whole of the existing circumstances, have reasonably believed that what they did was acting primarily in good faith, bona fide and would be in the best interest of the company, Protasco. As fiduciaries, the foremost consequence is that both would owe a duty of undivided loyalty to Protasco. There is sufficient evidence and justification to support the conclusion or inference that Larry and Adrian (either themselves or through their staff) had

caused the transfer of the RM50million deposit, the differential sum and the Shareholder's Advance and they had direct knowledge of the transfer of funds from PT ASU to a web of companies and had personally profited from the transaction when some of the funds originating from Protasco ended up in their own accounts or were utilized to purchase shares on their behalf in Malaysian public listed entities in which they had an interest in. There was no credibility at all to their case that Dedi Francis is the owner of *inter-alia* PT ASU, Acclaim, Telecity, Fast Global and PT Green Pine. Dedi Francis being owner of these companies simply could not be reconciled with the total body of evidence adduced.

[312] I have not overlooked Larry and Adrian's case that DSC knew and by extension Protasco had knowledge of the IA and of the correspondence between DSC/Kenny Chong and Larry and Adrian that Larry was linked to the oil and gas injection from the very outset up to the point where SPA 2 being signed and as such. there could not have been non-disclosure of interest in the oil and gas transaction. I find this contention untenable as Larry himself under cross-examination had consistently asserted that he had informed DSC that there was no need for any declaration because he had no pecuniary interest in the oil and gas project. Under cross-examination, Larry agreed that shareholders' approval is needed if the oil and gas project is a related party transaction but Larry had stated in cross-examination that "I'm not a related party, so what should I be declaring for?" Larry is not "a babe in the woods" nor a 'country yokel', a term used in *Abdol Mulok Awang Damit v Perdana Industri Holdings Bhd* [2003] 3 CLJ 497 at page 502 as Larry had experience as a director in a few public listed companies such as Nexgram and Wintoni and was aware of the requirements of disclosure. The statutory declarations signed by both Larry and Adrian at the 25.7.2014 Board meeting are express representations to Protasco of their non interest in the oil and gas transaction. In any case, Suit 446 against Protasco was struck out by the High Court on 03.06.2015. There was no appeal by Global Cap and Kingdom Seekers against the striking out decision. Thus the issue of Protasco having knowledge of the IA is caught by the principles of res judicata and or issue estoppel as exposited in *Asia Commercial Finance (F) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189.

[313] Larry and Adrian in breach of their statutory duties and fiduciary duties failed to disclose to Protasco that they were persons connected to PT ASU, PT ASI and the security provider, Acclaim. They brazenly affirmed statutory declarations declaring to Protasco that PT ASU is not a party related or any person connected to them as defined under the Companies Act. There was also ample evidence to show that whilst breaching such duties, they had profited from their breach. Both of them having acted in breach of Section 132E of the CA 1965 are liable under the provisions of:

313.1 Section 132E(4)(a) to account to Protasco for any gain which they had made directly or indirectly; and

313.2 Section 132E(4)(b) to indemnify Protasco for its damages suffered resulting from the transaction entered into with PT ASU.

[314] In *Acumen Scientific Sdn Bhd v Yeow Liang Ming* [2020] 3 MLJ 82, *the Court of Appeal said:*

"[38] A company director holds a fiduciary relationship with his company and the duty to avoid conflicts of interest and must at all times exercise his powers bona fide and in the best interests of the company as a whole. The essence of the fiduciary duty is a duty to act bona fide at all times in the interests of the company and not for a collateral purpose. This the defendant failed to exercise and his failure to do so is a blatant breach of his fiduciary duties.

[39] The law requires the defendant as a director of the plaintiff to do, act and behave as follows:

(a) exercise the powers vested as a director in the interests of the company;

(b) must not exercise those powers as a director against the interests of the company; and

(c) in exercising those powers by virtue of his position as a director he must always do so for the general interests of the company and nothing else.

[40] In the Privy Council case of *Brickenden v London Loan & Savings Co* [1934] 3 DLR 465 a solicitor acting for the loan company had a personal interest in certain loans made to a customer of the company which, in breach of his fiduciary duty, he failed to disclose to the company. The trial judge entered judgment for the company. The Court of Appeal of Ontario set aside the judgment on the ground that no breach of duty had been proved, and that in any event the company had suffered no loss. The Supreme Court of Canada restored the judgment of the trial judge, and its decision was affirmed by the [2020] 3 MLJ 82 at 100Privy Council. Giving the judgment of the Privy Council, Lord Thankerton said this (at p 469):

> When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered his decision to proceed with the transaction, because the constituent's action would be solely determined by some other factor, such as the valuation by another party of the property proposed to be mortgaged. Once the Court has determined that the non-disclosed facts were material, speculation as to what course the constituent, on disclosure, would have taken is not relevant.

[41] The defendant had breached not only both the agreements but his fiduciary duties as a director of the plaintiff by failing to disclose and making use of the plaintiff's confidential information. He had used the company's asset, the Dell laptop from 23 December 2014 until 12 January 2015 to communicate and receive emails with regards to Amcen's business operations through his personal email. The defendant had conducted evaluation monitoring of Dynacraft Industries Sdn Bhd on 3 July 2014 and 4 July 2014 in his capacity as associate consultant of Amcen. There was also evidence that whilst still under the employment of the plaintiff, the defendant had registered the website of Amcen and that he was also the administrator."

[315] I find Larry and Adrian's allegation that the board of directors had greenlighted SPA 1 and the payment of the deposit even prior to due diligence, the board of directors had granted extensions to PT ASU to comply with its obligations under SPA 1, and that despite what their learned counsel referred to as 'red flags' arising from the due diligence, the board still proceeded to enter into SPA 2 with the payment of further monies to PT ASU and PT ASI do not exonerate them from breach of statutory and common law fiduciary duties. They had behind the scenes in breach of their duty of good faith, worked against the very interest of Protasco as alluded earlier in the judgment and the evidence is borne out by the email exchanges.

[316] I am inclined to agree with Protasco's counsel that the lack of disclosure by Larry and Adrian as being related persons with PT ASU and being in control of Acclaim and therefore correspondingly being in a position of conflict, had a direct consequence on Protasco proceeding with the transaction and making the necessary payments pursuant thereto. The lack of disclosure had a direct consequence on the integrity of announcement made by Protasco to Bursa and on the audit conducted by Protasco's auditors on the transaction.

[317] Larry and Adrian had procured the securities from Acclaim including the necessary Blocking Letters allegedly signed by Lim Sue Fern which were relied upon by Protasco to justify the terms of the acquisition as announced to Bursa and these securities were in fact an inducement for Protasco to enter into the transactions with PT ASU and make the payments thereunder. The terms of SPA 2 clearly sets out that in the event of non-compliance of the Conditions Subsequent, Protasco has a right to terminate and cause the sale of the blocked securities. As reflected further in SPA 2, the securities were also central in causing Protasco to provide the Shareholder's Advance to PT ASI and the terms of SPA 2 provides that a charge be created over the securities. After Protasco terminated SPA 2 with PT ASU as it was entitled,

behind the scenes and without the knowledge of the board, both Larry and Adrian acted to deprive Protasco of its right to a refund of the purchase consideration and the Shareholder's Advance. Acclaim, a company under their control through their nominee director Lim Sue Fern denied executing the Blocking Letters thereby preventing Protasco from effecting the sale through PT Brent.

[318] I find from the emails sent by On Yong Chieh, it has been clearly established that both Larry and Adrian had knowledge of the transfer of funds, part of which ended up in their personal share margin and bank accounts and they had appropriated the sum of USD27million for the benefit of themselves using various corporate vehicles, fronts and nominees.

[319] From the evidence adduced, there is no escaping that Larry and Adrian have indubitably breached their duty to act in good faith and in the best interest of Protasco, breached their duty of permitting their interest to conflict with that of Protasco and breached their duty not to make a secret profit. In my respectful view, there is ample evidence that Protasco's losses are causally connected to their failure of duties to Protasco.

[320] It is trite that the remedy imposed on the wrongdoers for breach of fiduciary duties would be compensation in equity. The measure of compensation is to put the Plaintiff in the position he would have been had the breach not been committed, see *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [2000] 2 MLJ 353 (FC) at p 378.

Fraud and Conspiracy to defraud

[321] On the facts and evidence adduced, given the probabilities, the reasonable result is my finding that fraud has also been proven against Larry and Adrian. In respect of the securities they both caused to be provided to Protasco, Protasco was in fact induced to enter into SPA 1 and SPA 2 by Larry and Adrian on their representation that the securities could be sold should there be a breach by PT ASU of SPA 2. Both of them knew that Protasco will rely on their representation and towards this end, Adrian instructed the Indonesian legal firm Messrs Risman Hutabarat & Rekan to provide the legal opinion to Protasco that the enforceability and dealing in the Blocked shares comply with the laws of Indonesia. Protasco had also made payment of the differential sum and the shareholders' advance pursuant to SPA 2 premised on Adrian's representations that the conditions subsequent contained in SPA 2, including the extension to the PMPA, was attainable provided the wells were reactivated. Protasco had made the payment of shareholders advance on Adrian's representations that the said advance was needed as working capital for wells reactivation. Both Larry and Adrian had concealed from Protasco their control of PT ASU, PT ASI, Acclaim, their involvement in the issuance of the letters on behalf of PT ASU denying Protasco's request for a return of USD27million, their knowledge of the fact that the total USD27million was already paid out to various third parties including themselves on their instructions and their secret profit and benefit from the entire transaction. Yet at the Board meetings of 25.07.2014 and 04.08.2014, they continued their dishonest conduct. The entire transaction in fact turned out to be a scam to defraud Protasco of its money.

[322] The concatenation of circumstances and events, the acts and conduct of Larry and Adrian, the totality of their dealings and the oral evidence pieced together and weighed, I find that there is credible, cogent, convincing, and compelling tangible evidence that Larry and Adrian have combined together with a common purpose or intention to defraud and injure and/or cause loss to Protasco by unlawful means. In this regard, there is sufficient evidence from which

a conspiracy could be properly inferred, and their acts done in execution of that agreement had resulted in damage to Protasco to the tune of USD 27million.

Evaluation and assessment of the credibility of the witnesses

[323] As "evidence" is not confined to documents and the Court is enjoined by s. 3 of the Evidence Act to consider oral statements by witnesses, the evaluation and assessment of the credibility (or otherwise), of the witnesses were crucial to the present case. In assessing credibility of the witnesses, I have taken note that credibility of a witness embraces not only the concept of his truthfulness ie whether the evidence of the witness is to be believed but also the objective reliability of the witness ie his ability to observe or remember facts and events about which the witness is giving evidence and this court must pay attention to a number of factors which, inter alia, include the following as exposited by Gillen J in *Sean Thornton (a minor by his mother and next friend) v Northern Ireland Housing Executive* [2010] NIQB 4:

(i) The inherent probability or improbability of representations of fact;

(ii) The presence of independent evidence tending to corroborate or undermine any given statement of fact;

(iii) The presence of contemporaneous records;

(iv) The demeanour of witnesses e.g., does he equivocate in cross examination;

(v) The frailty of the population at large in accurately recollecting and describing events in the distant past;

(vi) Does the witness take refuge in wild speculation or uncorroborated allegations of fabrication;

(vii) Does the witness have a motive for misleading the court; and

(viii) Weigh up one witness against another

[324] Sir George Farwell in the Privy Council case of **Bombay Cotton Manufacturing Company v Motilal Shivlal ILR 1915 39 Bom 386**, PC, in addressing the credit of a witness upon cross-examination, said that 'it is most relevant in a case where everything depends on the judge's belief or disbelief in the witness' story.'

[325] In deciding the matter, I have preferred the evidence of the Plaintiff's witnesses whom I viewed as 'more credible' in support of the Plaintiff's contentions, as compared to the Defendants' witnesses whom I found 'evasive' when troubling questions were put to them, and were not credible at all. The Defendants' witnesses' evidence were riddled with contradictions and simply do not add up. Even if there were discrepancies in the Plaintiff's witnesses' evidence, if at all, were minor and not relevant, and on the whole, their evidence was comprehensive, quite compelling, convincing and consistent with the documents and the overall probabilities. In the context of the entirety of the evidence before the court, any lingering doubts that I have, I would resolve in favour of the Plaintiff. I also find nothing sinister in the fact that Kenny Chong was not called to give evidence by the Plaintiff or that any adverse inference should be drawn against the Plaintiff for not calling him. There is no property in a witness. If the Defendants deem him a material witness, they could have called him instead.

Other matters - RM10million Loan Gratification

[326] Larry and Adrian as part of their pleaded case allege that DSC, his son Kenny Chong and senior management of Protasco and/or its subsidiaries have financially benefited through

gratification, breach of fiduciary duties and illegal financial gain from the agreements between Protasco and PT ASU. Larry and Adrian contend that the financial gain of RM10million was received via an entity named RS Maha Niaga. I find this complaint is caught by the proper plaintiff rule in *Foss v Harbottle* and does not concern this court. There is also no relief sought By Larry and Adrain in the present proceedings against DSC personally.

[327] In sum, based on the sum total of all the evidence adduced herein, I am satisfied that Protasco has discharged its burden in establishing its claim for breach of fiduciary duties, breach of Section 131 and 132E of the Companies Act, fraud, and conspiracy to defraud on the part of the 2nd and 3rd Defendants on a balance of probabilities. In the present case, I am of the ciew that it would not be inequitable or contrary to conscience to grant the relief as sought by Protasco . So that there is no overlap or double recovery, the claims in para 76 (a), (b), (k) & (l) are allowed with costs of RM650,000 subject to allocator. In determining cost, this court took into account the criterias in O59 r16 *interalia*, the trial took 42 days, documents involved are voluminous and this is not a run of the mill case. In allowing pre judgment interest at 5% per annum from the date of the writ, this court exercised its discretion under s.11 Civil Law Act. 1956. The USD27 million is coverted to its Ringgit equivalent as at date of judgment.

[328] It remains for me to record my appreciation to learned counsel for the respective parties for their efforts and industry expended in their submissions. I do not propose to burden this judgment by citing at length each of the arguments and authorities relied upon by learned counsel.

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