In The Supreme Court of Bermuda

CIVIL JURISDICTION

2018: No. 359

BETWEEN:

(1) ANNUITY & LIFE RE LTD
(2) POPE ASSET MANAGEMENT LLC

Plaintiffs

-AND-

(1) KINGBOARD COPPER FOIL HOLDINGS LIMITED
(2) JAMPLAN (BVI) LIMITED
(3) KINGBOARD LAMINATES HOLDINGS LIMITED
(4) EXCEL FIRST INVESTMEMNTS LIMITED
(5) KINGBOARD CHEMICAL HOLDINGS LIMITED

Defendants

JUDGMENT

Trial of an action to enforce an anti-embarrassment clause in a Deed of Settlement and Release; Singapore Code on Take Overs and Mergers; meaning of "Offer"

Dates of Hearing: **23, 24, 25 and 26 June 2025**
Date of Judgment: **18 August 2025**

Appearances: *Keith Robinson* and *Matthew Rhodes* of Carey Olsen Bermuda Limited for the Plaintiffs

Jern-Fei Ng KC of counsel with

Britt Smith and *Mathew Hudson* of Conyers Dill & Pearman Limited for the Defendants

JUDGMENT OF MARTIN J

Introduction

1. This is the Court's Judgment in an action brought by the Plaintiffs to enforce an anti-embarrassment clause in a Settlement and Release Agreement executed in April 2018 ("the Settlement Agreement")[1].

2. The Settlement Agreement arose out of a minority shareholders' petition brought by the Plaintiffs under section 111 of the Bermuda Companies Act 1981 which alleged oppressive and unfair conduct on the part of the majority shareholders of the First Defendant. In separate proceedings issued by the Plaintiffs in 2014, the Plaintiffs had petitioned for the 'alternative remedy' to a winding up and sought relief requiring the Defendants to acquire the Plaintiffs' shares at their fair value. It is not necessary to set out the full history of that action, save to record that after a trial, which resulted in a Judgment in favour of the Plaintiffs, and an appeal, which resulted in a reversal of the that Judgment in favour of the Defendants, the parties ultimately entered into a compromise on the terms set out in the Settlement Agreement.

3. By the terms of the Settlement Agreement, the Defendants acquired the Plaintiffs' shares in the First Defendant at a price of Singapore $ (SG$) 0.45 per share. As a guard against the potential that the shares were being acquired by the Defendants at less than their fair value, the Settlement Agreement also provided that in the event that the any of the Defendants or their affiliates *"enters into a transaction to the effect that the shares in the Company [i.e. the First Defendant] are offered to be purchased or are issued at a price exceeding Singapore $0.45 per share"* within 12 months of the date of the Settlement Agreement, the Defendants would pay to the Plaintiffs the difference in that price. This is referred to as the "anti-embarrassment" clause.

4. The issues in this case revolve around whether the terms of the anti-embarrassment clause were triggered by two separate sets of circumstances. The first claim relates to the acquisition of shares in the First Defendant by persons who were alleged to be affiliated with the Defendants (within the meaning of that term as defined in the Settlement Agreement). The acquisitions of these shares were made on 10 July 2018, well within the 12-month period covered by the anti-embarrassment clause, and at a price of SG$0.51 (i.e. 6 cents a share higher than the price paid under the Settlement Agreement).

5. The second claim relates to the Fourth Defendant's announcement of its intention to acquire the remainder of the shares not already owned by the Fourth Defendant or its concert parties. This announcement was made by way of an announcement of a Voluntary Unconditional Cash Offer on 4 April 2019 which was posted on the

[1] The Settlement Agreement is produced at Hearing Bundle 1 (HB1) at pages 129-137.

Singapore Stock Exchange ("the SGX-ST") at a price of SG$0.60 per share (i.e. 15 cents a share higher than the price paid under the Settlement Agreement).

6. There was a dispute as to whether this announcement was made within the 12-month period covered by the anti-embarrassment clause which will be explained in more detail below. Essentially the issue was whether the Settlement Agreement had been executed on 3 April 2018 (which would have meant that the announcement had been made one day *outside* the 12-month period), or 5 April 2018, (which would mean that the announcement had been made one day *within* the 12-month period).

7. The details of the Settlement Agreement and the facts giving rise to the Plaintiffs' claims are set out in the Judgment below. The key matters for the Court decide were (i) what was the date of execution of the Settlement Agreement (for the purposes of determining when the one-year anti-embarrassment period expired) (ii) whether the acquisitions of shares made by Mr Chan Win Kwan (also known as Mr. Patrick Chan) and Smart Guys Group Ltd on 10 July 2018 were acquisitions by persons affiliated with the Defendants such as to trigger the provisions of the anti-embarrassment clause and (iii) whether the announcement on 4 April 2019 of the Fourth Defendant's intention to make an unconditional cash offer to purchase the remaining shares meant that the Fourth Defendant had entered into a *"transaction to the effect that the shares [of the First Defendant] were offered to be purchased"* within the meaning of the anti-embarrassment clause.

Summary and Disposition

8. For the reasons set out below, the Court has reached the following conclusions in relation to the issues described above.

The 10 July 2018 purchases of shares in the First Defendant

9. The Court is not satisfied that the acquisitions of shares by Mr Chan Win Kwan and Smart Guys Group Ltd were acquisitions made by the Defendants or their "Affiliates" within the meaning of clause 7 of the Settlement Agreement when read with the definition of Affiliates within clause 4 clause of the Settlement Agreement. This is because neither Mr Chan Win Kwan nor Smart Guys Group Ltd were "Affiliates" (within the meaning of the term) nor is there any evidence that Mr Chan Win Kwan or Smart Guys Group Ltd purchased the shares as agents for the Defendants or in concert with them.

10. On the contrary, the only evidence shows that these purchases were made long after Mr. Chan had resigned from the Boards of the Kingboard companies and were made through the personal brokerage account of Mr. Chan Win Kwan and the corporate account of Smart Guys Group Ltd (which is owned by Mr. Chan Win Kwan). There is no evidence linking the purchases of these shares on 10 July 2018 to any of the Defendants. Accordingly, the Plaintiffs' first claim fails.

The express and/or implied terms as to disclosure

11. The Plaintiffs also alleged that clause 14.5 of the Settlement Agreement imposed a positive ongoing obligation of disclosure regarding share purchases made. The Court is unable to construe the clause to extend the obligations to execute all documents and do all acts to give effect to the agreement to include an obligation of ongoing disclosure of this type. Nor does the Court consider that it is necessary to imply such a term to give business efficacy or coherence to the Settlement Agreement.

Date of the Settlement Agreement

12. The Court is satisfied that the Settlement Agreement was executed and entered into on 5 April 2018 so that the announcement made on 4 April 2019 by the Fourth Defendant fell within the anti-embarrassment period.

The Fourth Defendant's announcement of an intention to make an unconditional offer

13. The Court is not satisfied that the making of the announcement of the intention to make an unconditional cash offer to purchase the remaining shares of the First Defendant was *"a transaction to the effect that the shares in the [First Defendant] were offered to be purchased or issued"* within the meaning of the anti-embarrassment clause.

14. This is because, on proper construction, the announcement of an intention to make an offer to purchase the shares is not a transaction to the effect that the ordinary shares in the First Defendant were *offered to be purchased* within the meaning of clause 7 of the Settlement Agreement as a matter of Bermuda law.

15. The announcement by the Fourth Defendant of an intention to make an offer ("the Offer Announcement") was not an offer which could be accepted by anyone nor would it inevitably lead to a transaction whereby shares in the First Defendant would be purchased (or issued). It was therefore not a transaction *to the effect* that the shares were offered to be purchased (or issued).

16. The Offer Announcement was later followed by an unconditional Offer Document which was later circulated to the shareholders which was capable of being accepted, but that unconditional offer was made after the 12-month anti-embarrassment period had expired.

17. For the reasons given later in the Judgment, the Court does not accept the Plaintiffs' submission that because the Offer Announcement could not be withdrawn without consent of the Singapore Securities Industry Council, and that the evidence was that such consent would not have been given in this case, that the Offer Announcement had the same legal as an Offer, nor that the Offer Announcement was a transaction that had the effect that the First Defendant's shares were offered to be purchased within the meaning of clause 7 of the Settlement Agreement.

18. This is because the Singapore Take Over Code does not affect the legal principles which apply under both Singapore law and Bermuda law that an offer is not made in law until the terms of the offer are capable of being accepted. The Offer Document that contained the materials which were capable of being accepted by shareholders was not sent out until after the expiry of the 12 month anti-embarrassment period provided in the Settlement Agreement. The Plaintiffs' second claim therefore also fails.

19. As a result of these findings, the Plaintiffs' claims are dismissed with costs.

Background

20. The detailed background to the history of the Plaintiffs' involvement as shareholders in the First Defendant is set out in the first affidavit and witness statement of Mr William Wells[2].

21. In brief, the First Defendant was incorporated in Bermuda in 1999 was in the business of manufacturing copper foil in the People's Republic of China, and its shares were listed on the Singapore Stock Exchange ("the SGX-ST"). In 2011 Annuity & Life Re Ltd ("Annuity & Life") owned 17,361,000 common shares and Pope Asset Management LLC ("Pope") owned 20,928,344 common shares in the First Defendant, which together represented about 5.2 % of the total issued shares of the First Defendant at that time.

22. The Plaintiffs[3] alleged that the affairs of the First Defendant were being carried on in a manner oppressive to the Plaintiffs as a result of (i) a pattern of dealing with related companies in the Kingboard group (principally the Third Defendant) which the Plaintiffs alleged amounted to a preferential transfer pricing scheme and (ii) a licensing arrangement which was alleged to have been used as a device to overcome the refusal of the minority shareholders to approve an "interested persons mandate" that was required to enable the First Defendant to sell copper foil to the Third Defendant. The commercial consequences of this alleged 'device' were alleged to amount to oppressive conduct justifying a winding up order and triggering a right to claim the alternative remedy to a winding up order in the form of an order to purchase the Plaintiffs' shares.

23. The Plaintiffs accordingly issued a petition to this Court under section 111 of the Bermuda Companies Act 1981 seeking an order that the Defendants purchase the shares owned by the Plaintiffs at their fair value.

24. At the trial of the action in 2015, Kawaley CJ found in favour of the Plaintiffs in part on the ground that the entering of the licencing arrangement amounted to oppressive

[2] HB1 pages 487-90 and HB 2 pages 930 to 944.
[3] The proceedings were commenced by Annuity & Life but at a later stage Pope was added as a party, the details of which are not relevant to the summary of the background history. For convenience the court has combined the parties in the expression 'the Plaintiffs' throughout, although this is not strictly accurate until a later stage in the proceedings.

conduct, but adjourned consideration of the remedy to allow other minority shareholders who had not participated in the proceedings to make submissions[4].

25. However, on appeal, the Bermuda Court of Appeal reversed the decision of Kawaley CJ and held that the Licence Agreement did not amount to a visible departure from standards of fair dealing and set aside the first instance decision[5].

26. The Plaintiffs filed an application for leave to appeal to the Privy Council, but shortly afterwards, entered into a settlement agreement (the "2017 settlement agreement") under the terms of which the Defendants were to purchase Annuity & Life's shares in the First Defendant at a price of SG$0.40 per share.

27. However, the Defendants failed to complete the purchase and the Plaintiffs commenced arbitration proceedings under the terms of the 2017 settlement agreement. Further negotiations ensued and ultimately a further settlement was reached, the terms of which were set out in a Settlement and Release Agreement that was executed in April 2018. It is the terms of this agreement (referred to in this Judgment as "the Settlement Agreement") with which the Court is concerned.

The Settlement Agreement

28. The essential terms of the Settlement Agreement[6] (so far as material to the present proceedings) provided as follows:

"SALE AND PURCHASE OF SHARES

3.1 Pursuant to the terms and conditions set forth in this agreement, the Petitioner is legal and beneficial owner of the Petitioner Shares agrees to sell, transfer, assign, grant and deliver the Kingboard Laminates Holding Ltd and Excel First Investment Ltd (collectively, the "Purchasers"), and the Purchasers hereby agreed to purchase the Petitioner Shares from the Petitioner, warranted by Petitioner to be free and clear from all liens and encumbrances whatsoever, at dollars 0.45 per ordinary shares, i.e. a total aggregate purchase price of Singapore $7,812,450.

3.2 Pope hereby warrants that as of this date it has the authority to sell the total of 20,928,344 ordinary shares of the Company (defined above as the "PAM shares") held by its clients and deliver the entirety of the PAM shares, warranted by Pope to be free and clear from all liens and encumbrances whatsoever, to the Purchasers at S$ 0.45 per ordinary shares, i.e. at a total aggregate purchase price of S$9,417,754.80."

4. RELEASE

This Settlement Agreement is in full and final settlement of, and of each of the Parties (and its Affiliates (defined below) and their predecessors an successors) hereby irrevocably and unconditionally releases and forever discharges each of the other parties and their respective owners, affiliates, members, officers, employees, agents, predecessors, successors, assigns, assignees, successors in interest, principals, partners, managers, representatives, attorneys,

[4] [2015] SC (Bda) 76 Comm at paragraph 174 of the Judgment of Kawaley CJ.
[5] [2017] CA (Bda) 3 civ at paragraph 89 in the Judgment of Clarke JA.
[6] HB1 pages 127-37.

and all persons and entities acting by, through, under or in concert with them, or any of them, from all and/or any actions, claims, rights, demands and set-offs, whether in this jurisdiction or any other, whether or not presently known to the parties or to the law, and whether in law or equity, that it may have or hereafter can, shall or may have against any other Party arising out of or connected directly or indirectly with the Dispute and the Arbitration….and any other matters relating to the Petitioners and Pope's (including their clients') legal and/or beneficial shareholding in the company (except with respect to performance of the Party's obligations under this Settlement Agreement, and/or except in the event that the conditions precedent to this Settlement Agreement at clause 3.5 above are not satisfied).

"Affiliates" shall mean, with respect to a party, any entity which directly or indirectly controls, is controlled by or is under common control of a party to this agreement; the term "control" as used herein shall mean the possession of the power to direct or cause the direction of the management and the policies of an entity, whether through the ownership of the majority of the outstanding voting rights or by contract or otherwise.

7. FURTHER ENTITLEMENT IN THE EVENT OF CERTAIN TRANSACTION

In the event that any of the Kingboard Respondents, the Company, or any of their Affiliates (as defined in clause 4) enters into a transaction within 12 (twelve) calendar months from the date herein to the effect that the ordinary shares of the Company are offered to be purchased or are issued at a price exceeding S$0.45 per ordinary share, the Purchasers shall pay the Petitioner and Pope respectively an additional payment of an amount which equals to: (Transaction price per ordinary share--$0.45) x number of ordinary shares being sold under this Agreement (i.e. 17,361 000 in the case of the Petitioner; and 20,928,344 in the case of Pope).

14. GENERAL

14.4 This Settlement Agreement may be amended only by written agreement of all the Parties.

14.5 The Parties agree to execute and deliver all additional documents and instruments and to do all acts not specifically referred to herein which are required to give full effect to the intent, terms, and conditions of this Settlement Agreement.

29. The Settlement Agreement was executed in counterparts. The counterpart executed by Mr. Wells on behalf of the Plaintiffs was dated 3 April 2018 and the counterpart executed by the Defendants was dated 5 April 2018.

30. The payment of the purchase price was made to the Plaintiffs in accordance with the terms of the Settlement Agreement. The Court should mention that the Settlement Agreement also provided for the settlement of the Plaintiffs' costs claims of US$1.7 million on completion of the transaction. As a condition precedent to the implementation of the settlement, the funds were to be sent to the Defendants' attorneys in Bermuda to be held in escrow, and upon receipt of those funds the Bermuda attorneys were to notify the Plaintiffs that the funds had been received and were being held upon their undertaking to release the sum within 5 working days of the confirmation of the completion of the sale transaction, for which the trade confirmation from the executing broker was to be accepted as confirmation[7]. This provision gave rise to a delay in the

[7] Clause 6 of the Settlement Agreement.

dating and return of the counterpart by the Defendants who later explained that they had wished to obtain an additional period in which to pay the settlement sum.

The Evidence

31. This case is primarily about contractual interpretation. The factual evidence in this case related to one area of disputed fact. This was the identity of the purchasers of the shares that were acquired on two separate trades through the Singapore Stock Exchange on 10 July 2018. The number of shares purchased and the prices paid for them were not in dispute.

32. Mr. Wells gave evidence on behalf of the Plaintiffs about his suspicions and explained why he and his colleagues and his contacts in the brokerage world thought that it was likely that the Defendants were behind these purchases. In reality, Mr. Wells gave no direct evidence of fact about the transactions, but asked the Court draw the inference from what he and his colleague and his contacts considered to be the most likely explanation, namely that the Defendants were somehow behind the purchases. Most of what Mr. Wells had to say about the matters in dispute was inadmissible as hearsay, or inadmissible as opinion evidence.

33. Mr. Lam Kam Cheung gave evidence on behalf of the Defendants primarily in respect of the documentary disclosure that had been given by the Defendants in the case, and although he was pressed vigorously on many areas, he was not in a position to give any direct evidence concerning the transactions which were the subject of the dispute. His evidence really went to background matters.

34. The Court did therefore not derive much assistance from the evidence of these witnesses, and there is no purpose in recounting in detail the evidence they gave in their witness statements or their cross examinations because they did not shed much light on the matters the Court has to decide. However, where relevant, the Court has set out the evidence they were able to give and evaluates it as it pertains to the issues in dispute.

35. The factual evidence relating to these transactions was provided by documentary disclosure under Letters Rogatory which had been issued by the Bermuda court seeking international judicial assistance from the courts in Hong Kong and Singapore. The documents speak for themselves and are recorded in the Judgment below.

36. The second area of dispute was the legal effect of an Offer Announcement under the Singapore Take Over Code and whether this Offer Announcement amounted to a transaction to the effect that the shares in the First Defendant were offered for sale. Expert evidence was given by two lawyers who gave evidence on the meaning of various provisions of the Singapore Take Over Code.

37. Ms. Chui Lijun gave evidence on the behalf of the Plaintiffs and Professor Hans Tjio gave evidence on behalf of the Defendants, and they were each cross-examined on the content of their respective reports. The substance of this evidence is explained below, and its relevance to the Court's decision is evaluated and explained.

The 10 July 2018 purchases of shares

38. About three months after the Settlement Agreement was executed, on 10 July 2018 42,177,400 common shares in the First Defendant were purchased through the SGX-ST in two tranches at a purchase price of SG$0.51 and SG$0.485. The identity of the purchaser(s) was not known at the time of the purchase, but the Plaintiffs strongly suspected that the purchase had been made by the Defendants because (in Mr. Wells' opinion) it would not have made commercial sense for anyone other than the Defendants to effect a trade for that number of shares at a substantial premium to the market price because the First Defendant's business was not making money at that time and was illiquid[8]. Mr. Wells gave his account of what happened next which is summarised below and is not in dispute.

39. Mr. Wells and his colleague Mr. McCandless thereupon made enquiries from their contacts to try to find out the identity of the purchaser.

40. Mr. Wells emailed Mr. Hoi Kok Wong who was at APS Investments, which was the only other shareholder Mr. Wells thought would have had enough shares to make a trade of that size, to try to get confirmation of the identity of the purchaser. At first Mr. Wong stated unequivocally that the purchaser was a related party to the First Defendant. After a further enquiry, Mr. Wong told Mr. Wells that he did not know the identity of the purchaser first hand because *"it had been a broker who had approached APS on the deal"*. But Mr. Wong gave Mr. Wells the details of the broker, Mr. Chee Kin Soo.

41. Mr. Wells then contacted Mr. Soo who said he did not know the identity of the purchaser because he had himself been approached by a broker, and that he had not told Mr. Wong that the purchaser was a party related to the First Defendant.

42. Mr Wells went back to Mr. Wong who confirmed he did not deal directly with the purchaser but with a broker, but he too assumed that the purchaser must be a related party, and said that *"no idiot will buy an illiquid stock at a premium to the market but we don't know who they were because we were approached by the broker"*[9].

43. Mr. McCandless contacted Mr. Dick Chan at the Plaintiffs' primary broker in Singapore to ask if he had any information, but Mr. Dick Chan said he did not know but surmised that the First Defendant itself had bought the block of shares[10].

[8] Wells WS paragraph 34 HB2 page 939.
[9] Wells WS paragraphs 38-9 HB2 page 940-1 and 1345.
[10] Wells WS paragraph 36 HB2 page 940.

44. In order to obtain independent evidence to support the theory of the claim that these shares were purchased by the First Defendant or one of its affiliates, the Plaintiffs engaged in a lengthy and exhaustive campaign of Letters Rogatory directed at establishing the identity of the purchaser of the shares[11]. The results of that campaign can be summarised as follows:

a. On 10 July 2018 Mr. Chan Win Kwan (also known as Mr. Patrick Chan) purchased 22,177,400 ordinary shares in the First Defendant at S$0.51 and 96,000 shares at S$0.466 which resulted in a total purchase of 22,273,400 shares[12]. These shares were purchased through Mr. Chan's "B" account #357488-8 at DBS Vickers (Hong Kong) Limited.
b. On 10 July 2018 Smart Guys Group Ltd purchased 20,018,000 ordinary shares in the First Defendant at S$0.485 through Smart Guys Group Ltd.'s account #P-125363 at DBS Vickers Securities (Singapore)[13].
c. Mr. Chan Win Kwan is the ultimate beneficial owner of Smart Guys Group Ltd., and the DBS Vickers Securities (Singapore) Account was opened on 19 April 2016[14].
d. On 27 July 2018 18,000 of these shares were sold on the SGX-ST at S$0.45 to an unknown purchaser[15].
e. On 21 August 2018 Mr Chan Win Kwan transferred 10,000,000 of these shares to Mr. Mok Cham Hung (Chadwick), who is Mr. Chan's son-in-law[16].
f. The remaining 10,000,000 common shares acquired in the 10 July 2018 purchase were retained by Mr. Chan.

45. The Plaintiffs urged the Court to infer from these facts that the purchase of these shares and their subsequent transfer to Mr. Mok Cham Hung was an orchestrated move on the part of the Defendants to acquire additional shares in anticipation of, or as a preliminary step taken to promote the success of, a planned offer to take the First Defendant private and delist it from the SGX-ST. The Plaintiffs pointed to a number of matters in support of this claim.

46. The Plaintiffs say that Mr. Chan Win Kwan is the former chief executive of the First Defendant and a co-founder of the company. Mr Mok Cham Hung is also a former executive of the First Defendant. The Plaintiffs say that Mr. Chan Win Kwan and Mr. Mok Cham Hung had nominated an email account at Kingboard and mailing address to receive trade confirmations and account statements in relation to the July 2018 transaction[17], and remained in friendly contact with the executive team after he left

[11] McCandless 2nd affidavit HB8 pages 1637-41.
[12] HB7 pages 481 and 907.
[13] HB8 pages 1697-9, 1770 and 1777.
[14] HB8 pages 1765-6.
[15] HB8 page 2122.
[16] HB8 page 2119
[17] Paragraphs 16 and 44-5 of the Plaintiffs' opening submissions

Kingboard[18]. The Plaintiffs say that Smart Guys Group Limited is wholly owned by Mr. Chan Win Kwan and is therefore in reality to be treated as an extension of Mr Chan Win Kwan. In all the circumstances the Plaintiffs say that these gentlemen (and Smart Guys Group Ltd) are affiliates of the Defendants within the meaning of clause 4 of the Settlement Agreement[19].

47. The Plaintiffs also submitted that if these gentlemen and Smart Guys Group Ltd were not affiliates, the Court should infer that they were acting as the agents of the Defendants.

48. Alternatively, the Plaintiffs says that the Defendants acted in breach of the obligation in clause 14.5 of the Settlement Agreement by failing to disclose the details of the transaction, and asked the Court to interpret the clause as a continuing obligation clause to give effect to the parties' intention that there should be some mechanism for the disclosure of the details of transactions which fall within the ambit of the Settlement Agreement. The Plaintiffs asked the Court to infer that the failure to disclose these details the Plaintiffs have hidden the fact that the purchases were made by purchasers affiliated with the Defendants. Alternatively the Plaintiffs say that the Court can and should infer that an agency arrangement existed between the Defendants and the purchasers.

49. Mr. Wells' evidence in his witness statement was that he did not know who the purchasers were but said that the transaction was inconsistent with a third-party purchase. He said he disbelieved the Defendants when they denied involvement, but pointed to the *modus operandi* of the Defendants in the oppression proceedings and implied that the Defendants were not being straightforward in their responses.

50. The Defendants took the position that the Plaintiffs were speculating about the connection between Mr. Chan Win Kwan and Smart Guys Group Ltd and that in fact the purchase was an entirely private transaction and the Defendants had no connection involvement in Mr. Chan Win Kwan's and Smart Guys Group Ltd's purchases of the shares in the First Defendant on 10 July 2018.

51. Under cross examination Mr. Wells accepted that both Mr. Chan Win Kwan and Mr. Mok Cham Hung had resigned all their positions with the Kingboard group of companies by 1 August 2014[20], and that Mr. Chan junior had left his position in a related Kingboard group company by 1 September 2014. Mr. Wells also accepted that the assertion that there was a continuing connection to Mr. Chan Win Kwan in 2018 through

[18] Cross-examination of Mr. Lam Kam Cheung Transcript Day 2 page 143.
[19] Paragraph 45 of the Plaintiffs' opening submissions and oral closing submissions Transcript Day 4 pages 159-60.
[20] Transcript Day 1 pages 144, 145, 146 and 160.

Mrs. Chan Wai Lin (Stephanie) a was mistaken reference to Mrs. Cheung Wai Lin (Stephanie)[21] who is unrelated to Mr. Chan Win Kwan.

52. Under cross examination Mr. Wells was also taken to a series of documents which were also disclosed as part of the Letters Rogatory exercise undertaken by the Plaintiffs. The first was the personal trading account at DBS Vickers Hong Kong which was opened on 3 March 2009 and was named as Mr Chan's "A" account numbered 352278[22]. The contact details for this account were given as an address at Science Park East Avenue as Mr. Chan Win Kwan's business address and an email contact address at patrickchan@kingboard.com. Mr Wells accepted that this account was closed on 9 March 2018 and had not been active since 2012[23].

53. Mr. Wells was also taken to the account opening documents for Mr. Chan Win Kwan's personal trading account which was designated his "B" account numbered 357488[24]. Mr. Wells accepted that the contact address and email address for trade confirmations were reflected as the personal addresses of Mr. Chan Win Kwan, not Kingboard[25]. This was the trading account through which Mr. Chan Win Kwan made the purchase of 22,273,400 shares in the First Defendant on 10 July 2018. Mr. Wells was however not prepared to accept that this was the only account because the account reference was shown as 357488-8[26].

54. Mr. Wells was also taken to the account opening documents for the trading account of Smart Guys Group Ltd[27]. Mr. Wells accepted that these documents showed that the account was a corporate account and had the contact address at the residential address and personal email account address of Mr. Chan Win Kwan[28]. However, Mr. Wells continued to maintain that these documents related to the same account through which Smart Guys Group Ltd purchased the shares.

55. Mr. Lam Kam Cheung gave (unchallenged) evidence that the normal practice at the Kingboard group was that the email accounts of former employees would normally be closed soon after the departure of the employee from his or her post, but he could not say that he had personally checked to see if the email accounts of Mr. Chan Win Kwan or Mr. Mok Cham Hung had been closed[29].

56. In the light of these materials and this evidence, the Court can only come to the conclusion that there is no evidence linking the accounts through which the shares in

[21] Transcript Day 1 pages 151, 157.
[22] HB7 tab 8 page 769.
[23] Transcript Day 1 page 177.
[24] HB7 tab 8 page 877.
[25] Transcript Day 1 page 181.
[26] Transcript Day 1 page 189.
[27] HB7 tab 8 page 830.
[28] Transcript Day 1 page 197.
[29] Transcript Day 2 pages 148-158.

the First Defendant were purchased to the Defendants in any way. The suspicions and assumptions made by Mr. Wells and his colleagues (and those with whom they communicated) are entirely unsubstantiated. In reality these claims are contrary to the incontestable facts disclosed by the documents.

57. Mr. Wells gave his evidence in a clear and intelligent way, and no doubt his evidence (so far as it went) was sincere. However, his stubborn refusal[30] to accept the plain documentary evidence that showed that the accounts through which the share purchases were made were the personal account of Mr. Chan Win Kwan and the corporate account of Smart Guys Group Ltd did him no credit.

58. Mr. Chan Win Kwan and Mr. Mok Cham Hung were not employed by the Defendants at the time the shares were purchased: they had left the Defendants more than 4 years earlier. The tenuous link between Mr. Chan Win Kwan's Kingboard email address and Kingboard disappears when it is appreciated that the "A" account to which that email address was linked was closed prior to the purchase taking place and had been inactive for over 6 years.

59. The claim that Smart Guys Group Ltd was an "Affiliate" is not understood, given that the ultimate beneficial owner is Mr. Chan Win Kwan and is completely unconnected to the Defendants within the definition of the term "Affiliate" in clause 4 of the Settlement Agreement: it is not controlled by the Defendants.

60. Similarly, there is absolutely no evidence that Mr. Chan Win Kwan or Smart Guys Group Ltd purchased the shares as agent(s) for the Defendants.

Express or implied terms as to disclosure

61. The alternative claim made by the Plaintiffs that the obligation to provide disclosure of the details of the purchase under clause 14.5 is also misconceived. This clause is a standard provision which means that the Defendants must execute or deliver documents necessary to give effect to the transaction contemplated by the Settlement Agreement.

62. On its proper construction clause 14.5 does not extend to providing information in relation to the purchase of shares in the First Defendant. This is for two reasons. The first is that unless the purchase was in fact made by the Defendants, the Defendants would be unable to provide any information. The second is that the obligation to provide such information would have to fall within the single word "intent" in that clause. This would put too much weight on that word, and the Court considers that an ongoing disclosure obligation would have to be expressly set out for the clause to bear the meaning contended for.

[30] Transcript Day 1 pages 189-197.

63. Similarly, there is no room to imply a term to that effect to give business efficacy to the Settlement Agreement, whose purpose was to provide the terms of the payment of the purchase price, the mutual release of claims and the payment of costs. The implication of a term of the type urged by the Plaintiffs would not be justified on any of the grounds set out in **Marks & Spencer plc v BNP Paribas Securities Services**[31]. In particular, the Settlement Agreement does not lack commercial or practical coherence without the implication of a term requiring ongoing disclosure.

64. Moreover, the documents now disclosed show that the purchases on 10 July 2018 were in fact made by Mr. Chan Win Kwan and Smart Guys Group Ltd and not by the Defendants. Accordingly, there could not have been a breach of that term even if it bore the meaning the Plaintiffs contended for. There is no evidence that the Defendants had any knowledge as to the identity of the purchasers until the documents were produced under the Letters Rogatory.

65. For all the reasons stated above, the Court dismisses the Plaintiffs' claim in relation to the purchase of the shares in the First Defendant on 10 July 2018.

The 4 April 2019 Offer Announcement

66. On 4 April 2019 the Fourth Defendant made an announcement on the web portal of the First Defendant on the SGX-ST in the following terms[32] (so far as material for the purposes of these proceedings):

> *"**VOLUNTARY UNCONDITIONAL CASH OFFER***
> *by*
> ***EXCEL FIRST INVESTMENTS LIMITED**[33]*
> *for all the issued and paid-up ordinary shares in the capital of*
>
> ***KINGBOARD COPPER FOIL HOLDINGS LIMITED**[34]*
>
> *other than those which are owned, controlled or agreed to be acquired by the Offeror or by parties acting in concert with the Offeror in relation to the Offer*
>
> ***OFFER ANNOUNCEMENT***
>
> ***1. Introduction***
> *Excel First Investments Ltd ("**Offeror**") wishes to announce that it intends to make a voluntary unconditional cash offer ("**Offer**") for all the issued and paid-up ordinary shares of a par value of US$0.10 ("**Shares**") in the capital of Kingboard Copper Foil Holdings Ltd ("**Company**"), other than those which are owned, controlled or agreed to be acquired by the Offeror or by parties acting in concert or deemed to be acting in concert with the Offeror in relation to the Offer ("**Concert Parties**" and such Shares, "**Offer Shares**") with*

[31] [2016] AC 742 at paragraphs 18-21 per Lord Neuberger PSC.
[32] HB1 pages 138-146.
[33] The Fourth Defendant in these proceedings.
[34] The First Defendant in these proceedings.

*a view to delist the company from the main board of Singapore Exchange Securities Trading Ltd ("**SGX-ST**").*

2. Offer

2.1 General

*The Offer will be made on the terms and conditions set out in this announcement and the offer document to be issued by the Offeror **("Offer Document")**, and in accordance with section 139 of the securities and futures act, Chapter 289 of Singapore and the Singapore Code on Takeovers and Mergers.*

2.2 Offer Price

*The Offer will be made at: S $0.60 in cash for each offer share ("**Offer Price**").*

2.3 Offer Shares

*The Offer will be extended to all the offer shares. The Offer does not extend to the shares owned, controlled or agreed to be acquired by the Offeror or its Concert Parties, including the shares held directly and indirectly by the Offeror and its Concert Parties as at the date hereof ("**Announcement Date**") as set out in **Schedule 1**.*

2.4 Rights and Encumbrances

The Offer Shares will be acquired:

(a) fully paid;

(b) free from all claims charges, liens, mortgages...

(c) together with all rights, entitlements...

2.5 Offer unconditional

The Offer will <u>not</u> be subject to any conditions and will be unconditional in all respects.

2.6 Offer Document

Further information on the Offer shall be set out in the Offer Document to be issued by the Offeror.

10. INDICATIVE TIMELINE

10.1 Offer Document

The Offer Document, setting out the terms and conditions of the Offer and enclosing the relevant forms of acceptance and approval of the offer, will be dispatched to shareholders not earlier than 14 days and not later than 21 days from the Announcement Date.

67. On 18 April 2019 the Fourth Defendant issued the Offer Document[35] which set out the terms of the Offer in detail together with a letter to shareholders explaining the background and reasons for the Offer, setting out the details of the offer and explaining the procedures for acceptance the Offer.

[35] HB1 pages 147-212.

68. The forms that were annexed to the Offer Document provided the details and formalities for accepting the Offer and providing details for the payment of the Offer Price tot he shareholders who accepted the Offer.

69. The essential questions for the Court to determine are (i) whether the Fourth Defendant's announcement of its intention to make an offer amounted to entering into *"a transaction to the effect that the shares in the [First Defendant] were offered to be purchased"* and (ii) whether that announcement took place within the 12-month period provided for in clause 7 of the Settlement Agreement.

70. It is convenient to address the question whether the Offer Announcement took place within 12 months of the execution of the Settlement Agreement before addressing the effect of the Offer Announcement.

The effective date of the Settlement Agreement

71. As briefly described above, the Settlement Agreement was executed in counterparts. The issue for the Court is to determine when the Settlement Agreement became effective for the purposes of calculating the date on which the effectiveness of the anti-embarrassment clause came to an end. This requires a short explanation of the rival contentions on the facts.

72. On 29 March 2018 the Plaintiffs' attorneys wrote to the Defendants' attorneys[36]:

> *"In the expectation that the revisions to the draft settlement agreement circulated yesterday on behalf of my clients will be acceptable, my clients have sent me a signed version -electronically-to hold in escrow pending confirmation of agreement and with a view to exchanging counterparts asap."*

73. On 3 April 2018 the Defendants' attorneys responded[37]:

> *"Our clients have also signed this in escrow. We are instructed that the signatory is Mr. Lam Ka Po who is a director of Kingboard Copper Foil, Jamplan, and Kingboard Laminates Holdings Limited. Mr. Lam is also authorised to sign the agreement on behalf of First Excel and Kingboard Chemical Holdings Limited. Upon sight of you client's signed agreement, $1.7 m will be transferred by the clients for us for your clients' benefit."*

74. The Plaintiffs executed it on 3 April 2018, and their attorneys sent it back to the Defendants' attorneys[38]:

> *"Please see attached our clients' signed version of the settlement agreement. We look forward to receipt of your clients' signed version by return/ in counterpart."*

[36] HB6 page 989
[37] HB6 page 994
[38] HB6 page 1006

75. However, the Defendants did not send their version of the agreement back to the Plaintiffs' attorneys.

76. In an email dated 5 April 2018 Mr. Elkinson wrote (on behalf of the Defendants) to Mr. Potts KC (on behalf of the Plaintiffs)[39]:

> *"Alex. While Mr. Wells dated the agreement 3 April, our clients' signature page is to be dated 5 April so that we have up to 12 April (Next Thurs) to complete sale and purchase. While Mr Wells dated it the 3rd, there was still uncertainty on his part about carrying out the trade as contemplated in the agreement as the subsequent email exchanges show.*
> *There is no intention to cause any delay and our clients are equally keen to close. The 7-day period was acceded to in the draft to accommodate Mr. Wells' request but to ensure the logistics can be done in the timeframe it must be when the parties were ad idem. Realistically I think the sale and purchase of the shares can take place next Monday or Tuesday but in fairness the date of the agreement should be the later date. Can this be confirmed please? Upon confirmation, this will then be sent to you. I am overseas but the letter will be drafted in the form proposed and sent to you upon confirmation of the above.*
> *Kind regards, Jeffrey"*

77. The Defendants took the position that the Settlement Agreement was effective when the parties were *ad idem* on the terms and they said that the Defendants (on the strength of the email of 3 April 2018 which stated "*our clients have also signed this in escrow*") had in fact signed the Settlement Agreement on 3 April 2018 and that this was the operative date of the Settlement Agreement. The Defendants contended that this meant that the Fourth Defendant's Announcement was made one day after the terms of the anti-embarrassment clause had ceased to apply.

78. The Court does not accept the argument made by the Defendants for several reasons. The first reason is that there is no version of the Settlement Agreement in the evidence which shows that the Settlement Agreement had in fact been signed by the Defendants on 3 April 2018, notwithstanding the statement in the email that it had. It may be that there was another version that was signed but was never released and a second copy was printed and signed on 5 April 2018, but there is no evidence that this was the case.

79. The second reason is that even it if had been signed on 3 April 2018 by the Defendants, it had been signed "*in escrow*", which is a term which means (in this context) that it was not to be released until authority was given for it to be exchanged with the other parties. This means that the execution of the Settlement Agreement by the Defendants on 3 April 2018 (assuming it was), was not effective to bind the Defendants.

[39] HB6 page 1010.

80. The third reason is that the evidence shows that the version that was (eventually) released by the Defendants was dated 5 April 2018. This reason for this change (assuming it was a change) was explained by the Defendants attorneys in the email of 5 April 2018 quoted above. Mr. Elkinson said in express terms on behalf of his clients *"...Upon confirmation, this will then be sent to you..."* This statement makes it clear that the Defendants did not consider themselves bound by the Settlement Agreement until they released the signature page on 5 April 2018, which is consistent with the earlier statement that the signature page was being held "*in escrow*" until confirmation that the Plaintiffs had executed it, when it would be released.

81. The fourth reason is that the signature page when it was released in final form shows no sign of having been amended or changed from 3 April to 5 April and no evidence was led to say that it had been so amended or changed.

82. The fifth reason is that there was no element of part performance by the Defendants which would have bound the parties earlier than the date the execution page of Settlement Agreement was released by the Defendants, namely 5 April 2018.

83. The general rule is that (unless expressly agreed otherwise) an agreement executed in counterparts becomes effective on the date it is executed by the last party to execute it. In this context 'execution' means when the signature page is released, not when it is physically signed.

84. This is for obvious reasons: an agreement cannot become effective until all the parties have signed it and have agreed to be bound by it. A party may agree that an agreement takes effect on some other date or may agree to be bound by its terms at an earlier (or later) date than it was executed. But those considerations do not apply here.

85. On the evidence contained in Mr. Elkinson's emails, the Defendants represented expressly that they did not agree to be bound by the terms of the Settlement Agreement until 5 April 2018 for the reasons given. The execution page was then released and delivered dated 5 April 2018.

86. Therefore, the Court concludes that the Settlement Agreement did not become effective until 5 April 2018, and this means that the Fourth Defendant's Offer Announcement of its intention to make an offer to purchase all the shares in the First Defendant on 4 April 2019 fell within the 12-month period covered by the anti-embarrassment clause.

The legal effect of the Offer Announcement

87. The main issue in the case is what was the legal effect of the Offer Announcement and whether it triggered the provisions of clause 7. The Plaintiffs contended that the Fourth Defendant's Announcement contained all the necessary elements required by clause 7

of the Settlement Agreement, and that as soon as it was made, the anti-embarrassment clause entitled the Plaintiffs to a "top-up" payment of SG$0.15 per share.

88. This requires the Court to analyze the true construction of the clause in the context of the background facts and applying the recognized principles of contractual interpretation conveniently summarized and applied in **Re X Trusts**[40] by the Bermuda Court of Appeal. These principles are (in summary):

(i) The court's task to ascertain the objective meaning of the language which the parties have chosen to express their agreement[41].

(ii) The court must identify the intention of the parties by reference to what a reasonable person having all the background knowledge that would have been reasonably available to the parties would have understood them to be using the language in the contract to mean[42].

(iii) The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of contracts, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used.

(iv) If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.

(v) When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document (iv) the facts known or assumed by the parties at the time the document was executed and (v) commonsense, but (b) ignoring subjective evidence of any party's intentions[43].

89. The Court must therefore first look at the objective meaning of the words used. The Court can take account of clumsy drafting in forming a view as to that objective meaning. In coming to that meaning the court can take into account the facts known or assumed by the parties at the time the agreement was drafted, the purpose the relevant clause was intended to achieve, and the commercial context in which the agreement was executed.

[40] [2023] CA (Bda) 4 Civ at paragraphs 33-5 per Gloster JA.
[41] Lord Hodge JSC in **Wood v Capita Insurance Services Ltd** [2017] AC 1173 at paragraph 10.
[42] Popplewell J in **Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd (Ocean Neptune)** [2018] EWHC 163 at paragraph 8
[43] Lord Neuberger in **Marley v Rawlings** [2015] AC 129 at paragraph 19.

The Plaintiffs' arguments[44]

90. The Plaintiffs argued that in the context of the proceedings which the Settlement Agreement was compromising, the "transaction" was the Fourth Defendant's unconditional offer to purchase of the shares. Even though the announcement was expressed as an announcement of an intention to make an offer, under the Singapore Code on Take Overs and Mergers ("the Singapore Take Over Code") which applies to all companies listed on the SGX-ST, it was argued that such an announcement started in train an obligation to take all the necessary next steps to make the offer in accordance with the announcement.

91. The Plaintiffs say that in the context of such an announcement in relation to a company listed on the SGX-ST this was the relevant transaction because it in fact led to the Offer Document being issued by the Fourth Defendant on 19 April 2019 and which resulted in shares in the First Defendant being acquired by the Fourth Defendant. The Plaintiffs argued that a transaction is a term of wide import and it can be unilateral.

92. The Plaintiffs say that the Fourth Defendant's Offer Announcement on 4 April 2019 was therefore a *"transaction to the effect that shares in the First Defendant were offered to be purchased".*

93. In support of their case the Plaintiffs adduced expert evidence from Ms Chui Lijun who is an advocate and solicitor admitted to practise in Singapore[45]. Ms Chui set out her background and experience in practice, spanning 20 years in commercial dispute resolution and regulatory investigations and enforcement, and includes experience in arbitration in the Singapore International Arbitration Centre.

94. Ms Chui's opinion was to the following effect:

    (i) By making the Offer Announcement the Fourth Defendant was taking the first of several mandatory steps in engaging with external parties, which steps the Fourth Defendant was required to take to complete a take-over offer in compliance with the Singapore Take Over Code. The Fourth Defendant was further obliged to follow through on the Offer Announcement by despatching the requisite offer document within the timelines stipulated by the Singapore Take Over Code[46].

[44] These are set out in summary form.
[45] HB 3 pages 1806- 2339.
[46] Section 4 of the Singapore Take Over Code provides: *"**NO WITHDRAWAL OF AN OFFER**: Where the offeror has announced a firm intention to make an offer (as opposed to an announcement that talks are taking place which may lead to an offer), it cannot withdraw the offer without the Council's consent, unless the posting of the offer was expressed as being subject to the prior fulfillment of a specific condition and that condition has not been met."* HB3 page 1549.

(ii) Having regard to Singapore law, by publishing the Offer Announcement, the Fourth Defendant entered into a transaction within 12 calendar months from the date of the Settlement Agreement to the effect that the ordinary shares of the First Defendant were offered to be purchased art a price exceeding $0.45 per ordinary share.

(iii) Upon publishing the Offer Announcement, the Fourth Defendant became obliged to proceed with the Fourth Defendant's Offer under the Singapore Take Over Code and despatch the requisite offer document within the timelines stipulated by the Singapore Take Over Code. After making the offer announcement, the Fourth Defendant would not be permitted under the Code to withdraw the Fourth Defendant's Offer unless: (i) the exceptions in the code applied; (ii) there were exceptional reasons which would warrant the Securities Industry Council (the "SIC")'s consent. In the scenario of the Fourth Defendant's Offer, neither was applicable. The Fourth Defendant had to comply with the provisions of the Singapore Take Over Code pursuant to section 139 (4) of the Singapore Securities and Futures Act 2001 ("the SFA").

(iv) A failure to follow through on the Fourth Defendant's Offer may have resulted in the Fourth Defendant being sanctioned by the SIC. The SFA also contemplates that civil proceedings may be commenced to obtain an injunction in respect of conduct which constitutes or would constitute a contravention of the SFA.

(v) Where the SIC has permitted the withdrawal of takeover offers, they were permitted in limited circumstances such as: (i) where the Offeror was not able to secure the necessary financing to proceed with the take over offer; or (ii) where the takeover offer could not be completed for regulatory reasons, or (iii) because the requisite number of acceptances could not be garnered.

(vi) The SIC would not have permitted the Fourth Defendant to withdraw the Fourth Defendant's Offer after making the Offer Announcement given the lack of facts or potential reasons available that could have enabled the Fourth Defendant to make such withdrawal.

95. The Plaintiffs therefore rely upon (i) (iii) and (vi) above to construe the Settlement Agreement as meaning that once the Offer Announcement was made it was an irrevocable offer which it could not withdraw, and that this means that it was an offer to be purchase the shares in the First Defendant's shares.

The Defendants' arguments[47]

96. The Defendants took the position that an announcement of an intention to make an offer is not an offer: and offer must be capable of being accepted, and a transaction requires a binding agreement.

97. The Defendants say that the Offer Announcement by its terms was an announcement of a future intention to make an offer, as can be seen from the language in the announcement itself ("*intends to make a voluntary cash Offer*"; "*the Offer will be made*"; "*the Offer will extend*"; *the Offer shares will be acquired*") and importantly "*The Offer Document, setting out the terms and conditions of the Offer and enclosing the relevant forms of acceptance and approval of the offer, will be dispatched to shareholders...*"

98. On the facts, the Defendants say there was no offer to purchase the shares in the First Defendant until the Offer Document was posted on 19 April 2019, which was outside the anti-embarrassment period, and there was no transaction until acceptances were taken up by shareholders who wished to sell their shares.

99. The Defendants argue that the mere fact of an offer (which the announcement was not) does not mean that it will be accepted, and until there has been an acceptance there can be no transaction, all of which occurred outside the anti-embarrassment period.

100. In answer to Ms Chui's evidence, the Defendants adduced expert evidence from Professor Hans Tjio[48]. Professor Tijo is a professor of law at the National University of Singapore and he has taught course in equity and trust law, companies law and securities regulation and has a distinguished academic background. Of particular relevance to this case, Professor Tijo has served on the SIC since 2008. The SIC administers and enforces the Singapore Take Over Code. He has sat on SIC hearing committees in relation to a number of cases which have engaged the rules upon which Ms Chui relies.

101. Professor Tjio's opinion was to the following effect:

(i) An Offer Announcement kicks off the offer period under the Singapore Take Over Code and discloses that the Offeror may make a takeover offer. The Offer Announcement is normally made by the Offeror (before the target board has been approached) but under the Singapore Take Over Code the responsibility for making an announcement normally lies with the target company (after it has been approached) or with the potential vendor shareholders if circumstances demand it, usually to prevent a false market from arising.

[47] These are set out in summary form.
[48] HB3 pages 1357-1804.

(ii) The Fourth Defendant did not enter into a transaction to purchase the ordinary shares of the First Defendant by making its Offer Announcement on 4 April 2019. An Offer Announcement constitutes an intention to make a takeover offer and is not a contractual offer let alone a transaction which, depending on the context, could require the acceptance of an offer. An Offer Announcement serves to communicate the target company that the Offeror intends to make an offer to them in the future. It is quite different from purchases on the open market which offeror can continue after the Offer Announcement (and often does).

(iii) The Offer Announcement initiates the offer period under the Singapore Take Over Code and this has regulatory consequences which are largely to protect the existing shareholders of the target company and to prevent a false market arising. These consequences have been worked out with the SIC, which is a market regulator, often on an *ex ante* basis. But it does not mean that an Offeror is contractually obliged to proceed with the offer in terms of it being legally enforceable by the shareholders of the target company (the duty/right requirement). There have been a number of occasions in which a takeover offer did not proceed or has failed after an Offer Announcement.

(iv) Professor Tjio knew of no cases in which the SIC permitted an Offeror to withdraw from a Voluntary Unconditional Offer to purchase the shares of a company listed SGX-ST. The SIC does not permit any Offeror to withdraw from any form of offer (whether conditional or unconditional) unless there are highly extenuating circumstances (as opposed to cases where stipulated conditions were not met). In the few cases where a voluntary conditional offer was set aside (where the only condition involved the Minimum Acceptance Condition was not at issue in those cases nor in this case), these were because there had been a failure to comply with the Singapore Take Over Code and other securities regulations which made it financially impossible for the Offer to proceed. The SIC punished the relevant parties involved for non-compliance but did not order them to compensate the target shareholders. In Professor Tijo's view, these circumstances would also have led to the SIC allowing the Voluntary Unconditional Offer to lapse.

(v) Professor Tjio's opinion was that the SIC would not permit the Fourth Defendant to not proceed with the Voluntary Unconditional Cash Offer after making the Offer Announcement without there being highly extenuating circumstances. Again, this is because the SIC would not permit any Offeror from withdrawing (as opposed to cases where stipulated conditions were not met) from its stated intention with respect

> to any kind of offer unless it is legally or financially impossible for the offer to proceed. One example of this would be if the Offeror does not in fact have enough financial resources to complete the takeover. Another would be where the target company exercises a poison pill (which is a device target company's board can utilise to make it impossible for the Offeror to succeed in its takeover) such as the sale of its assets at an undervalue all the payment of excessive fees to a third party so that it becomes less valuable to the Offeror. A further example would be whether the target company's financial statements have been found to be fraudulent.

How the Court has approached the expert evidence

102. The experts agreed (in broad terms) that once an Offer Announcement has been made, the SIC will not allow the Offeror to withdraw the Offer in the absence of extenuating circumstances. They also agreed that no such circumstances applied in this case, and that when the Fourth Defendant announced its intention to make an Offer, it would not have been able to withdraw from making the Offer in the Offer Document under the Section 4 of the Singapore Take Over Code. The experts disagreed, however, as to what the legal effect of making the Offer Announcement was.

103. In cross-examination Ms Chui frankly accepted that although she has advised on matters involving the Singapore Take Over Code in her practice, she has not been involved in litigation in which the provisions of the Singapore were involved, nor has she represented clients before the SIC on matters involving the Singapore Take Over Code[49].

104. Professor Tjio is clearly the more experienced of the two experts when it comes to matters relating to the way in which the SIC will approach questions under the Singapore Take Over Code, and to the extent that there was any material difference in view between the two experts on how the SIC would approach a failure to proceed with an Offer, the Court would be inclined to accept Professor Tjio's evidence. Apart from their disagreement over the effect of section 4 of the Singapore Take Over Code, the differences between them were minor and more of nuance than substance. Both of their respective opinions on these points of disagreement were however entirely theoretical because the Fourth Defendant did not fail to proceed with the Offer.

105. It is therefore not necessary or helpful for the Court to engage in an extensive analysis of their evidence or to consider the detailed cross examination on points which are not before the Court for consideration.

106. The question for the Court is whether the fact that once an Offer Announcement is made under the Singapore Take Over Code it cannot be withdrawn means that by making the

[49] Transcript Day 2 pages 10-11.

Offer Announcement the Fourth Defendant entered into a *"transaction to the effect that the First Defendant's shares were offered to be purchased*".

107. The Court has strong reservations about the value of adducing expert evidence to assist the Court in its task of interpreting the objective meaning of the anti-embarrassment clause. It is a matter of Bermuda law. Both experts have expressed a view on the conclusion the Bermuda court should reach in paragraph (ii) of each of the summaries of their views set out above. These aspects of their respective opinions are plainly inadmissible and the Court has left those expressions of view entirely out of account when coming to its own conclusions.

108. The Court considers that the value of the expert evidence is to explain to the Court the process and procedures are involved in (a) an Offer Announcement and (b) a Voluntary Unconditional Cash Offer of the type made by the Fourth Defendant in this case. This is perhaps evidence of mixed fact and law, to the extent that the provisions of the Singapore Take Over Code and the statutory underpinning of the SFA are matters of foreign law.

109. The Court can certainly take comfort from their respective explanations of the procedure, but it ultimately remains a matter of legal construction and interpretation of the contract as to whether the Offer Announcement triggered the provisions of the anti-embarrassment clause.

The anti-embarrassment clause.

110. In construing the objective meaning of clause 7, the Court has balanced two separate considerations. The first is to come to a view as to the ordinary and natural meaning of the words used in the clause against the rest of the Settlement Agreement when read as a whole, and the second is to consider whether there are any facts which the parties knew or must be taken to have had in mind when negotiating the terms of the clause, excluding any subjective intentions[50], which affect the objective interpretation of what the words used mean when read against those facts.

"enters into a transaction"

111. The first aspect of the relevant phrase is "*enters into a transaction*". The main purpose of the Settlement Agreement was to compromise the litigation and settle the Plaintiffs' claims by purchasing the Plaintiffs' shares, so clause 7 must be read offering a measure of protection against a purchase of shares in the First Defendant (by the Defendants) at a higher price than the settlement price of S$0.45, within the period of 12-months of the settlement date.

[50] Mr. Wells set out his subjective intentions when insisting on the inclusion of this clause in his witness statement at paragraphs 24-31 HB 936-41, but the Court has not had regard to these considerations and has left them entirely out of account.

112. In the Court's view this necessarily implies a bilateral transaction of purchase and sale as opposed to a negotiation or an indication of an intention to make an offer to purchase shares in the First Defendant. In the Court's view this must mean entering a binding contract of purchase and sale, or other binding commitment to purchase the shares, whether or it not it had concluded within the 12-month period. In the Court's view, this is the ordinary and natural meaning of the words "*enter into a transaction*" in this context.

"to the effect that the [First Defendant's] shares are offered to be purchased or issued"

113. The second element of the clause which needs to be considered is "*to the effect that the [First Defendant's] shares are offered to be purchased*". The phrasing of this expression of the parties' intentions (applying the ordinary meaning of the words) is awkward. The phrase '*shares are to be offered to be purchased'* as a matter of language would normally mean that the First Defendant must enter into a transaction by which its shares are offered <u>to be</u> purchased, because if it was intended to mean otherwise, the parties would have used the simpler formula of '*if any of the Defendants make an offer to purchase...*' or something similar.

114. The term that follows "*to be purchased*" is "*or issued*". This is also consistent with the idea that it is the action of the First Defendant that is the focus of the draftsman's attention because only the First Defendant can issue shares, and the "*or issued*" is the only alternative to phrase "*is offered to be purchased*". The two terms appear to contemplate that the alternatives are both steps taken by the First Defendant.

115. It may well be that the phrase was intended to capture the possibility that the First Defendant might offer to repurchase its own shares or enter into an amalgamation transaction by which the shares in the First Defendant were to be acquired by one or more of the Defendants, and the words "*to the effect*" were used to cover these eventualities. But this is an inference from the circumstances rather than interpretation of the language used.

116. However, in the context of the Settlement Agreement, and reading the agreement as a whole, taking into account the purpose of the anti-embarrassment clause, which is not in dispute, such a narrow interpretation would not reflect the inclusion of the other Defendants or their Affiliates, and so the clause must have been intended to capture a wider range of potential transactions and included offers made by the Defendants.

117. In the Court's view this is an example of where the Court should take account of 'clumsy' drafting, and that the Court should construe the objective meaning of this phrase in the context of the Settlement Agreement as being that 'if either the First Defendant or any of the other Defendants (or their Affiliates) enter into a transaction to purchase shares in the First Defendant, or if there is some other form of transaction

(including an amalgamation) that has the result that the shares in the First Defendant are the subject of an offer to purchase them', the terms of the clause would be engaged.

118. Therefore, the Court concludes that the ordinary and natural meaning of the terms of clause 7 require one of the Defendants or their affiliates to enter into a contract (or other transaction) to purchase (or acquire) shares in the First Defendant in order to engage the terms of the anti-embarrassment clause.

119. The Court has also considered whether there are any facts which the parties knew or must be taken to have known which affect this meaning. The only relevant facts seem to be that the parties knew that the Fourth Defendant had proposed an unsuccessful offer to purchase shares in the First Defendant on 3 April 2017[51].

120. A similar transaction structure had been proposed by the Fourth Defendant to take the First Defendant private, but it had not proceeded because the Offer Price of SG$0.40 was not considered to be fair by the independent committee of directors, based on the report of the independent financial advisers[52]. It therefore seems to the Court that the requirements of the procedure set out in the Singapore Take Over Code must be taken to have been known and understood by the parties when they negotiated and executed the Settlement Agreement a year later. This means that the parties must have appreciated that the requirements of the Singapore Take Over Code would be engaged in relation to any 'transaction' which would be the subject of clause 7.

121. This necessarily means that the parties must be taken to have appreciated that before an Offer to purchase could be made, an Offer Announcement would have to be made, and that the stipulated steps and time limits set out in the Singapore Take Over Code would apply. This reinforces the Court's view that the Plaintiffs must be taken to have known that before any formal Offer could be made, an Offer Announcement would be made at least 14 days beforehand.

122. Moreover, the terms of the Offer Announcement make it clear that the announcement is **not** the Offer, and that the Offer Document will not be posted until at least 14 days after the Offer Announcement[53], and that the Offer would not be capable of being accepted until the Offer Document had been posted and the forms that enable acceptance of the Offer had been made available to shareholders[54].

123. These facts do not affect the ordinary and natural meaning of the words used in clause 7 of the Settlement Agreement, or how those words are to be construed to derive their meaning against the background facts known to the parties at the time the Settlement

[51] HB 2 pages 1139-1306.
[52] HB 2 page 1154.
[53] Clause 10.5 of the Offer Announcement and section 22 of the Singapore Take Over Code: HB3 page 1562.
[54] Appendix II of the Offer Document sets out the procedure by which the Offer may be accepted or rejected: HB1 pages 167-172.

Agreement was negotiated and drafted. On the contrary, in the Court's judgment, those facts reinforce and confirm that the parties knew well and fully understood that an Offer Announcement is not an Offer for the purposes of the Singapore Take Over Code (or otherwise).

124. The Court also takes into account that the parties are sophisticated commercial parties and were advised by highly experienced attorneys, so that the language of the clause should be interpreted strictly. This is what the parties must be taken to have intended after negotiating the settlement of what was recognised to have been very hard fought and expensive litigation spanning several years.

125. The Settlement Agreement is governed by Bermuda law, not Singapore law. This was a deliberate choice of law by the parties to which effect must be given. If it had been intended to define the operative trigger for the anti-embarrassment clause as an Offer Announcement under the Singapore Take Over Code, this could easily have been done. It was not.

126. In expressing the objective meaning of the clause in the terms described in paragraph 117 above, the Court is not re-drafting the clause: the Court is putting into different words (hopefully in a clearer and more precise way) the objective meaning that is to be given to the words the parties used, taking into account the rest of the Settlement Agreement, the purpose of the clause, the relevant matters which were known to the parties at the time, as well as ordinary common sense.

127. In this case, it is clear that as a matter of Bermuda law an announcement of an intention to make an offer is not an offer, certainly not one which can be accepted by anyone, and it is not of itself a transaction by which shares are offered to be purchased or sold. Therefore, as a matter of Bermuda law, the Court concludes that the terms of clause 7 were not triggered by the Offer Announcement on 4 April 2019.

Alternative holding

128. In case the Court were to be held to be wrong in its analysis, the Court has also considered whether the provisions of the Singapore Take Over Code would have made any material difference to the outcome of the Court's analysis. In short, the Court has concluded that the Court's conclusion would be the same. The Court's reasons for this alternative finding are briefly set out below.

129. The Plaintiffs say that a transaction does not need to be bilateral, and that this word means no more than taking a step or doing something that leads to a transaction. The Plaintiffs submissions on this point depend upon the Court finding that the Singapore Take Over Code is to be interpreted as binding the Fourth Defendant to purchase shares in the First Defendant.

130. The Court does not accept that submission in the context of the Settlement Agreement. In the first place, an Offer Announcement is not an Offer under the Singapore Take Over Code: sections 3 and 4 deal with an Offer Announcement, and sections 15 and 22 deal with the Offer Document. Each are treated as separate and distinct phases of the process of making an Offer.

131. The contract for the purchase of the shares under the Offer Document is governed by Singapore law. Until the formal Offer is made, as a matter of Singapore law set out in Professor Tjio's analysis (which reflects both English and Bermuda law), there is nothing to accept[55]. The Court accepts this evidence as a correct statement of Singapore law.

132. It is true that the Offer Announcement must contain the proposed Offer Price and some of the key terms: but this is because it is required by Section 3 of the Singapore Take Over Code. This is to ensure that the market is informed of material information. It is common ground that the fundamental purpose of the Offer Announcement is to alert the market of a proposed offer before a formal offer is launched and prevent a false market in the shares arising[56]. But the Offer Announcement is not the document which contains the formal Offer nor does it attach the documents by which the Offer can be accepted.

133. In the Court's judgment, the fact that the experts agree that once it made the Offer Announcement the Fourth Defendant could not have withdrawn from making the Offer in accordance with the Singapore Take Over Code does not elevate the legal effect of an Offer Announcement into an Offer.

134. Taking into account the explanations of the process set out in the Singapore Take Over Code given by the expert witnesses, it is plain that purpose of the provision that prevents a party from withdrawing from proceeding to make an Offer after an Offer Announcement is made is to prevent a false market in the shares being created, i.e. influencing the market value of the shares to increase, allowing shareholders to artificially inflate the value of the shares, as in a "pump and dump" scheme[57].

135. The Singapore Take Over Code is not a statutory provision, it is a voluntary code to which all companies who apply for listing on the SGX-ST agree to be bound[58]. Section

---

[55] See **Portcom Pte Ltd v Verrency Group Ltd** [2022] SGHC 97 "*What must be communicated is something capable of being accepted by the shareholders so as to give rise to a contract, whether absolute or conditional*" per Philip Jeyaretnam J at para 42 and **Re Chez Nico (Restaurants) Ltd [**1991] BCC 736 "*The Offeror must specify the terms which are capable of being accepted by the shareholders so as to give rise to a contract…"* per Sir Nicholas Browne-Wilkinson VC (as he then was) at 746 cited by Professor Tjio in his Report at page HB3 1364-5

[56] Paragraph 42 of Professor Tjio's report at HB3 1372 and paragraph 19 of Ms. Chi's report at HB3 page 1821.

[57] Ms. Chui refers to these as "bluffing offers".

[58] HB1 page 584: "*1: The Singapore Code on Take Overs and Mergers is issued by the Monetary Authority of Singapore pursuant to section 321 of the Securities and Futures Act. The Code is nevertheless non-statutory in*

4 of the Singapore Take Over Code does not alter the law of contract in relation to the sale of shares, but seeks to prevent the unscrupulous from manipulating the share market to the detriment of investors in securities listed on the SGX-ST. The Code says that its primary objective is fair and equal treatment of all shareholders in a take-over or merger situation. The giving of notice of an intended offer is therefore directed at ensuring the market has information about a forthcoming offer and does not amount to the making of an offer.

136. In conclusion, if the Court were required to take into account the effect of the Singapore Take Over Code in reaching a conclusion on the meaning and interpretation of clause 7 of the Settlement Agreement, the Court would reject the evidence given by Ms Chui[59] and accept and endorse the evidence given by Professor Tjio on this point.[60]

137. Applying those findings, the Court would conclude that section 4 of the Singapore Take-Over Code does not affect the analysis given above, and by making the Offer Announcement, the Fourth Defendant was not thereby entering into a transaction to the effect that the shares in the First Defendant were offered to be purchased.

Conclusions

138. In the light of the findings explained above, the Court concludes that:

(i) The 10 July 2018 purchases of shares in the First Defendant by Mr. Chan Win Kwan and Smart Guys Group Ltd were not purchases made by the Defendants or their Affiliates (within the meaning of the definition in clause 4 of the Settlement Agreement) and so the anti-embarrassment clause was not triggered by those purchases;

(ii) There is no evidence that the purchases of shares made by Mr. Chan Win Kwan and Smart Guys Group Ltd were made as agents for the Defendants;

(iii) There is no positive obligation on the part of the Defendants to inform the Plaintiffs about any share transactions under clause 14.5 of the Settlement Agreement, nor is there any basis upon which the Court can properly imply such a term. In any event, the evidence shows positively that the shares were not purchased by the Defendants or their Affiliates and there is no evidence to suggest that the shares were purchased on behalf of the Defendants.

---

that it does not have the force of law. Its primary objective is fair and equal treatment of all shareholders in a take-over or merger situation."

[59] At paragraphs 27-32 of her Report HB3 pages 1825-1828.

[60] At paragraphs 18-23 of his Report HB3 pages 1364-5.

(iv) The effective date of the Settlement Agreement was 5 April 2018 and so the Offer Announcement made by the Fourth Defendant on 4 April 2019 fell within the operative 12-month period of clause 7 of the anti-embarrassment clause; but

(v) The Offer Announcement did not amount to the Fourth Defendant entering into a transaction to the effect that the shares of the First Defendant were offered to be purchased within the meaning of the anti-embarrassment clause.

139. In the light of these conclusions the Court dismisses the Plaintiffs' claims with costs.

Dated 18th August 2025

THE HON. MR. ANDREW MARTIN

PUISNE JUDGE