Neutral Citation Number: [2020] EWHC 2602 (Comm)

Case No: CL-2018-000283

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 02/10/2020

Before :

MRS JUSTICE MOULDER

- -

Between :

RAIFFEISEN BANK INTERNATIONAL AG	**Claimant**
- and -	
(1) ASIA COAL ENERGY VENTURES LIMITED	**Defendants**
(2) ASHURST LLP	

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- -

ANDREW TWIGGER QC and **JONATHAN ALLCOCK** (instructed by **Stephenson Harwood LLP**) for the **CLAIMANT**
MATTHEW HARDWICK QC (instructed by **Squire Patton Boggs (UK) LLP**) for the **FIRST DEFENDANT**
DAVID WOLFSON, QC and **ADAM RUSHWORTH** (instructed by **Mayer Brown International LLP**) for the **SECOND DEFENDANT**

Hearing dates: 6-10,13-16, 21-23 July 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MRS JUSTICE MOULDER

"**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:30 on 02 October 2020.**"

Mrs Justice Moulder :

1. The claimant in this case is Raiffeisen Bank International AG ("RBI") a corporate and investment bank registered under the laws of Austria.

2. The proceedings concern the sale by RBI of a portfolio of defaulted loans and security for those loans including the shares held by RBI (the "RBI ARM Shares") in Asia Resource Minerals plc ("ARM") through Ravenwood Acquisition Company Limited ("RACL"). In 2015, ARM owned an indirect stake in PT Berau Coal Energy TBK ("BCE") (approximately 84.7%), which indirectly owned 90% of PT Berau Coal ("BC"), one of Indonesia's largest coal producers**.**

3. Between 2011 and 2013, RBI had made loans (the "Loans") totalling $374m to three companies beneficially owned by Samin Tan:

   i) Maxima Vale Holding Limited ("Maxima");

   ii) PT Samudra Pacific Marine ("Samudra" or "SPM"); and

   iii) RACL.

4. The Maxima facility agreement (as amended) provided (amongst other security) for a pledge of Maxima's 23.7% shareholding in PT Borneo Lumbung Energi & Metal TBK ("BORN"), a pledge of its ownership interest in a Gold mine in Kalimantan, and a second mortgage over land in Samarinda in East Kalimantan (the "Samarinda Land"). The facility was in default from April 2014.

5. The SPM facility agreement provided (amongst other security) for a pledge over tugs and barges (the "Samudra Vessels" or the "Vessels"), a pledge of the share capital of SPM (the "Samudra Shares") and a second mortgage of the Samarinda Land. The SPM facility first went into default in May 2014.

6. The RACL facility agreement provided (amongst other security) for a pledge of its shares in ARM and a mortgage by PT Tunggal Yudi Sawmill Plywood ("PT Tunggal") of the Samarinda Land. The RACL facility went into default on 24 September 2014.

7. In October 2014 RBI had taken steps to enforce its security under the Loans including appointing nominee directors of RACL through FTI Consulting (Singapore) PTE Limited.

8. The purchaser of the RBI ARM Shares and the Loans was to be the first defendant, Asia Coal Energy Ventures Ltd ("ACE") a special purpose vehicle which was incorporated in the British Virgin Islands on 17 January 2014. ACE was managed by Argyle Street Management Limited ("ASM") of which Mr Chan who is an investment manager was the Chief Investment Officer. ASM was active in acquisitions in Indonesia and in 2013 had acquired (in funds managed by ASM) just under 5% of the ordinary shares in ARM.

9. ACE's sole shareholder is ASM Administration Limited which is beneficially owned by the partners of ASM. ACE's sole (corporate) director was Adriatic Sea Management Limited ("Adriatic Sea"), of which Mr Chan was a director.

10. It is the claimant's case (paragraph 7 of its skeleton for trial) that the acquisition of the Shares and Loans by ACE was not only financed but fully orchestrated and directed by the Sinar Mas group of companies ("Sinar Mas"). Sinar Mas is headquartered in Indonesia and owned by the Widjaja family. The claimant says that Mr Fuganto Widjaja ("Mr Fuganto") was the member of the family with principal responsibility for the transaction and made all the key decisions.

11. ACE says that the transaction was funded by PT Sinar Mas Multiartha TBK ("SM Multiartha") and it was expected/likely that a company in the Sinar Mas group (GEAR) would ultimately acquire the shares in ARM but that was not necessarily the case.

12. Ashurst LLP ("Ashurst") is the second defendant in these proceedings. Ashurst says that it acted for SM Multiartha on the transaction. The claimant says that Ashurst also acted for ACE. As part of the acquisition documents Ashurst gave a solicitors' confirmation (the "Confirmation") pursuant to which it stated that it held $85 million which was to be transferred to an escrow agent upon signing of an escrow agreement. However the escrow agreement was never agreed and what should have happened to the monies which Ashurst held under the terms of the Confirmation in such circumstances is disputed in these proceedings.

13. ARM was, at all material times, a company listed and traded on the main market of The London Stock Exchange. The RBI ARM Shares were to be sold by RBI to ACE as part of a public general offer for the entire issued share capital of ARM. On 7 May 2015 ACE made a general offer for the shares in ARM at 41p per share (the "Offer"). Due to the need (under the Takeover Code) to obtain an independent valuation of the assets, the transaction which was originally structured as one transaction, was changed so that there were separate agreements for the sale of the RBI ARM Shares and the sale of the Loans. The documentation was structured so that satisfaction of the same conditions would trigger completion of both parts of the transaction.

14. A series of agreements and documents dated 7 May 2015 were executed including:

    i) a Sale and Purchase Agreement for the sale of the Loans and associated guarantees and security (other than the RBI ARM Shares) (the "Collateral") between RBI and ACE (the "SPA");

    ii) a Framework Agreement between, amongst others, ACE, RBI and RACL, in relation to the sale of the RBI ARM Shares;

    iii) the Confirmation addressed by Ashurst to RBI.

15. The total price which ACE was to pay for the RBI ARM Shares and the Loans was to be US$120 million. This comprised the amount to be paid by ACE for the RBI ARM Shares pursuant to the Offer (the "Share Purchase Price") and the amount to be paid for the Loans and the Collateral (the "Purchase Price"), which pursuant to the SPA which was to be US$120 million, less the Share Purchase Price. The Share Purchase Price depended on the final price of the Offer and thus the Purchase Price reduced as the final price of the Offer increased.

16. As stated above, it was originally intended that the transaction to purchase the RBI ARM Shares and the Loans would occur together. However due to events (in particular the threat of a bankruptcy process in Indonesia in relation to BCE) and in order to ensure that it could accept the offer on 1 July 2015 (thereby entitling it to payment on 15 July), RBI agreed to release its security over the RBI ARM Shares (on or about 30 June 2015), prior to the independent valuation of the Loans being obtained. RBI transferred the ARM Shares to ACE and received US$50 Million (the price for the ARM Shares having been increased to 56p/share on 8 June 2015). However, completion of the SPA did not occur. ACE did not pay the Purchase Price and the Loans and Collateral were not transferred by RBI.

17. On 29 July 2015 RBI sought the appointment of a liquidator of ACE in the BVI. This was unsuccessful.

Issues for determination

18. The court has had regard to the Amended List of Issues to identify the issues which fall for determination in this case and reference is made to them below. Following the conclusion of the factual evidence RBI no longer pursues the following bases for its claim against Ashurst:

    i) rectification (on the grounds of common mistake or unilateral mistake);

    ii) "actionable" representations; or

    iii) an equitable interest or charge

    (Issues 13, 15 and 16 Amended List of Issues).

19. The court has examined the issues so identified against the pleaded case and has considered the written and oral submissions. In writing this judgment the court also has the benefit of reviewing the daily transcripts. The court has addressed in this judgment those issues which are necessary in its view for the resolution of the claims against ACE and Ashurst. It is however not practicable or necessary in order to resolve the proceedings to address in this judgment every issue which was raised, far less each submission on every issue, and the omission of any particular submission is not to be taken as a failure by the court to consider that argument.

Claim against ACE

20. RBI asserts that ACE is liable to proceed with the sale and purchase under the SPA and to make payment of the Purchase Price to RBI. RBI therefore seeks an order for specific performance to compel ACE to make payment of the Purchase Price of $70m for the Loans (against delivery of the transfer certificates for the Loans). Further or alternatively RBI seeks damages for breach of contract.

21. ACE's defence to the claim for specific performance is that it is not liable to make payment by reason of the misrepresentations which were made in the BORN Exposure Information Summary (the "BORN Summary") which was placed in a virtual data room to which ACE was given access on 16 March 2015 and which

entitled it to rescind the SPA (which ACE did by service of its Defence in these proceedings).

Evidence

22. The trial in this action was held remotely by video conferencing due to COVID 19. However the court had the benefit of full oral and written submissions from leading counsel for each of the parties as well as a live transcript. The witnesses (apart from Mr Thornton) were in any event located abroad and gave evidence via video link. There were no notable issues arising out of the use of a video link which have a bearing on the evidence which they gave.

Witnesses of fact

RBI

23. The sole witness called for RBI was Mr Ryan Gonzalez ("Mr Gonzalez"). At the relevant time in 2015 he was a Director and Workout Manager at RBI. He was involved in the negotiations for the sale of the Loans. He reported to the head of RBI's "Workout" department who at that time was Ms Monika Ruch ("Ms Ruch"). Also involved in the transaction was Dr Strobl, then Head of Risk at RBI, Ms Monisha Kamdar ("Ms Kamdar"), an in-house lawyer at RBI and individuals working for RBI in Singapore including Mr Luke Thomas.

24. Mr Gonzalez for large part appeared to answer questions in cross examination honestly. However on occasions when presented with documentation which appeared to contradict the case being advanced by the claimant he appeared to find himself in some difficulty and at times sought to provide explanations which were consistent with the claimant's case and were clearly at odds with the contemporaneous record.

25. For example, when asked who had provided information to Mr Simms for his report that RBI had attempted to perfect its security rights over the Samarinda Land, the following exchange took place [Day 2 page 136]:

> "Q. Can I ask you to go back to [page 47 of Mr Simms report]. We looked at this text already at the top, and this is Mr Simms, your expert, saying: "While I understand that RBI did attempt to perfect security rights over the remaining properties, this was complicated by the criminal case ..." So Mr Simms must have learned from the bank that its attempts to perfect security had been complicated by the criminal case. Mr Simms must have got this from RBI?
>
> A. Not necessarily, but possible.
>
> Q. Where else could he possibly have got it other than the bank?
>
> A. By talking to the land office?

> Q. Just look at what is actually said by Mr Simms: "While I understand that RBI did attempt ..." You say that is from some other third party, do you?
>
> A. I am saying I don't know where it comes from but it is possible it comes from a third party."

26. Another example in my view was the following exchange when Mr Gonzalez was being asked about his paper to the board recommending that the sale of the RBI ARM shares go ahead before the sale of the Loans but on condition that the obligation to pay for the Loans was backed by a fully funded escrow account or RBI blocked account:

> "Q. And you still insisted on the funds being in a fully funded escrow account or a blocked RBI account, didn't you?
>
> A. Yes.
>
> Q. That is because you took the view at the time that the Ashurst confirmation, together with the money sitting in Ashurst's account, did not give you the security which a fully fund escrow account or a blocked RBI account gave you, did you?
>
> A. No, for the same reasons that I have already answered, it didn't provide an objective trigger. It was simply about mitigating risk, mitigating this operational litigation risk, if you like." [Day 3 p64]

27. This explanation as to why Mr Gonzalez did not regard the Confirmation as affording suitable protection was not credible in my view. The draft escrow agreement contemplated that the money would be released only when both parties had confirmed that the conditions precedent had been met.

28. It is also curious that in his witness statement Mr Gonzalez does not mention Dr Strobl nor does he refer to the emails in which Mr Gonzalez said RBI would need a fully funded account.

29. In my view the evidence of Mr Gonzalez in his witness statement was partial in that he sought to keep in line with the case advanced by RBI and has to be read in the context of all the contemporaneous emails and documents before the court including correspondence sent by other employees of RBI. In relation to his oral evidence, where matters remain in dispute, the court has in mind his apparent concern (on occasions) to avoid giving evidence which was inconsistent with the case advanced by RBI.

Witnesses for ACE

30. For ACE the court heard from:

i) Mr Kin Chan ("Mr Chan"); and

ii) Mr Liu.

Mr Chan

31. Mr Chan is the Chief Investment Officer of ASM. Mr Chan's evidence was that he was well connected and sought to put together a transaction which would benefit both Sinar Mas and ASM.

32. I accept Mr Chan's evidence that Mr Chan's focus was clearly on the financial aspects of the transaction and not the legal documents. His evidence supported an inference that he handled the commercial aspects of the transaction and left the legal documents to others.

33. It was submitted for RBI that Mr Chan gave untruthful evidence and two examples are given in RBI's closing submissions. Given the seriousness of that allegation to a professional person in business and the significance of the credibility of his evidence in these proceedings it is important that the court addresses such allegations in detail.

34. Firstly it is worth putting his evidence in context. At the outset of the cross examination Mr Chan was asked why he was defending the proceedings. He acknowledged that ACE (as an SPV) has no assets and said that he was defending these proceedings in order to defend his reputation. Whilst he was challenged in cross examination as to whether he himself had been threatened with legal proceedings, his evidence on this point appeared to be borne out by the solicitors' correspondence to which Mr Chan was taken in re-examination.

35. The relevant exchange was as follows:

> "Q. So why have you come to defend this claim at all, Mr Chan?
>
> A. I am an investment manager. I would hope I do have a reputation in the market that I operate, and these are serious allegations, and there were allegations and comments made during the course of the last five years that personal lawsuits would be brought against me, so both in terms of my reputation and also I guess protection of myself I would like to defend myself here.
>
> Q. Is that right, Mr Chan, that anyone has threatened a lawsuit against you personally?
>
> A. "Threatening" is a very high level word. But I think lawsuits were suggested, yes, in conversations." [Day 4 p5]

36. The starting point, it seems to me, therefore to assess the credibility of Mr Chan is that it is inherently unlikely that, having elected to defend the proceedings against an SPV in order to protect his reputation, he would set out to give untruthful evidence to the court.

37. Turning then to the two instances relied on by RBI, the first was Mr Chan's evidence in cross examination that he was told by RBI there were 57 Vessels and that perfected titles were not difficult to obtain but this was not in his witness statement. The relevant exchange was as follows:

> "A…The short answer to your question is we were told there were 57, and 42 were vessels that the titles have been perfected, but the balance were pending. And we had been told in numerous conversations, starting in June in 2014, that they are not difficult to obtain if we were –
>
> Q. Mr Chan, that is not true, is it? You have just made that up?
>
> A. Mr Twigger, that is absolutely true. I did not make that up.
>
> Q. Where in your witness statement do you say you had numerous conversations, starting in June 2014, to the effect that title over the remaining vessels was not difficult to obtain? Where do you say that?
>
> A. I am pretty -- okay, I apologise if I neglected to say that, but our involvement with ARMS dated all the way back to 2013. And numerous members in the Singapore office of RBI, we were in constant dialogue with them, and in fact in 2014, in June, we started conversation with them about buying the exact same portfolio from them. And at the time we were not working with Sinar Mas, we were working with Salim. I think there was a reference in one of their emails, but that is a factual piece of information. And we didn't start discussing with RBI about this portfolio in March, we started discussing with them in earnest back in -- back in middle of 2014, so it has been a one-year journey." [Day 4 p20] [emphasis added]

38. The evidence that Mr Chan through his colleagues in Singapore had been involved in trying to put together a deal with Salim in mid-2014 was supported by the contemporaneous documentation: for example an internal email to Mr Gonzalez from Ms Peishee Poh of RBI on 13 July 2015:

> "We did send the bible of documents to ASM rather early on, around 17 June 2014. These were then intended for the recipient's use in relation to their role as Salim's representatives (Project Goal)."

39. Mr Chan's evidence about the previous deal was therefore supported by the evidence and I note that the disclosure period in these proceedings did not extend to this earlier time period. I accept therefore the submission for ACE that there is no reason why his witness statement would have dealt with what occurred in the earlier period. In my view there is no basis to infer that this evidence from Mr Chan concerning what he was told about the security over the Vessels was fabricated.

40. The second instance relied on by the claimant as an example of "untruthful evidence" was Mr Chan's evidence in cross examination that it was only on 14 April 2015 that ACE was identified as the purchaser. The relevant parts of the exchange were as follows:

> "Q. But you hadn't been discussing with anyone before this date, had you, that the purchaser would be a company called Fengqiao Road?
>
> A. I don't think – again, I am talking about deal world. When we do deals you come up with, at the end, SPV limited liability company structure, and that is completely customary –
>
> Q. I accept that that is customary. But the point I am asking you about, Mr Chan, is that this was the date, 14 April, on which that SPV vehicle for the purposes of this transaction was identified as a company called ACE which had previously been called Fengqiao Road…
>
> A. … Fengqiao was no more special than an SPV –
>
> Q. I think the answer to my question is yes, isn't it, Mr Chan? That is the date on which ACE was identified as the SPV?
>
> A. The name, yes, but not the vehicle itself. We were presenting clearly with the takeover panel for a while. They know this is going to be an SPV which is –
>
> Q. They know it is going to be an SPV but they don't know which company until then?
>
> A. They know it is Fengqiao Road, ACE is the same company.
>
> Q. You are telling her Ladyship, are you, that you had identified to the takeover panel that there was going to be a company called Fengqiao Road that was going to be the SPV?
>
> A. I cannot remember the submission. But if we did make – if we did make specific reference to a company, it would have been Fengqiao Road prior to the change of name.
>
> Q. You didn't make specific reference to a company, did you, Mr Chan?
>
> A. I don't remember, I honestly – that part – we were going to –" [Day 4 page 82] [emphasis added]

41. I reject the submission for RBI that this was an attempt by Mr Chan to answer a different question or to retreat from evidence just given, let alone as showing he was giving "new and untruthful" evidence. It seems to me that Mr Chan sought to explain that they were using an SPV for the transaction and that in effect the name of the SPV was unimportant and he could not therefore remember whether in discussion with the Takeover Panel, he had made specific reference to its name. His evidence on this point seems to me to be logical and coherent.

42. It was also submitted by counsel for RBI that Mr Chan was prepared to level "accusations of dishonesty" against Mr Chubb and Mr Wang when a

contemporaneous document was put to him which "unambiguously contradicted his position". In this regard the evidence relied upon by RBI was as follows, in relation to an email sent by Mr Chubb to Dr Strobl on 7 June 2015:

> "Q… So he is asking there, isn't he, for a reduction in the purchase price of 20 million, yes?
>
> A. Yes, and this was subsequently corrected by Pak Fuganto in a follow-up email. Mr Chubb was trying to get his equity deal done because he knows – he knew if the RBI guys do not agree to an amendment of the terms of the deal – by the way, we were more into deferment of payment rather than reduction but small difference – we would not, "we", as in ACE, would not be able to close the transaction. And even the equity deal, because RBI would not be tendering, would have fallen through. Again, we all know how investment bankers are like, I was one too, he was – he knows exactly what needs to be done in order to get the deal done, which is changing, amending the payment terms to reflect the collateral, the perfection or the lack thereof of the security. But he didn't want to offend RBI, he is trying to be diplomatic, so he said – he put it in a way which is factually correct: we are now paying $40 – actually $50 million more, I think he did his maths a little bit wrong, and please help us to reduce, you know, the – but that is not the reason; you would see in all my communication with Mr Gonzalez and Dr Strobl I was very clear that it is the collateral that is driving our request, not liquidity. But in any case, what Mr Chubb is saying here, Mr Fuganto corrected him, I remember, in a subsequent email." [emphasis added]

43. The cross examination continued on this issue and a little further on the exchange was as follows:

> "Q. Mr Chan, I think you are mixing up time periods here. At this stage in early June you had not raised an issue of any defects in the collateral, and what was being discussed was the fact that the deal with Mr Rothschild had resulted in ACE having to pay $40 million more, and what you were asking for was for RBI to share the pain, either by reducing the price or providing a loan or helping in some way, isn't that right?
>
> A. That is not right. I am really – if Mr Chubb is here, I would smack him. He was the one who wrote this email, he wanted to get to where we wanted to go, but he didn't want – imagine Mr Chubb telling Dr Strobl, whom he only met once, that the collateral you told us you had, you know, you didn't have, so can you allow us to change the terms of the deal? I think rather than being blunt – maybe I am that type – he was trying to be diplomatic. But in any case, first point, the collateral deficiency has been discussed since May.

> Second point, Pak Fuganto did write an email subsequent to this one to correct – I mean, maybe like the amendment to the April 22 amendment that we both missed. But Fuganto did write one, and in that email he made it very clear that Sinar Mas is not – has not – does not need financial assistance." [emphasis added]

44. I reject the submission that Mr Chan accused Mr Chubb of dishonesty. In my view, as is evident from the extracts above, Mr Chan's evidence was that Mr Chubb was trying to get the deal done but in a way that would not offend RBI. Further Mr Chan's evidence that Mr Chubb's approach set out in his email was corrected by Mr Fuganto is borne out by the contemporaneous documentation: in his email on 8 June 2015 Mr Fuganto wrote, so far as material to this issue:

> "We acknowledge your thoughts about the matter, please note that I nor Sinarmas have never brought up any number or any demand about compensation, it was an idea being thrown about in friendly brainstorming. While Andrew, Kin or Willi may have been discussing with you how you can help us, and it is of course extremely helpful and well appreciated if there is some way you can offer assistance, for now I am not really focusing on this but on the offer and working with the board to regain control of Berau. There are a myriad of issues that are very concerning that have developed in the past few weeks. We have highlighted some of in our dinner but there are others that are not yet brought to your attention for various reasons. (We can talk about those with Kin off the record)" [emphasis added]

45. As to Mr Wang, in support of its attack on Mr Chan's credibility RBI relies on the following exchange with Mr Chan in cross examination:

> "Q…This is an email from Mr Wang to Mr Krombass and Mr Avramov, and you are copied in, on 12 April 2015. It is a very long email, I'm not proposing to read it all out, but you will see that what had happened at this point was that RBI had indicated the preferred bidder for its loans was somebody that we now know to be Mr Siegfried Wolf in Austria and this email was trying to persuade RBI to reconsider…So what Mr Wang was saying there was that it was important that you had an Indonesian owning the Berau Coal works and that foreigners owning those works didn't work, isn't that right?
>
> A. My colleague was trying to scare RBI into walking away from the move…
>
> Q. You are saying he is lying, are you?
>
> A. I think he is trying to resurrect a deal we were clearly behind…" [emphasis added]

46. It seems to me that far from seeking to avoid answering a question Mr Chan gave an answer and the answer that his colleague was trying to "scare RBI" seems credible in the circumstances where ASM and colleagues were trying to preserve a deal. It may not reflect well on Mr Chan's colleague but it does not affect the weight which I give to the evidence of Mr Chan to this court.

47. One of the most significant aspects of Mr Chan's evidence was the role of Sinar Mas. It was submitted for RBI that this was a further example of Mr Chan trying to avoid answering a question by levelling accusations of dishonesty, in this instance, it was submitted, against himself.

48. Mr Chan's evidence was that Sinar Mas was a funder and/or ACE was acting "in concert" with Sinar Mas. This was a recurrent theme in the course of his cross examination but one example is as follows concerning an email sent on 18 April 2015 to Mr Gonzalez:

> "Q. Yes. You say in this email to Mr Gonzalez: "We have performed miracles to meet your requests in the last few days. Like yourself, I have been in the finance business for a long time, having run Lazard (not Rothschild) in Asia and worked at Goldman Sachs for a few years. Surely you can appreciate, as I do, that what the Sinar Mas Group has done is extraordinary. It has demonstrated beyond any unreasonable doubt that the Sinar Mas Group is both a serious buyer and a money-good buyer." Do you agree, Mr Chan, that it was beyond any doubt, reasonable or unreasonable, that you regarded Sinar Mas as the buyer?
>
> A. We are working in concert, so our group is the buyer, and I think I am talking very loosely here. Again, as I mentioned earlier, we are – I should have been more precise in my wording. Sinar Mas is putting up all the funding, that is for sure. [emphasis added]

49. And in another email of 24 April 2015 from Mr Chan to Mr Gonzalez:

> Q. "We are working really hard on the panel. We respect your process and Willi in particular [that's Mr Hemetsberger] is sensitive about pestering Dr Strobl and you. Suffice to say Sinar Mas is totally committed to do the two purchases with a total consideration of 120 million. The closing of the second tranche is a matter of timing, not a matter of whether it can be completed or not." So again, Mr Chan, you were referring to Sinar Mas as the purchaser, weren't you?
>
> A. Again, I wish I would be more precise, but throughout the process, and I am glad you brought up the takeover panel. Our representation, formal legal representation has always been ASM and Sinar Mas are working in concert, and Sinar Mas is providing all the funding. ASM is providing 5% of the shares but not the funding for the new purchases…

> Q. And you were – in the last sentence, you were keen to persuade RBI there was no risk of Sinar Mas not completing the purchase at 120 million for the whole package, isn't that right?
>
> A. No. I mean – two nuances – I am learning to be precise here, Mr Twigger. I would have said you are right in my former self. Unfortunately I have to disagree with you today. What I am trying to tell him is not Sinar Mas is going to buy it, it is our consortium, ACE, as a vehicle, is going to close the deal. And it is all on the basis of what we have agreed to, which is all the tugs and barges, as they told us in the loan documentation, all the land of five pieces, and the share certificates of the company, 12,500 shares, personal guarantee and so on. If they can deliver, that is the deal." [emphasis added]

50. In my view it is a complete exaggeration for it to be submitted on behalf of RBI that Mr Chan was accusing himself of dishonesty in these exchanges. It seems to me that Mr Chan found himself in the far from uncommon situation of having to explain in cross examination the meaning of correspondence sent when litigation was not in prospect and the precise language used in emails was not a particular concern. It would be wholly wrong for the court to criticise a witness for wishing with the benefit of hindsight that they had used more precise language. It does not in any way reflect on the credibility of the witness.

51. It was submitted for ACE that Mr Chan was an honest witness and I accept the submission that Mr Chan was willing to accept a proposition that was contrary to his interests when he accepted the logic of the argument of counsel for RBI that the $120 million facility was no longer available (although subsequently Mr Chan relied on the supplemental agreement which he had overlooked in his earlier evidence).

52. The more substantive issue is the relationship between Sinar Mas and ASM and ACE. Whilst it seems to me on the evidence that Sinar Mas cannot be described merely as a "funder", the relationship has to be seen in context. On the (unchallenged) evidence of Mr Chan, ASM had held its stake in ARM since 2013. Attempts to divest themselves had been unsuccessful: in mid-2014 ASM (through its office in Singapore) had tried to put together a deal with the Salim family. However that had failed.

> "We have been involved in this situation for a number of years. We bought the shares in 2013. We looked nothing but stupid throughout. We teamed up with Samin Tan to do a proxy fight and lost in early 2014, and in the middle of 2013, in the middle of that year, we teamed up with another group, Salim Group. But Samin Tan was an existing interested party, Salim had no previous involvement. Like Sinar Mas Group about nine months later, Salim did not have any interest. We were talking to them about getting together, forming a consortium to work in concert. In fact even during that time we already engaged the service of Hannam. We were working with HFW even back in 2013. Hannam was brought in by HFW. And we went to the takeover panel to do a presentation about – the panel must be so confused

> by me, I kept coming back with different partners, but that was ... So I was trying really hard to tell Mr Twigger I am not a proxy of the Widjajas. I was the one who was trying to put the deal together. We are a fund manager with 5% of our shares stuck in the company, getting – getting slaughtered by Mr Rothschild, and we were trying to put a deal together whereby we can rescue ourselves, and hopefully, through that process, the new partner and ourselves can make some money. We teamed up with Samin Tan, that was bad. We spent a lot of time with Salim Group. In the end, Anthoni Salim decided not to proceed because he didn't want to have the – he didn't want to have the risk of having, you know, his name hurt in the London market. And we were able to luckily, in March, secure the support of Sinar Mas to be our partner to act in concert to make a go at ARMS." [emphasis added]

53. Thus it seems to me on the evidence that the involvement of the Widjaja family was a further attempt by ASM to sell their ARM Shares and to put together a deal which would earn them fees and potentially a profit. The separate and independent role of ASM and ACE is illustrated by this exchange with Mr Chan in cross examination:

> "Q. Yes. What was actually going to happen in the real world didn't change, did it, because ASM wasn't going to end up as the owner of a mining operation in Indonesia, was it?
>
> A. I think if the winding-up petition was not filed, ACE will continue to own this, and we would have done the rights issue, and we would have done the BORN restructuring, and five years later we could either relist it or we sell it to GEAR.
>
> Q. So your evidence to her Ladyship is that ASM had decided that it would get into the Indonesian coal mining business, is that right?
>
> A. Maybe you ought to know we are in Australian coal mining business. We actually have coal interest in Indonesia as well. So it is not – I sit on the board of CITIC Resources. We are actually quite familiar with mining and commodities." [Day 4 p45]

54. I note the evidence of the emails where Dr Strobl appears to have been in direct contact with Mr Fuganto in relation to the transaction, the email from Mr Chubb of Hannam referring to "the offer made by Fuganto" and the email quoted above referring to the Sinar Mas Group as "both a serious buyer and a money good buyer". However as discussed above I have considered the explanation of Mr Chan that he should have been more precise in his language. I also take into account the evidence of Mr Mehigan on this issue:

> "69:20 A. No. Absolutely not. Mr Chan – Sinar Mas and ACE had a common goal, and I suppose I will use the general term "partners" in consortium, ACE could see tangible benefits that

> Sinar Mas would bring to the consortium in the form of financing and what I will loosely call experience in Indonesia and particularly in a difficult part of the world which is Kalimantan. ACE through Mr Chan in particular also brought value to the partnership. Mr Chan was the one who as in kind of commercial parlance brought the deal to Sinar Mas, and he was going to work to try to achieve a successful transaction in the form of acquiring control of ARM, so both were working hand-in-hand with the common objective, but each part of the partnership had their role to play, or I suppose the best way it describe it would be their contribution to make." [emphasis added] [Day 7]

55. Whilst I think it was the intention of both ACE (through Mr Chan and ASM) and Sinar Mas that the ARM Shares would be sold to Sinar Mas, it seems to me that there were two separate entities ACE and Sinar Mas both of whom had an interest in the purchase of the shares going ahead and they can be accurately described as acting "in concert".

56. In conclusion in relation to the evidence of Mr Chan, for the reasons discussed above, I reject the submissions for RBI that his evidence should be given no weight and reject the allegations that he deliberately fabricated evidence. In my view, in giving evidence to the court Mr Chan was an honest witness albeit on occasions he sought to defend his case. He clearly felt he had a genuine grievance but on the whole he sought to answer questions fully and honestly even when he recognised that they did not assist his case.

Mr Liu

57. Mr Liu worked for Mr Chan and handled the day to day running of the transaction. I note his evidence in cross examination:

> "I was only 25 years old at that time. I worked closely with Mr Chan, on this transaction."

58. Unfortunately Mr Liu in cross examination appeared to tailor his answers to fit ACE's case. He also tended to echo answers given by Mr Chan in his cross examination. An example of this is as follows:

> "61:12 A. Sorry, I think I – again use building using Mr Chan's words, I haven't been precise. On what I mentioned. I was saying that we were working together with Sinar Mas Group. They have substantial very large in-house legal team. We with their help – maybe I should not use the word "advice" because this is – this is – maybe I was using the wrong word, we were working together, Sinar Mas help on the legal side, because we were partners. Because obviously Mr Chan, he himself is not – not trained in Indonesian law so we have to rely on Indonesian counsel, and Sinar Mas had a big team of Indonesian lawyers."

59. A further example was as follows:

> "72: 4 a liquidation scenario the value of – I don't know if this is helpful but the gold mine he mentioned is valued at zero and zero is the rock bottom value of any asset. Because the JORC report as Mr Chan mentioned earlier last week, a JORC report wasn't done so this – no value can be assigned but there could be potential value once more analysis, geological analysis is done. So these are again in response to your question, these are the recovery amount of money that you can get if you liquidate these assets, but not the value, the market value, if you continue to operate the asset as a going concern. "

60. There were also notable similarities in Mr Liu's witness statement with certain paragraphs of the (second) affidavit of Mr Chan dated 8 September 2015 for the proceedings in the BVI. For example, paragraph 14 of his witness statement was substantially similar to paragraph 40 of the affidavit notably in relation to the summary at the end of that paragraph concerning his belief as to status of security [F1670/15 and 20]

> "In summary: (1) the Loan Agreements identified the collateral securing the Loans; and these representations made by RBI in the BORN Summary concerning the "pending" process of hypothecation of the Samudra Vessels and the "reissuance" and "renewal" of the certificates of title for the Samarinda L.and confirmed that RBI was in the process of perfecting the security under the Loans. As a result, I (and my colleagues at ASML) concluded that (a) at that time RBI had valid but partially unperfected security interests over the collateral; (b) RBI would have the ability to procure the conveyance and transfer of its interest in all the collateral to ACE at the completion of the Loan Sale Agreement; and (c) RBI envisaged no real difficulties in the process of perfecting the collateral"

Only subparagraph (c) in paragraph 14 does not appear in the affidavit.

61. As a result of the manner in which Mr Liu gave his evidence and the similarities with the previous witness statement of Mr Chan, it is difficult to be sure that Mr Liu was giving independent evidence either in his witness statement or orally to the court as to his own recollection and belief. The court therefore approaches his evidence with caution and looks to see whether his evidence is supported by other evidence.

For Ashurst

62. Mr Bertie Mehigan ("Mr Mehigan") was a partner in Ashurst at the relevant time. His evidence is that he was instructed from time to time by various companies that were owned or controlled by the Widjaja family and that on this particular transaction he was instructed to advise and represent SM Multiartha and was instructed on a day to day basis by Mr Fuganto, a grandson of the founder of SM Multiartha, and son of Mr Indra Widjaja.

63. Mr Mehigan remains a solicitor and is now a partner in the firm of Mehigan LLP based in Hong Kong.

64. I note that prior to closing submissions RBI abandoned its case on rectification. Its case on unilateral rectification involved the assertion that there was a mistake on the part of RBI of which Mr Mehigan was aware and which he had omitted to draw to the attention of RBI. This was clearly a serious allegation against Mr Mehigan which was abandoned only after he had given evidence.

65. As a solicitor, Mr Mehigan owes duties to the court and I consider the weight to be given to his evidence against that duty. It seems to me that Mr Mehigan gave honest evidence to the court and sought to assist the court by providing clear and comprehensive answers in cross examination.

66. I note that on occasions he was unable to answer questions concerning the payments out of the Ashurst client account by reason of the legal privilege which attaches to the communications between Ashurst and SM Multiartha and which had not been waived by SM Multiartha but that of course is no reflection on Mr Mehigan or Ashurst, neither of which have the right to waive the privilege which is that of the client.

Not called

67. No witnesses other than Mr Gonzalez were called for RBI. Particularly striking was the absence of Dr Strobl. It was submitted that Mr Gonzalez was "obviously the appropriate witness to call in relation to RBI's understanding of the meaning of the Confirmation." However this does not provide an adequate explanation for the absence of Dr Strobl: although Mr Gonzalez was heavily involved in the transaction it appears that there were discussions which took place between Dr Strobl and Mr Fuganto notably in June 2015 of which Mr Gonzalez was (at best) unaware of the detail and which at times ran counter to the approach which Mr Gonzalez was advocating. His divergent approach is for example mentioned in the email dated 21 July 2015 from Mr Chubb to Mr Chan:

> "I emphasised how [Mr Gonzalez's] aggression, lack of flexibility and back-tracking on the commercial position of pain sharing, loans etc agreed with Dr Strobl had caused a lot of offence and frustration at Sinar Mas"

68. Where the court is faced with conflicting explanations as to what was said by ACE to RBI about deficiencies in the Collateral and its significance to ACE, the court is likely to have been assisted by evidence from Dr Strobl. Similarly it would appear from the evidence of Mr Gonzalez that Dr Strobl as a more senior employee was either able to take decisions in relation to the transaction himself or was able to have direct conversations with members of the Board of RBI and again this may well have thrown light on issues in this case.

69. In the absence of a good reason for Dr Strobl not being called to give evidence, on disputed points where the court is likely to have been assisted by evidence from Dr Strobl and has the direct evidence of Mr Chan but no clear contemporaneous documentation, the court is likely to prefer the evidence of Mr Chan.

70. Other witnesses who might have been called for RBI included Ms Kamdar and Mr Thomas. Again, no explanation was given to the court why none of these individuals

gave evidence although their evidence on the issues dealt with in this judgment is likely to have been of lesser significance than Dr Strobl's evidence.

71. The following people and firms were also involved in the transaction but were not called to give evidence:

i) Andrew Chubb of Hannam & Partners. Hannam acted as financial advisers to ACE;

ii) Holman Fenwick Willan LLP ("HFW") which acted for ACE;

iii) Allen & Overy LLP ("Allen & Overy") which acted for RBI (Fiona Cumming and Richard Woodworth); and

iv) Mr Fuganto.

72. No explanation was given to the court for their absence. Whilst the evidence of lawyers might not have been material, the absence of Mr Chubb, on whose emails particular reliance is placed by RBI, was notable and no explanation was given as to why Mr Chubb was not called.

73. In relation to Mr Fuganto it was submitted for ACE that his absence was "unremarkable". I do not accept that as a general proposition his absence was "unremarkable" given that in my view it is likely that he could have given material evidence on a number of issues which the court has to resolve. However the significant difference from the position of Dr Strobl is that Sinar Mas does not bring this claim and is not a party to these proceedings. Mr Fuganto therefore had no obligation to participate and give evidence in the proceedings. I draw no inference from his absence or the lack of explanation as to his absence.

Misrepresentation

74. ACE's primary defence to the claim for specific performance is that the BORN Summary contained misrepresentations, that ACE relied on those misrepresentations in entering into the SPA and that ACE is entitled to and has rescinded the SPA by reason of the misrepresentations.

Issue 1 and 2: did RBI make the representations alleged and were they true?

75. Issue 1 in the Agreed List of Issues is formulated as follows:

> "Did RBI, by providing ACE with access to the Data Room containing a copy of the BORN Summary, expressly or impliedly make the following representations to ACE (or any of them, and if so which):
>
> a The three "Samudra Vessels Representations" as defined in ACE Defence ¶18.3;
>
> b The three "Samarinda Land Representations" as defined in ACE Defence ¶18.4;

> c The "Samudra Shares Representation" as defined in ACE Defence ¶18.5.

76. Issue 2 is as follows:

> "If and insofar as such representations were made, were they true?"

Factual background

77. The contemporaneous emails show that ASM (through Mr Wang) was provided with a summary of the Loans and Collateral which was dated "as at 22 May 2014" ("the May BORN Summary") in July 2014 in connection with the proposed deal with Salim and that a further version "As at 30 Sep 2014" ("the September BORN Summary") was provided to ASM in December 2014.

78. On 16 March 2015 RBI provided ASM/ACE with access to a virtual data room containing documents including the September BORN Summary.

79. The September BORN Summary was a nine-page document giving details of the Loans and the Collateral. The third page is entitled "Summary of Securities" and consists of a table setting out the three borrowers under the Loans and under the heading "Security Description" the associated security. The third column is headed "Remarks" and there are entries against some but not all of the security listed. The fourth column is headed "Market Valuation" and amounts are given for some but not all of the security.

Relevant law on express and implied representations

80. ACE relied on *IFE Fund SA v Goldman Sachs International* [2006] EWHC 2887 (QB) (Comm) at [50]:

> "50. In determining whether there has been an express representation, and to what effect, the court has to consider what a reasonable person would have understood from the words used in the context in which they were used. In determining what, if any, implied representation has been made, the court has to perform a similar task, except that it has to consider what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct in their context." [emphasis added]

81. RBI referred to *Jaffray & Ors v Society of Lloyd's* [2002] EWCA Civ 1101at [52]-[55]:

> "52. Whether any of the alleged representations was made involves a consideration of each brochure or set of globals relied upon in order to see what the words used in the relevant document mean. The particular words used must of course be read in their context, which involves considering them in the context of the particular brochure or set of globals as a whole.

> Further, just as the words used must not be read in isolation, so the document must itself be considered against the relevant surrounding circumstances. In particular, it is necessary to have regard to the purpose for which the document came into existence, why the statements contained in it were made and by whom they were intended to be read.
>
> 53. It follows that the words used may have a meaning other than their literal meaning. They may also have a meaning which is not expressly stated, but which is implicit. However, as we see it, their meaning, whether explicit or implicit, should be arrived at by a process of construction and, subject to one point, not by a process of implication. In particular, whether the relevant document contains a particular representation does not depend upon a process of implication of the kind which is appropriate in answering the question whether a particular term is to be implied into a contract.
>
> 54. Mr Goldblatt submitted that the test is simply whether an ordinary person in the position of a prospective or existing name would have understood the document in question, read as a whole, to carry or contain the representation contended for. We agree. There has been some debate as to what attributes should be given to the person reading the brochure as a prospective name. In this regard Mr Goldblatt submitted that the ordinary person of reasonable intelligence in the position of a prospective (or indeed existing) name should not be treated as someone with previous knowledge of the insurance market generally or Lloyd's in particular. Again we agree.
>
> 55.. The point seems to us to be well demonstrated by the following statement made by Langley J in *Sumitomo Bank Ltd v Banque Bruxelles Lambert SA* [1997] 1 Lloyd's Rep 487 at 515:
>
> "It is well established in law that the question whether any kind and if so what particular representation was made depends upon an objective assessment of what was said or done and its likely effect on the alleged representee in the context in which the particular parties were concerned. In other words, what would the documents and exchanges relied upon have conveyed to a prudent banker in the position of the plaintiff banks?"
>
> In the instant case we are not concerned with the prudent banker, who is already versed in the world of banking, but with prospective names who may have no previous knowledge of the world of insurance." [emphasis added]

The context of the representations

82. In order to construe the alleged representations the court therefore, on the authorities referred to above, must consider the context in which the words were used and have

regard to the purpose for which the document came into existence and why the statements were made.

83. Mr Gonzalez was not involved in the preparation of the BORN Summary which as noted above was originally sent to Mr Wang in mid-2014. Mr Gonzalez only became involved in the transaction towards the end of 2014. However in cross examination Mr Gonzalez was asked about the purpose of the BORN Summary and RBI's pleaded case that it was an internal document.

84. His evidence was that he did not author the BORN Summary and it appears on the evidence that it was produced by a member of the collateral management team of RBI in Singapore. As to its purpose, in an email of 18 June 2015 to amongst others, Mr Chan, Mr Gonzalez stated:

> "Also, for your information, I have also attached the information pack that was provided to all interested investors already in November. It clearly says on page 3 that 15 vessels have not yet been perfected…"

The document which is referred to as the "information pack" is clearly the BORN Summary.

85. Mr Gonzalez accepted in cross examination that the BORN Summary in the data room was "the only document that gave any sort of overview of the material". [Day 2 p38]

86. In an email of 8 July 2015 Mr Gonzalez referred to the BORN Summary as the "IM":

> "Unfortunately, I think that we are going to have to sue them. For the loans, they offered the full 71 if we go show that "everything" is perfected, by which they mean also the 15 additional tugs (to the 42 tugs/barges) that were never perfected and the plots of land where there are title issues (<u>both of which were clearly stated in the IM that we sent to all investors).</u>" [emphasis added]

87. Mr Gonzalez confirmed in cross examination that "IM" in that email was a reference to the BORN Summary and that was how he viewed the BORN Summary:

> "Q. That in truth is how you saw the BORN summary; it was an Information Memorandum in relation to this deal?
>
> A. It was a snapshot, yes, a summary." [Day 2 p43]

88. Mr Gonzalez also accepted in cross examination that the BORN Summary was a marketing document and not (as pleaded by RBI) an internal document [Day 2 page 44]:

> "Q… the claim that the BORN summary was an internal document not produced for the provision of information to third parties, not to be relied on by ACE, that is not true, is it?

> A. It might have begun life like this but it was most certainly given to external parties.
>
> Q. Yes, given to investors in November, described by yourself as an Information Memorandum.
>
> A. Correct.
>
> Q. The updated version placed in the data room for the purposes of marketing the loans and the collateral?
>
> A. Yes."

89. The evidence therefore both of Mr Gonzalez and the contemporaneous documentation is that the purpose of the BORN Summary was to provide a summary or snapshot of the Loans and the associated Collateral and was the only document in the data room that gave an overview of the position. It was a marketing document and not an internal document.

90. The individual representations and their alleged falsity have to be construed objectively having regard to the likely effect on the representee in this context.

Date of representations in the BORN Summary

91. It was submitted for RBI in closing (paragraph 27) that the BORN Summary clearly stated the position "as at 30 September 2014" and that any representation could only have been a representation as to the position as at that date and could not have been expected to mislead a reader in March 2015 into thinking it was more up-to-date and therefore no obligation to update it could have arisen.

92. This is not a point which appears to have been pleaded. The response to the allegation of false representations which was pleaded was at paragraph 15. 2 of the Reply:

> "It is admitted that on 16 March 2015 RBI provided ACE with access to the Data Room. There were numerous documents in the Data Room, included in which was the BORN Summary. The BORN Summary was an internal RBI document, not produced for the provision of information to third parties and, in particular, not to be relied on by ACE in entering into, or to induce it to enter into, any transactions with RBI." [emphasis added]

93. RBI's pleaded case therefore relied on the purpose of the BORN Summary and asserted that it was not produced for the provision of information to third parties. As referred to above, this assertion was not supported by the evidence at trial.

94. It does not appear to have been alleged prior to trial therefore that the BORN Summary was true as at 30 September 2014 but subsequently became untrue. However it was a submission which was made on behalf of RBI in relation to the Samudra Vessels and the Samarinda Land (closing submissions Day 10 pages 36 and 46).

95. It seems to me that this is not a point which it is open to RBI to take on the pleadings. However, in case I were wrong on that, I will consider the point.

96. It was submitted for ACE that the court has to construe the text of the BORN Summary in the context in which it was made and interpret it objectively: *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd.* [2011] EWHC 484 (Comm) at [215]:

> "A representation is a statement of fact made by the representor to the representee on which the representee is intended and entitled to rely as a positive assertion that the fact is true. In order to determine whether any and if so what representation was made by a statement requires (1) construing the statement in the context in which it was made, and (2) interpreting the statement objectively according to the impact it might be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee:…"

97. It was submitted for ACE that a reasonable representee would read the "as of 30 September 2014" on the first page but would reasonably assume that the remarks about the status of the collateral that RBI was selling remained accurate. It would reasonably assume that RBI had not permitted JPMorgan to put in the data room remarks about the assets that no longer reflected the true status of the securities. The evidence showed that Mr Gonzalez referred to it in emails as an "IM" (Information Memorandum) and it was submitted that this reflected its importance.

98. The document clearly stated that it was a summary as at 30 September 2014. However viewed in the context that:

    i) it was a marketing document and was placed in the data room for marketing purposes; and

    ii) although it was not given particular prominence in the data room it was the only document to give an overview of the Collateral;

    in my view the likely effect of the representations on the representee is that a reasonable person would have inferred that the position as to the "Summary of Securities" remained true at the time of the document being placed in the data room on 16 March 2015.

Samudra Vessels Representations

99. Turning then to the specific representations which are alleged to have been made. In relation to the Samudra Vessels (defence 18.3) ACE pleads that RBI made express or implied representations:

> "18.3.1. there were 57 Samudra Vessels (as identified in Schedule 7 of the Samudra Loan) and mortgages had been "perfected" in respect of 42 of them;

> 18.3.2. the process of obtaining mortgages over the 15 remaining Samudra Vessels was "on- going" and "pending"; and
>
> 18.3.3. no substantive difficulties were envisaged in the process of obtaining mortgages in order to "perfect" the security over the 15 remaining Samudra Vessels;"

100. In relation to the Samudra facility the BORN Summary stated on page 1 that:

> "SPM is a privately owned company incorporated on 10 May 2011. The company is deemed to be controlled by Samin Tan. SPM's principal activity is mainly to undertake tug and barge operation to transport coal from AKT mines located along the Barito River waterways... For its operation, SPM employs new fleet of 4,000- tonne capacity barge which is more manoeuvrable in the volatile Barito waterways. Currently it has 17 units of tugboats and 25 units of barges. Another five units of tugs are being registered and will be operational in the second half of 2014.
>
> The SPM facility went into default when SPM failed to pay a principal instalment…on 21 May 2014. A second principal instalment subsequently also went unpaid on 21 August 2014. Current outstanding principal stands at USD 42 million." [emphasis added]

101. On page 3 of the BORN Summary entitled "Summary of Securities" seven types of security were listed against SPM as borrower and the relevant lines read:

Borrower	Security Description	Remarks	Market Valuation (USD million)
SPM	1) Hypothec Deed over Tugs & Barges	On-going process. Total perfected: 42 vessels. Pending :15 vessels	43.31

"there were 57 Samudra Vessels (as identified in Schedule 7 of the Samudra Loan)"

102. Taking the first alleged representation that "there were 57 Samudra Vessels (as identified in Schedule 7 of the Samudra Loan)", the relevant statement in the BORN Summary on page 1 was that:

> "Currently [SPM] has 17 units of tugboats and 25 units of barges. Another five units of tugs are being registered and will be operational in the second half of 2014."

This therefore states that there are only 42 vessels with a further 5 to be registered making a total of 47. However on page 3 there was a reference to 57 vessels in total: 42 vessels being described as "perfected" and 15 vessels "pending".

103. It was submitted for the claimant that ACE had access (through the data room) to the Samudra loan documentation in which a schedule of 57 tugs and barges was set out with the date of registration and the date by which security was to be provided. It was therefore submitted that read in context it would have been clear that vessels were still under construction when the loan was entered into and yet to be registered and therefore reference to the number of vessels on page 3 should be read accordingly and include vessels which were still to be registered.

104. In my view:

i) when the loan was entered into the documentation made it clear that vessels were still under construction and yet to be registered; however a reasonable person would not infer as at the date of the representation in 2015 that the current position regarding the Vessels was provided by the facility documentation entered into some years before;

ii) whilst the BORN Summary clearly stated that the loan was in default having missed two instalments of principal in May and August 2014, a reasonable person would infer that the reference on page 3 to "ongoing process" was a reference to the status of the security over the Vessels as the "Remarks" were against the words "Hypothec Deed over Tugs & Barges". It is to be inferred that the Remark was therefore dealing with the security and not the underlying assets, that is the status of the registration or construction of the Vessel;

iii) it is the process of taking security which is described as "ongoing" and a reasonable person would infer that the word "pending" referred back to the ongoing process of taking security; a reasonable person would not have understood that security being described as "pending" over vessels extended to vessels which had not yet been constructed and/or registered.

105. For these reasons I find that there was an implied representation that there were 57 Vessels and on the evidence of the reports commissioned for ACE there were not 57 Vessels so the representation was false.

"mortgages had been "perfected" in respect of 42 of them"

106. This representation was made expressly on page 3 of the BORN Summary (as set out above)

107. This representation was accepted by counsel for ACE to be true (Day11 p91) so does not fall for consideration.

"the process of obtaining mortgages over the 15 remaining Samudra Vessels was "on- going" and "pending"

108. As set out above, it was submitted for the claimant that in the context of the Samudra loan facility setting out the process for vessels to be bought or built and then registered and then mortgaged, the "on-going process" refers to the whole process of building, registering and mortgaging the vessels.

109. As set out above in my view a reasonable person would have understood the words in the context in which they were used, to be referring to the security and not the underlying status of registration or existence of the vessel.

110. It was further submitted for the claimant that the process could be "on-going" or "pending" even though there was nothing happening provided the process had not finished and the example given was legal proceedings. In my view in the context of taking security (which unlike legal proceedings the reasonable person would not expect to take months or years) the reasonable person would infer that if the security process was described as "on-going" active steps were being taken. In this case on the evidence 57 Vessels could not be found or at best had not been registered, so no process of taking security could be said to be "ongoing".

111. Although some vessels had been registered, the evidence is clear that after the loans went into default the process of registration (and in some cases construction) stopped and unless they were registered no security could be taken. Further no steps were taken to perfect the security after the loans went into default. Mr Thomas wrote in an email to Mr Liu on 11 May 2015 [F926]:

> "What I have been able to determine is that the 15 vessels should have been pledged to RBI under the Hypothec (mortgage) arrangement, but we have been unable to compel SPM to do so. The process appears to be that the vessels first need to be registered with the Indonesian vessels registry (flag and class) in the Ministry of Transportation, before the mortgage (Hypothec) can be charged over the vessel. As the registrations have never been performed, the Hypothecs also remain incomplete.
>
> There has been no communication on the state of progress of the registrations ever since RBI put SPM in default." [emphasis added]

112. The same point was confirmed in a subsequent email from Mr Thomas on 20 May 2015:

> "In fact the monitoring agent has identified the location of 47 vessels, 22 tugs and 25 barges. The increase from last week is amongst the tugs, which have increased in number from 17 tugs last week to 22 this week. This is because we have only extended the scope for the agent since last week to additionally locate and track the additional 15 tugs that have neither been registered nor pledged to us… Of that number (15) five have been located thus far…
>
> As I intimated in my email of 11th May, these vessels have neither been registered nor have the Hypothecs been perfected; indeed SPM has not even attempted to mortgage (Hypothec) them to us…" [emphasis added]

113. It was submitted for the claimant that the court should interpret the words "since RBI put SPM in default" in the email of 11 May (above) as a reference to enforcement by RBI of the security in October 2014 not the earlier defaults. It seems to me that RBI gave no reason for not calling Mr Thomas if they wished to advance evidence of the context in which the representations were made.

114. In any event as discussed above in my view the date of the representation is to be taken as the date on which it was placed in the data room and thus any difference in the position pre and post enforcement of the security is irrelevant to the falsity of the representation in March 2015.

115. For these reasons I find that there was a representation that the process of obtaining mortgages over the 15 remaining Samudra Vessels was "on- going" and "pending" and this representation was untrue.

"no substantive difficulties were envisaged in the process of obtaining mortgages in order to "perfect" the security over the 15 remaining Samudra Vessels"

116. It was submitted for ACE:

i) that only RBI could give information about state of the security;

ii) RBI gave no inkling that it anticipated or was aware of substantive difficulties and the impression that was given was that all was "in hand".

117. It was submitted for ACE that the vessel registration schedule (ACE skeleton paragraph 107) which had blanks for the date of construction clearly indicated that someone at RBI knew that there were significant problems with the process of registration and mortgaging of vessels. However in my view the state of knowledge of RBI is irrelevant to the question of whether the language used in the BORN Summary that the process was "ongoing" or "pending" in context would lead a reasonable person to conclude or infer that there was any warranty as to the substantive difficulties anticipated.

118. Having found that the references to the process being "on-going" and "pending" referred to the process of obtaining mortgages over the 15 remaining Samudra Vessels, the statement that security was "pending" in respect of 15 Vessels indicated

that the process had not been completed. However, the words "on-going process" precede that statement about how many "vessels" were "perfected".

119. The statement has to be construed in context and on page 1 of the BORN Summary it was clearly stated that 2 instalments of principal had been missed in May and August 2014. Nevertheless, this table on page 3 is headed "Summary of Securities" and there is an express statement that the process is "ongoing". The court also has to consider the document itself and the purpose for which the BORN Summary came into existence which, as discussed above, was a marketing document to provide potential purchasers with a summary or overview of the Loans and the Collateral.

120. In my view although the "remark" was made in the context of loans which were in default, a reasonable person would infer from the words "ongoing process" and "pending" that steps in relation to the taking of the security were continuing notwithstanding the fact that loans were in default. Taking into account the purpose of the BORN Summary, and the absence of any other qualification against this particular line entry, a reasonable person would have inferred that it was implicitly represented that "no substantive difficulties were envisaged in the process of obtaining mortgages in order to "perfect" the security over the 15 remaining Samudra Vessels."

Samarinda Land

121. In relation to the Samarinda Land (Defence 18.4) it is pleaded that:

> "RBI made express (alternatively implied) representations to the effect that:
>
> 18.4.1. original Certificates of Title existed for each of Nos 16, 17, 29, 32 and 35 Samarinda and were in its control;
>
> 18.4.2. two of the Certificates of Title were in the process of being reissued and one was in the process of being renewed; and
>
> 18.4.3. no substantive difficulties were envisaged in the perfection of the security over the Samarinda Land";

122. In relation to the Samarinda Land, the BORN Summary stated in the table on page 3 entitled "Summary of Securities" (so far as material to this issue):

Borrower	Security Description	Remarks	Market Valuation (USD million)
Maxima	6) 2nd mortgage of Samarinda Properties (East Kalimantan)		

SPM	7) 2nd mortgage of Samarinda Properties (East Kalimantan)		
RACL	3rd Party Mortgage of Samarinda Properties (East Kalimantan)	Registered 2 of 5 Cert of Titles. 2 titles in process of reissuance and 1 in process of renewal	62.59

"original Certificates of Title existed for each of Nos 16, 17, 29, 32 and 35 Samarinda and were in its control"

123. Two "titles" were expressly stated to be in the "process of reissuance" from which a reasonable person might infer that the original certificates of title no longer existed since they needed to be "reissued" and a reasonable person might assume that they were being reissued by an authority ie not RBI and thus were not in the control of RBI. No further information was given in relation to the "process". The remarks are silent as to the original certificate and its existence and location. In my view it cannot be said that a reasonable person would have understood any such warranty as alleged - there was no express representation in relation to the original certificates and in my view it cannot be said a reasonable person would have inferred that it was being implicitly represented.

124. In my view with regard to the statement that one title was in the "process of renewal", one might infer that the original Certificate existed but again in the absence of any further information about the process of renewal and the circumstances when renewal might arise, it cannot be said a reasonable person would have inferred that it was being implicitly represented that the original Certificate existed.

125. In my view no such representation was made either expressly or impliedly in relation to the original Certificates of Title.

"two of the Certificates of Title were in the process of being reissued and one was in the process of being renewed"

126. RBI took a pleading point in its closing submissions that ACE had not pleaded any case that these representations were false.

127. At paragraph 29.5 of its Amended Defence ACE pleaded:

> "in the premises:
>
> 29.5.1. RBI did not have 3 of 5 of the original Certificates of Title in its control;
>
> 29.5.2. 3 Certificates of Title were not in the process of being reissued or renewed; and…"

128. It was submitted for RBI that the "premises" did not address the question of whether the certificates were being reissued or renewed.

129. The "premises" set out the emails in May 2015 when ACE asked about the originals of the land certificates and investigated the existence of the security with its legal advisers. There was no misunderstanding in my view on the part of RBI as to the case which was being advanced in paragraph 29.5.2 as is evident from the response from RBI in its Reply as follows:

> "22.4.2 ACE is put to proof of the matters alleged in paragraph 29.5.2."

In my view the pleading point is not well founded: the issue was identified as was the scope of the dispute. No further detail was required.

130. In relation to the substantive issue, it was submitted for RBI that the process of reissuance/renewal was ongoing at the date of the BORN Summary. RBI relied on the email from Ms Kandar on 25 May 2015 to Ms Chen at Ashurst. Ms Kamdar wrote:

> "As regards the land, yes, only 2 parcels of land were ever mortgaged to us. The other 3 did not materialize as we enforced on the Borrower group when the land office process was ongoing (hence we did not expect the Borrower to cooperate with us thereafter)." [emphasis added]

RBI also relied on the evidence of the Ruky Safrudin Rekan land valuation report dated 24 April 2015 (the "RSR Report") [F699/15] which referred to letters from notaries saying that the land certificates were in the process of renewal/reissuance.

131. In my view:

i) the representation is that the titles were "in process" of reissuance and "in process" of renewal. A reasonable person would infer that "in process of reissuance" meant that there was a "process" in the sense of a series of steps or things that were being done and "in process" that those steps or things were being taken or done;

ii) whilst Ms Kamdar attributes any failure to obtain the new land certificates to the lack of cooperation following enforcement of the security (accepted to be in October 2014), (for the reasons set out above) the relevant date is the date on which the BORN Summary was placed in the data room that is March 2015.

132. The RSR Report is clearly relying on information from 2013. The notes in the RSR Report stated:

> "1. Based on the letter No. 47 / KET / RT / XII / 2013 dated December 23, 2013 issued by Rusnah Saidah, SH substitute of Ruddyantho Tantry, SH, Notary and Land Deed official in Samarinda, explained that SHGB No 16 / bukuan of an area of 57,790 sqm is in renewal process of Right to Build in office of Land Authority Samarinda.

> 2. Based on Letter No. 56/KET/RT/XII/2009 dated December 24, 2013 issued by Rusnah Saidah, SH, Notary and Land Deed Official in Samarinda, the original SHGB No. 17 (land area 59,700.00 m2) and SHGB No. 29 (land area 153,960.00 m2) were missing, however, the management of the Company had already reported the missing certificates to the police as proven by Surat Tanda Penerimaan Laporan Pengaduan from Kapolres Metro Jakarta Pusat No. Pol:6788/B/XTT/2013/POLRES JP dated Desember 20, 2013, and the missing certificates will be processed in Office of Land Authority Samarinda for their replacement." [emphasis added]

133. The history of Certificate 29 is set out in Appendix 6 of the Report of Mr Simms dated 27 March 2020. He states:

> "In 2008, Samin Tan agreed to lend Gunawan Tue Land Certificate No. 29 for the purpose of obtaining a credit facility from Bank Mandiri, and have the ownership status transferred to Mulia under the condition that the ownership of the land should be transferred back to Tunggal at all costs following the release of the security… In 2013, Tunggal planned to request a credit facility from a foreign bank with Land Certificate No. 29 as collateral. It is to be noted that the Ravenwood loan agreement was entered in 22 November 2013. However, Tunggal was not able to locate the certificate and attempts to obtain the certificate back from Gunawan Tue were not successful. Tunggal made an inquiry to Samarinda Land Office to understand the status of the certificate and found that: (i) the certificate was still under Mulia's name; and (ii) the land certificate was pledged to Tegak Sukma Budiman, the owner of UD Pulau Agung, a supplier of Mulia's, for IDR 20 billion debt. There was no permission from Samin Tan for this. Following these findings, Tunggal reported Gunawan Tue to Central Jakarta Police in the same year." [emphasis added]

134. In the Prasetio land valuation report 6 June 2015 the report stated:

> "Further, as recorded in the copies of the land title certificates, HGB Nos.16 and 17 have expired on 23 April 2011 and 27 January 2012, respectively. Based on Representation Letters …dated 10 November 2014 issued by Notary Dedek Yuliona, SH, M. Kn, the HGB Nos.16 and 17 are in the process of renewal and extension under the name of PT. Tunggal Yudi Sawmill Plywood for a land area of approximately 57,790 square meters and 59,700 square meters, respectively." [emphasis added]

135. In the Workout Application dated 10 March 2015 there was a statement that:

> "Progress with extension of land certificate HGB16 and HGB 17 has been good. The renewed land certificates are expected to be received by end- Nov."

This statement appears to be taken from a valuation report prepared by Wilson & Rekan in November 2014.

136. Ms Kamdar's explanation in her email that the titles did not materialise once RBI started the enforcement process was not explored in cross examination as she did not give evidence. It was an explanation provided by RBI to Ashurst only once questions were being asked about the title to the collateral. It seems to conflict with the view expressed in the Workout Application that "progress was good" in November 2014. No explanation as to the basis for the remarks in the BORN Summary is provided in the witness statement of Mr Gonzalez.

137. It is notable that Mr Simms in his report instructed by, and with access to, RBI, does not provide any more up to date information which would support RBI's representation that the titles were in the process of renewal or reissuance. He merely states in the body of the report:

> "11.1.7 While I understand that RBI did attempt to perfect security rights over the remaining properties, this was complicated by the criminal case and other events (see Tunggal time line in Appendix 6) and was not supported by Tunggal's management or shareholders."

138. It is clear from Appendix 6 of the report of Mr Simms (reproduced above) that Land Certificate 29 had been transferred away in 2008 and not only had it been lent to another company (Mulia) but had also then been wrongly pledged and therefore misappropriated by Mulia.

139. As to the statement by Mr Simms (quoted above) that he understood that "RBI did attempt to perfect security rights over the remaining properties" no evidence was provided by RBI to explain this statement either as to who provided the information to Mr Simms or what steps were taken. The evidence of Mr Gonzalez was that he did not know whether Mr Simms was given information by RBI.

140. However it seems to me that Mr Simms having been instructed to prepare a valuation of the assets for the purpose of these proceedings, the statements in his report on this issue are to be preferred to the Workout Application prepared in March 2015 as to which the court has insufficient knowledge as to authorship or the basis on which it was prepared to be satisfied that it is reliable. I also have regard in this context to a Collateral Evaluation Sheet dated 25 February 2015 prepared internally by RBI in which Plots 16 and 17 are given no value on the basis that the land titles had expired in 2011 and 2012 respectively.

141. On the evidence before the court and for these reasons, I therefore find that the representation that the Certificate for Plot 29 was in the "process of" renewal or reissuance was untrue.

142. The titles for Plots 16 and 17 had expired in 2011 and 2012. In relation to certificate 17 the reference in the notes to the certificate being "missing" in 2013 and the absence of any more up to date information in the report of Mr Simms leads me to infer that no active steps or ongoing steps were being taken in March 2015.

143. Similarly it seems to me that even if Certificate 16 was at one stage in the process of renewal, the evidence of Mr Simms and the passage of time leads to a conclusion that by the time that the BORN Summary was placed in the data room in March 2015 the representation was no longer true.

144. For these reasons I find that the representation that "two of the Certificates of Title were in the process of being reissued and one was in the process of being renewed" was untrue.

"no substantive difficulties were envisaged in the perfection of the security over the Samarinda Land"

145. It was submitted for RBI that it was clear from the data room list of documents that RBI did not have perfected security over the Samarinda Land as it expressly lists the deeds for properties for which security had been taken and thus the reader would infer that RBI did not have security.

146. It seems to me that a reasonable person would infer from the express statements concerning the certificates of title that the security was not yet perfected. However having regard to the purpose of the BORN Summary providing potential purchasers with a summary or overview of the Loans and the Collateral, it seems to me that the absence of any other remarks and the fact that the titles were expressly described as "in process" of reissuance/renewal (that is that active steps were being taken) would lead a reasonable person to infer that the maker was implicitly representing that no substantive difficulties were envisaged in the execution of those steps and thus the perfection of the security over the Samarinda Land.

Samudra Shares

147. In relation to the Samudra Shares (Defence 18.5) the alleged representation is that:

> "RBI made express (alternatively implied) representations to the effect that it had perfected security over the Samudra Shares which could and would be transferred to ACE on Completion"

148. In the table entitled "Summary of Securities" the September BORN Summary stated in this regard:

Borrower	Security Description	Remarks	Market Valuation (USD million)
SPM	3) Pledge of ownership interest in SPM		

149. There were 2 pledge agreements by the parent companies (referred to for convenience as Bisnis and Mineralindo). Under the pledge agreements (clause 3.1) the company was obliged to deliver the share certificates and the pledge had to be registered in the share register.

150. Given the absence of any "remarks" against the entry in this table and the context that other security in the same table had "remarks" such as "on-going process" (in respect of the Hypothec over the tugs and barges) in my view a reasonable person would infer that the security described as a "pledge of ownership interest" was not just a pledge agreement but a perfected pledge of the interest in SPM.

151. As to whether the representation was true, the evidence on this was set out in an email from Ms Kamdar to Ashurst on 9 June 2015:

> "Unfortunately, we do not have the original share certificates or a copy of the share register duly annotated with the pledge.
>
> We understand from our Indonesian counsel that in terms of enforceability, the pledge of shares agreements have been signed in a notarial deed form, which is considered as prima facie and complete evidence for third parties that the pledge agreement has been executed. We also have notified the company of the pledge and have received the Acceptance Letter from the company acknowledging the pledge of shares agreement (attached). Despite the share certificates and annotation in share register book have not been received by the pledgee, based on the pledge agreement, the notice and the acceptance, requirement for pledge perfection under Indonesian Civil Code has been satisfied. Our counsel is of the firm view that on these grounds, the pledge under the pledge agreement remains valid and enforceable." [emphasis added]

152. It was submitted for RBI that there were pledges and RBI had legal advice that the pledges were valid and enforceable, despite the share certificates not having been delivered and the annotation in the share register not being made. However, counsel for RBI acknowledged in his closing submissions that it is a matter of Indonesian law and there is no evidence on that (Day10 page 50).

153. In my view a reasonable person would have understood the representation that there was a pledge without any qualification through the "Remarks" to be a valid and perfected pledge and on the evidence before the court this representation was untrue.

Reliance

154. The issue of reliance on the misrepresentations is formulated in general terms in the Amended List of Issues as follows:

> "Did ACE rely on (and/or were they induced to enter into the SPA by) any of the alleged misrepresentations? (Issue 3)"

155. The first sub-issue is whether the representations in the BORN Summary were statements on which the representee is entitled to rely: *Cassa di Risparmio della Repubblica di San Marino SpA* at [215]:

> "A representation is a statement of fact made by the representor to the representee on which the representee is intended and entitled to rely as a positive assertion that the fact is true."

156. RBI pleaded in its Reply (at paragraph 15.2.1) that it was an internal document not to be relied upon by ACE. However as referred to above, the evidence showed that Mr Gonzalez referred to it in emails as an Information Memorandum and in cross examination Mr Gonzalez accepted it was in effect a marketing document given to third parties.

157. The next issue which falls to be determined on the pleadings (Reply paragraph 15.2.3) was whether ACE accessed or reviewed the BORN Summary. RBI relied on evidence that Mr Liu only accessed the data room on one occasion before the SPA was entered into, on 17 March 2015 (paragraph 75 of Mr Gonzalez' witness statement).

158. Mr Liu's evidence both in his witness statement and in cross examination was that he downloaded the contents of the data room (paragraph 12 of his witness statement). Accordingly, he did not need to access the data room repeatedly and this evidence is supported by the contemporaneous emails in which he sent links to documents by creating Dropbox files.

159. If further confirmation were needed then the data log provided an example of where a document was recorded as "last viewed" but had in fact been provided by Mr Liu to a third party prior to the date given for the last view of the document. So, the relevant entries at line 23 of the log were:

type	folder	title	attachments	Last viewed
publication	Documentation	Grosse Akta Hipotek Pertama Tuhp	Grosse Akta Hipotek Pertama Tuhp 3.pdf	May 08, 15 03:10

In an email of 1 May 2015 from Mr Liu to Mr Bambang Heruawan this same document was provided to him as can be inferred by reference to its description of the document which includes the typographical error in Tuhup.

160. It was also consistent with what RBI expected to happen as evidenced by an email exchange between Ms Kamdar and Mr Chubb on 13 May 2015 where this was confirmed:

> "I also note that from a Singapore regulatory perspective, RBI cannot share the RBI loan information directly with ARM/its advisors but is allowed to share (and has shared) the information with ACE (as the potential purchaser of the loans). This point was discussed with Ashurt last week. We understand and note that to evaluate the purchase of the RBI loans, ACE may need to disclose the information to its advisers including information which ACE has received through the JPM data room. Under the circumstances and given that the disclosure by ACE to ARM/its advisers is linked to the sale and purchase of the RBI loans, and we do not see this as a major issue. I assume however that ACE will take the information from the data room and send the relevant information to ARM/its advisors (and ACE is not going to request direct access for ARM to the data room - which may create some legal issues for us and JPM)."[emphasis added]

161. As to whether ACE reviewed the BORN Summary the evidence of Mr Chan in this regard was as follows:

> "Q…Should her Ladyship understand from what you say there that you didn't read the BORN summary yourself?
>
> A I did. I have had in my possession the BORN summary for a long period of time. I read it many times over that period from 2014 to 2015." [Day 4 p24]

162. There is reference to information contained in the BORN Summary in the contemporaneous documentation which supports the evidence of Mr Chan and Mr Liu that ACE relied on the BORN Summary: for example in an email of 8 May 2015 Mr Liu wrote to Ms Kamdar:

> "In the "BORN EXPOSURE INFORMATION SUMMARY" presentation (attached), it is mentioned that 15 other vessels were pending perfection (p.2), in addition to the 42 vessels on which you provided information just now. Are these 15 vessels still pledged to these loans?"

163. The next sub-issue which arises is whether ACE relied on the September BORN Summary as distinct from the May version. It was submitted for the claimant that the claim in misrepresentation fails because the document on which ACE relied was the May BORN Summary provided to Mr Liu by Mr Wang, and not the September BORN Summary from the Data Room.

164. It was submitted for ACE that the point was entirely new only being raised in RBI's skeleton for trial and had never been pleaded - the pleaded case being that ACE had not accessed or reviewed the BORN Summary. It was therefore submitted that this explained why the evidence given by Mr Chan and Mr Liu in this regard was "new evidence" not in their witness statements.

165. The principal evidence of Mr Chan in this regard was as follows:

"Q. Did you ever see any other version of this BORN summary?

A. I have seen two versions. Mr Gonzalez told me he sent me something in December of 2014, but we couldn't locate it, so we have only seen two versions. One is this May one we have had in our possession since July 2014. There was another one that we received from the data room from March 2015, I think it was March 16. But thank you for not taking this as a memory test, so I am -- but Brian got that from the data room. The two summaries are essentially the same, so we continued to work off the May summary…" [Day 4 p26]

"Q. When did you see another one?

A. Oh, that must have been in March, middle of March. After Brian got the stuff from the data room, and I cannot remember exactly when, but we had a conversation and we looked at the two summaries and we concluded they are essentially the same, so we will just use the one we have always been using so that we don't confuse people.

Q. Where does it say in your witness statement that you compared two BORN summaries in March and concluded they were essentially the same?

A. I probably didn't say that, but we did have –

Q. You didn't say that. You didn't say that because it wasn't true.

A. It is true. I mean there are many things during that process that we did. I could have talked about the conversation with Alex Ramlie, which was very useful, but we didn't talk about it in my -- because otherwise we would be writing much longer. The two summaries are essentially the same."

"Q. I am going to ask you one more time, Mr Chan. It is not true, is it, that you saw the September version of the BORN summary?

A. Mr Twigger, you can ask me a couple more times but we did obtain the -- when I say "we did", I mean Mr Liu did. And then we looked at the September summary comparing it with the March summary -- sorry, the May summary, sorry, the May summary from the previous years, and as a financial analyst we concluded -- and I still stand by that conclusion -- the two documents are essentially the same." [Day 4 page 28] [emphasis added]

166. It was submitted that the evidence given by Mr Chan (and Mr Liu) was fabricated on this issue. Taking the reasons relied on by RBI in its submissions for alleging fabrication (in summary) in turn:

i) that it was "implausible" that Mr Chan and Mr Liu forgot to mention in their witness statements that they took a positive decision, having compared the versions, to rely on the May version and if they had "forgotten" it would have been elicited by their solicitors.

I accept the submission for ACE that the issue of which version they had relied on was not an issue at the time witness statements were prepared and therefore this was not a matter which would have been considered at the time for inclusion.

ii) That the affidavit in 2015 to defend the winding up petition did not state that Mr Chan had read the September BORN Summary or two versions of the BORN Summary.

I accept the submission for ACE that this witness statement was prepared for a different purpose, namely to defeat the winding up petition and not the issue which has only now been raised by RBI of which version of the BORN Summary was relied upon.

iii) that it is clear from emails that Mr Liu was always working from the May version.

This in my view is not inconsistent with the evidence of Mr Chan which is that they decided to continue to work with the May version on the basis that the two versions were essentially the same. It is relevant that the Summary of Securities and the "remarks" which form the basis of ACE's present complaint of false representations are identical in the two versions. This does not mean that ACE's case on misrepresentation is based on the provision of the May version and its case on reliance on the representations can still be established even though Mr Liu worked from the May version. The valuations of the assets and the share prices did change in the two versions but the evidence of Mr Chan was that they did not rely on the BORN Summary for valuation of the assets and the evidence is that they obtained their own valuation reports. The valuations do not form part of the alleged misrepresentations.

iv) that the explanation that Mr Chan and Mr Liu relied on the May version in order not to "confuse people" was absurd, that the witnesses were unable to give a "convincing explanation" for the decision to rely on the "more out of date" document and that Mr Chan and Mr Liu gave untruthful evidence on this and other issues.

I have dealt above with the credibility of Mr Chan and Mr Liu and rejected the allegations of untruthful evidence. Whilst I have stated that as a general matter the evidence of Mr Liu does not in my view provide independent evidence, I have accepted the evidence of Mr Chan as credible and against that finding, I see no good reason to find that he was untruthful on this particular issue. Further on the one hand RBI criticise Mr Liu for repeating the "story" about comparing

> the versions and at the same time rely on the "contradiction" that Mr Liu in his evidence said that Mr Chan took the decision. In the context of giving oral evidence in response to questions put in cross examination and acknowledging that Mr Liu is the more junior employee, I do not accept that there is any significance to be drawn from the distinction between Mr Chan who said that "we concluded" they would use the earlier version and Mr Liu who said "Mr Chan" decided. As noted above the May version was not "out of date" in the material respects. The "convincing" explanation in my view was that so far as Mr Chan and Mr Liu was concerned there was no material difference between the two versions.

167. Accordingly I find on the evidence that ACE did rely on the September version of the BORN Summary.

Whether ACE was induced by the statements in the BORN Summary to enter into the SPA

168. I now deal with the issue of whether ACE was induced by the statements in the BORN Summary to enter into the SPA.

169. It was accepted for ACE that as a matter of law:

> "It is essential if the misrepresentation is to have legal effect that it should have operated on the mind of the representee. It follows that if the misrepresentation did not affect the representee's mind, because he was unaware that it had been made, or follows that if the misrepresentation did not affect the representee's mind, because he was unaware that it had been made, or because he was not influenced by it, he has no remedy." (*Chitty on Contracts* 33rd Edition at 7-036)

170. The following propositions in *Chitty* were also relied upon for ACE:

> "The burden of proving that the claimant's decision to enter the contract was not induced by a misrepresentation normally lies on the defendant… the question of the burden of proof is an evidential one, not a rule of law; and this has been confirmed by the Court of Appeal [in BV Nederlandse Industrie Van Eiprodukten v Rembrandt Enterprises Inc [2019] EWCA Civ 596, [2019] at [32] and [44]]" (*Chitty* at 7-037).

> "It is not necessary that the misrepresentation should be the sole cause which induced the representee to make the contract. It is sufficient if it can be shown to have been one of the inducing causes." (*Chitty* at 7-038) [emphasis added]

171. At 7-039 *Chitty* states:

> "It seems to be the normal rule that, where a party has entered a contract after a misrepresentation has been made to him, he will not have a remedy unless he would not have entered the contract (or at least not on the same terms) but for the misrepresentation.

> Certainly this is the case when the misrepresentee claims damages in tort for negligent misstatement; and it seems also to be required if damages are claimed for fraud. It seems likely that the same rule applies if he seeks to rescind on the ground of an innocent or negligent misrepresentation." [emphasis added]

172. It was submitted for RBI that ACE only cared about the existence of the assets and thus did not rely on the status of the process: RBI relied on the evidence of Mr Chan in cross examination when he said that ACE relied on:

> "the existence of these assets and the nature of these assets, and what they are, are the factual information that we relied on." [Day 4 p18]

173. I do not accept this as a correct interpretation of his evidence. The words relied upon were in the context of Mr Chan explaining that he did not rely on the valuations of the assets in the BORN Summary. The evidence in context was as follows:

> "So if your question is: are we just blindly taking the valuation? No, we were not relying on that. We are financial investors, we should do our own work, but what we are relying on is these assets that were told to us by -- by RBI -- sorry -- yes, RBI, this is from RBI. And the existence of these assets and the nature of these assets, and what they are, are the factual information that we relied on."

(A similar exchange took place later in the cross examination).

174. It seems to me that the assets which were being sold by RBI were RBI's interest in the assets created by the security over the assets. RBI did not own the underlying assets but an interest in those assets created through the taking of the security over those assets. If the security had not been taken or perfected over any of the assets, then this affected the value of the interest which ACE was buying and therefore ACE was concerned not only as to whether the underlying assets existed, but also about the nature of the security taken, as this was the asset which was being purchased and only through enforcement of the security would ACE be able to realise the value in the underlying assets. This conclusion is borne out by the following evidence of Mr Chan:

> "Q. Mr Chan, the reason you are not including those [in the presentation of 9 May 2015] is the same reason that you didn't include the 15 vessels, which is that you didn't care about them. You didn't think they had any value, you knew you didn't have vessels at all, didn't you?
>
> A. That is incorrect. Let me be nuanced. We bought the portfolio, we assumed the portfolio had these assets as they are represented by the seller. That is a typical portfolio trade situation. But as and when you are doing the valuation, just like a typical portfolio trade, you don't have time -- and exactly the case here -- to find out about every single asset so you make

> assumptions, and in this case we assumed the 15 pending vessels are ours, but we don't know how we are going to get them, but if RBI said in the loan documentation they have them -- in any other portfolio trade, you buy it from Citibank, JP Morgan, if they say in the loan docs they have those as security you trust them. RBI --" [Day 5 page 45]

175. As to the importance of the underlying assets, in his witness statement Mr Liu stated that he relied on the BORN Summary in preparing the financial models and investor presentations and that the value of the collateral was important. The evidence shows that Mr Liu consulted with experts about their value including emails to senior people in their respective fields (Alan Tung about the tugs and barges and Daniel Budiman about the Vessels, the Samarinda Land and the goldmine) and he travelled to Indonesia to inspect the Samarinda Land and locate the Samudra Vessels.

176. Although, as stated above, the court therefore approaches Mr Liu's evidence with caution and looks to see whether his evidence is supported by other evidence, this evidence as to reliance was in my view supported by the documentary evidence before the court. The value of the underlying assets was important to ACE as is evident from the investigations that they carried out and the various valuers' reports that were commissioned.

177. It was submitted for RBI that, if as Mr Chan stated in his oral evidence, RBI gave assurances as to the Vessels and the Samarinda Land, ACE must have been relying on these assurances rather than the BORN Summary.

178. I accept the submission for ACE that their case is that the BORN Summary is one of the key inducing causes and that (on the authorities referred to above) it need not be the sole cause.

179. It was submitted for RBI that the Purchase Price was fixed at $120 million and varied only according to the price paid for the RBI ARM Shares and thus ACE was indifferent to the price paid for the Loans and Collateral (originally $85m and later $70m).

180. This was addressed a number of times in the evidence of Mr Chan. This exchange in cross examination illustrates his position:

> "… We are obviously keen to buy the ARM shares, that was our primary target, there was never any doubt. But we are also forced to buy some other stuff. And we need to understand the valuation of the other stuff. If the valuation that we need to pay for the other stuff is too high the transaction wouldn't make sense.
>
> Q. But my point was that the family was willing to increase the offer regardless of what the non-ARM collateral was worth. That is right, isn't it?
>
> A. I don't think -- no, it's not. I don't think I could honestly advise anyone or -- and this is our economics here. Recovery is

> very serious from our perspective. Why would we want -- why would we want someone working in concert with us to fund a transaction which is grossly overpaying, overvaluing the assets? I don't think we would be willing to do that, and I don't think the Sinar Mas family would be willing to do that, and that is why we continued to do our analysis to figure out how much these assets are really worth." [Day 4 p70] [emphasis added]

I accept the evidence of Mr Chan on this point which is clearly consistent with commercial logic: a buyer would not agree to pay $70 million for assets regardless of their value and if that meant ACE was overpaying for the assets.

181. The importance of the Collateral is supported by the evidence of the valuation reports which were commissioned by ASM. Mr Chan's evidence was as follows:

> "… Look, before this whole thing happened, we already hire five valuers and after this we hire an additional valuer and Deloitte to oversee the process. You can argue hiring these valuers is for the purpose of dealing with the NMR because the gentleman at Deloitte used to be the head of NMR in South East Asia, but the valuers that we have hired prior were in existence since before we signed the agreement on May 7, and it was their work which led to the conclusion that on a conservative basis these collaterals are worth 91.2 million. And this is conservative because we are not including the personal guarantee of Samin Tan. We are not even assuming any value for the gold mine. We are assuming only 42 tugs and barges as opposed to 57. This is conservative but even -- but this is our valuation." [Day 5 page 38]

182. It was pointed out to Mr Chan in cross examination that he had not received the valuation reports when he signed the SPA. His explanation was as follows:

> "Q. Mr Chan, those five valuers that you refer to, and I think there might in fact have been six of them, how many of them had actually produced valuation reports before 7 May?
>
> A. I think not -- either two, I think maybe two. But you must understand, May 7 was not a date that we wanted. Because Nat Rothschild launched -- if you don't mind, you have to indulge me to give you the context in order to answer your question. Nat Rothschild launched an open offer on March (inaudible), I believe, and he launched a Rule 2.1 takeover intention to offer on April 20, I believe. And the EGM is going to come up I believe on May 8 or 9, or roundabout. If we do not do this deal, the ship would have sailed. So in the ideal world, Mr Twigger, we all want everything is lined up, but in this particular case, not everything was lined up. If we waited for all the valuation reports to come out -- that was a decision, a hard decision, Mr Twigger. If we had waited for all the valuation reports to come out, we would not have been able to do the deal before the EGM,

> and Nat would have walked away with the company, and the fact that we wanted to circumvent that, we had to get a deal done on May 7, even though we haven't gotten all the valuation reports. So you are quite right, that we haven't gotten all the valuation reports but, as you know -- you know, if you buy a house, you ask a valuer to produce a valuation report. Even though he has not produced a final beautiful one, he would have told you within, like, maybe 3%, 5%, accuracy what his numbers are going to be. We have been working the entire month of April so, even though we have not gotten the final report, we have a pretty good sense of what the valuation is going to be. And the final valuation report didn't come out very differently by the way." [Day 5 page 40] [emphasis added]

183. It was submitted for RBI that the presentations prepared by Mr Liu for the Widjaja family assumed a value for the assets of $20-40 million which was far less than the $70 million ultimately attributable to the assets.

184. The evidence for ACE was that the presentations contained conservative figures for prudent internal modelling: Mr Chan was asked in cross examination about a presentation of 5 April 2015 which stated that the recoverable amount for the Non-ARM Collateral was $40 million. His evidence was: [Day 4/62]

> "Q…So what you were telling the Widjaja family in this presentation was that the amount they expected to recover from the non-ARMS collateral was $40 million, is that right?
>
> A. No. Again, us finance people are not as precise as lawyers. What we are saying here, recoverable amount is like worst case, it's a liquidation. The recoverable amount from the other stuff, tugs and barges and so on, is 40 million in the worst case scenario, and we are not going to work towards that, obviously. All of us, our interests will be aligned to maximise that. In fact, if my memory serves me right, our conservative valuation was in excess of 90 million and --" [emphasis added]

185. Mr Chan's evidence included the following on this issue:

> "Sorry, Mr Twigger, I agree with you, that is the ARM shares that we are primarily going after the ARM shares are worth a lot more than what we were thinking that we were paying. However, it doesn't mean we did not care about whatever else we were buying as a result of a portfolio trade. In a portfolio trade, you buy stuff that you do not primarily want but it doesn't mean you don't value it. The fact that we put 40 million [in presentation of 9 May 2015 **[F912/9**] doesn't mean after we close the trade we will be happy with 40 million. We would pursue it actively proactively aggressively trying to get a value a recovery, a realisable value, which is higher than 40, in terms of our conservative valuation assumptions we get to a $91 million but

> that doesn't assume we scrap the tugs and barges it doesn't assume we sell the land for cheap." [day 5 p48] [emphasis added]

186. I accept this evidence which again seems to me to have commercial logic. It also seems to me to be an answer to the submission that ACE's concern as to the deficiencies in the Collateral related only to the "Fairness Opinion" (the opinion required in accordance with Rule 16.1 of the City Code from NM Rothschild & Sons as the independent adviser to ARMS that the terms of the transaction contemplated under the SPA were fair and reasonable).

187. The reason for the Fairness Opinion was explained by Mr Liu in his presentation of 9 May 2015 and summarised by counsel for RBI in cross examination of Mr Chan as follows [Day 5 p36]:

> "NR [Rothschild] will attack us by claiming that we pay RBI too much and is therefore required to increase our general offer price. We need to obtain a fairness opinion from NM Rothschild & Sons, independent adviser A plc. This is a request from the takeover panel. The board of ARMS and the adviser need to opine the price we pay for RBI loans is fair. Our defence, the valuation of other collateral must exceed 85 million."

188. The Fairness Opinion was required in order to complete the transaction but the evidence was that was not the only reason why the work was done and why the Collateral was significant. The evidence of Mr Chan on this point was as follows:

> "A. No. I mean, we are conflating two issues and ignoring one of them. We just -- yes, we have to do the fairness opinion. That is absolutely true. We -- but in order to do the fairness opinion, we didn't have to do so much. We were -- we just signed on May 7. We were trying to start the closing process. That is how it works. You sign an agreement then you ask the counterparty to deliver you the closing documentation. But the two processes -- the two rationales are not necessarily one over the other. The fairness opinion point, yes, we have to satisfy the takeover panel, NMR and also the ARMS board but at the same time we need to make sure we are going to get -- if the deal goes through, we are going to get what we thought we were going to get, which is, you know, the tugs and barges, the land and the shares, and the gold mine and so on." [emphasis added]

189. It was submitted for RBI that the problem about the Collateral was raised only once as is evident from the email of 15 June 2015 from Mr Gonzalez to Dr Strobl:

> "Spoke to Willi and Andrew.
>
> More pressure: the situation in Indonesia is very precarious. I will try to get some 3rd party confirmation of this. They are concerned that about Samin Tan doing a counter offer…

> They said that there is a problem with some titles associated with some parcels of the land and barges. The issue with the land I was aware of. I was not aware of any issues with the tugs/barges." [emphasis added]

190. ACE submitted that it is clear from the emails in May 2015 that ACE took steps to try to resolve the problems for example the trip by Mr Liu to Indonesia to try and locate the Vessels and that the events of May and June were complex and challenging given the events going on with the Offer.

191. Mr Chan's evidence was that the issue of the defects in the collateral was raised at a dinner with Dr Strobl in Vienna on 3 June 2015: his evidence in re-examination was as follows:

> "Q. So to what was Mr Widjaja referring [in his email of 8 June 2015] when he said: "There are a myriad of issues that are very concerning. We highlighted some in our dinner." What were some of the myriad issues to which Mr Widjaja referred in that dinner in Vienna?
>
> A. We talked about the collateral. It wasn't like, hey, your collateral were all -- it wasn't -- it was a very pleasant dinner. With Dr Strobl, I have never had a bad experience. He has always been pleasant and engaging. It was more than three hours long. But we mentioned -- and again I thought I mentioned that to Mr Twigger earlier, Fuganto more diplomatically, me more bluntly, about hey, your collateral has issues." [Day 4 page147] [emphasis added]

192. As discussed at the outset there is no evidence from Dr Strobl on this point and no explanation as to why Dr Strobl was not called. There is no evidence therefore to contradict the evidence of Mr Chan concerning the dinner on 3 June 2015 and his evidence that the issue of the Collateral was raised with RBI. I note my findings at the outset concerning the evidence of Mr Chan and the absence of Dr Strobl and accept the evidence of Mr Chan on this issue.

193. Further it is clear from the evidence that throughout May 2015 ACE (through Mr Liu) sought to verify the Collateral: for example, on 8 May 2015 Mr Liu emailed Ms Kamdar:

> "In the "BORN EXPOSURE INFORMATION SUMMARY" presentation (attached), it is mentioned that 15 other vessels were pending perfection (p.2), in addition to the 42 vessels on which you provided information just now.
>
> Are these 15 vessels still pledged to these loans?
>
> If yes, may I have information on these vessels as well?" [emphasis added]

On 13 May 2015 Mr Liu emailed Ms Kamdar:

> "May I check if you have the originals of the land certificates?
>
> Our valuer told me the vessels should have "operating certificates". May I check if you have them as well?" [emphasis added]

194. It was submitted for RBI that contrary to the evidence of Mr Liu (paragraph 43 of his witness statement) that they were "alarmed" by the information that 15 vessels have neither been registered nor mortgaged, there was a lack of complaint when the defects were discovered.

But the concern is evident from the evidence of the email exchange with Mr Thomas on 8 May 2015, which included the following from Mr Thomas to Mr Liu:

> "… the current valuations have all been based on 42 vessels (17 tugs and 25 barges) over which the pledges have been perfected. Although a remaining 15 vessels were due to be pledged this does not seem to have been completed."

Mr Liu responded the same day:

> "Please try hard to find info on the other 15 vessels.
>
> Value is significant. Roughly assuming $lm each, they're worth $15m." [emphasis added]

195. On the evidence it is clear that investigations had been going on throughout May to verify the Collateral and legal advisers were instructed on behalf of ACE in June 2015 to advise in relation to the collateral. They gave two opinions dated 19 June 2015: the first stated that security had only been created over 42 vessels (and not, as required by the documentation, 57) and that the share certificates and copy of the share register had not been delivered by the pledgors of the Samudra Shares; the second stated that security had not been granted over Plots 16,17 and 29 of the Samarinda Land.

196. It was submitted for RBI that the complaints in mid-June 2015 were not genuine concerns but an attempt to gain commercial leverage and were a consequence of liquidity issues when ACE needed to find an extra $40m for the general offer as a result of the deal they had had to do with Mr Rothschild. RBI rely in particular on the email from Mr Chubb to Mr Gonzalez and Dr Strobl on 7 June 2015 which read (so far as material)

> "I am pleased to report that we have managed to reach a deal with both Nat, the ARMS board and NMR whereby Nat has irrevocably agreed to tender his shares and vote in favour of the Rule 16, NMR have signed off on the fairness and the board will recommend our offer. I do not need to tell you that this is a fantastic result.

> As you know, this has come at a significant price for Sinar Mas. Accordingly, we would hope that you will be in a position to help us share the pain of this price of securing a clear path to a clean victory in what has been a very challenging situation. With the additional consideration, contractor penalties and other costs, we expect the combined cost to be in excess of $40m. We would hope that, as you have suggested, RBI might be in a position to help us share this burden. You have suggested to us that you could be able to agree to do this in the amount of $20m. We are open to your views but we would suggest that the easiest and cleanest way to do this would be through a reduction in the consideration allocated to the loan package. Your share consideration would increase to the 56p offer price with a commensurate reduction in the loan price..." [emphasis added]

197. As set out above (in relation to Mr Chan's evidence generally) Mr Chan's evidence on this email was that Mr Chubb was trying to get the deal done but in a way that would not offend RBI. Further as Mr Chan stated and as borne out by the contemporaneous documentation, Mr Chubb's approach set out in his email was corrected by Mr Fuganto in his email on 8 June 2015. The email sent by Mr Fuganto is set out above in part, but the key sentence with regard to the alleged liquidity is the following:

> "Thanks for your sincere consideration and suggestion of a loan, but in our spirit we don't want to add debt or liability as of now. However we recognize the well intention and we appreciate it very much."

198. Much time was spent with Mr Chan in cross examination seeking to establish that ACE did not have committed funds available to it under the various facilities and that there was a liquidity issue. However ultimately regardless of the documentation between ACE and Sinar Mas, the issue is whether the funds would be made available by Sinar Mas. As Mr Chan observed in his evidence:

> "… Sinar Mas Group is one of the most substantial conglomerates in South East Asia. $70 million is not a lot of money to them."

199. Further the contemporaneous email from Mr Fuganto made it clear that no loan was being sought from RBI arising out of the increase to the general offer price.

200. The evidence of Mr Chan in cross examination was that they would not be prepared to go ahead at the originally agreed price if the assets were not as stated by RBI:

> "A. We -- they have already provided us the loan documents. Mr Twigger, I have a lot of experience buying loans from banks. Citibank, Chinese bank, Thai banks. When the banks give you loan documents, you don't assume the security that they -- particularly in a portfolio transaction, you don't assume the collateral that they claim they have in the loan document. They didn't have. Right? You find out in the closing. And in the

> finance world how it works is most of the assets, I am thinking of 90%-plus, 99%, the documentation security is all good. If the rest is not good you either put back or you adjust the price." [Day 4 page 72]

201. RBI also relied on Mr Chubb's email of 19 June 2015 in which he stated that an amendment to the SPA that would include a provision that ACE would purchase the assets without relying on any representations from RBI was acceptable.

202. The relevant exchanges were that Mr Gonzalez wrote to Mr Chubb copying Mr Chan as follows:

> "Subject to documentation acceptable to RBI (Richard has already started to prepare the documentation), RBI is, in principle, willing to accept your proposal to have RACL accept the offer before the Rule 16 vote has occurred. Before RACL accepts the offer, RBI will require an agreement amending and restating the loan purchase agreement and the framework agreement and providing for the termination of the irrevocable undertaking (the Amendment Agreement) to be executed and become fully effective between ACE, RACL, RBI and ASM. A condition precedent to the Amendment Agreement will be that the Escrow Agreement is executed and the Escrow Agent confirms receipt of funds or that the full purchase price is held directly by RBI. In addition to making suitable amendments to the existing transaction documents to reflect the revised transaction structure, the Amendment Agreement will contain:
>
> …
>
> e. acknowledgement and confirmation from ACE that it performed its own due diligence prior to entering into the loan purchase agreement and framework agreement, did not seek any representations and warranties and has no recourse to RBI whatsoever in respect of the loans save for a breach by RBI of an express term of the loan purchase agreement." [emphasis added]

The response (so far as material) from Mr Chubb (which was not copied to Mr Chan) was:

> "I think all of what you propose is fine - including e) in your email apart from the need to fund the escrow in full as that doesn't solve our cashflow/ liquidity issue…" [emphasis added]

203. However, it was Mr Chan's evidence in cross examination that he would not and did not agree to such a provision or instruct Mr Chubb to accept the provision on his behalf:

> "A. He is not me. I'm not even copied on it. I did not -- he is an adviser to ACE. I think if I -- if I were to guess what he was

> thinking was, he was trying to be a really good investment banker, playing both sides, trying to find out whether he can get some concession from RBI, and then came back and tried to convince me. But I don't think he succeeded because that was a deal-breaker. Because by virtue of the fact that we agreed to (e), which was brought up I believe in the later part of June, more than six weeks after the document was -- the original document was signed, they want to make the document "as is, where is". But it was not "as is, where is", it was something that we rejected. We never agreed to --" [Day 5 page 78]

204. The question was put to Mr Chan again and again Mr Chan rejected the proposition that he had accepted this or authorised Mr Chubb to do so:

> "Q. Mr Chan, it is simply incredible, isn't it, that Mr Chubb could have written this email without having your instructions?
>
> A. He did not have my instruction, because in all my communication with RBI I did not -- I did not make any of these points. So how could I be saying no -- for instance, how could I be saying no to an as is where is deal and at the same time instructing him, ie Mr Chubb, to be communicating to RBI in a totally opposite, different scenario?"

205. Mr Chan's evidence that the complaints about the Collateral defects were genuine concerns and the refusal of ACE to agree the proposed amendment to the documentation to preclude reliance on the representations is supported by an RBI internal document. Mr Gonzalez prepared a "status update" (dated 18 June 2015 but on its face apparently updated on 10/11 July 2015) for the Management Board of RBI in which Mr Gonzalez stated (so far as material):

> "On 19 June 2015, the Board approved a request to modify (at ACE's request) the structure of the deal to allow for acceptance of the shares before the Rule 16 vote. This approval had a number of conditions, including the full funding of the escrow account. This condition was ultimately rejected by ACE. As an alternative, RBI then negotiated with the counterparty to put in place a deferred consideration scheme whereby ACE would only partially fund the escrow account. Ultimately, the parties were unable to agree on a number of points (see Annex) before the Rule 16 vote [on 29 June 2015]."

The points listed in that Annex included:

> "ACE/Sinar Mas's unwillingness to sign an amendment agreement, which including representations for them confirming that they asked for no representations as to the state of the underlying security, carried out their own DD and that the purchase price was fair."

206. On the evidence it is clear that such a provision was not agreed and the proposed supplemental agreements were never signed.

Specific representations

207. It was submitted for RBI that Mr Liu did not rely on the representation in relation to the Vessels because (in his oral evidence to the court) he did not understand "ongoing process" to be confined to the security but understood it to extend to building and registering the Vessels.

208. The meaning of a representation is an objective test. The court has found above that the representation in relation to "ongoing process" related to the security as an objective matter. The court has also found that the representation on the evidence was false. The issue now being considered is whether ACE relied on that representation. It is clear in my view on the evidence (including the steps they took to try and locate the Vessels and the inquiries to establish the value of Vessels) that ACE was induced to enter into the SPA in reliance on the statement that the process of taking security over the remaining 15 Vessels was ongoing and no substantive difficulties were envisaged.

209. It was submitted for RBI that Mr Chan recognised that once the loans were in default, Mr Samin Tan would not cooperate and thus there could be no reliance. That would seem to ignore the representations which were made and which were complained of, which gave no detail of what remained to be done and by whom and the court has held implicitly represented that there were no difficulties with the process of taking security which was expressly stated to be "ongoing".

210. It was also submitted for RBI that the presentations which Mr Liu prepared only referred to 42 Vessels so Mr Liu did not rely on a statement that there were 57 Vessels. There was also an email to Mr Chan of 17 April 2015 which referred to the assets to be valued as 42 Vessels.

211. The email relied upon is a brief email referring also to the Samarinda Land but without providing any detail. I do not think it can be inferred from this brief email that no reliance was placed on the representation that there were 57 Vessels. As noted above, the evidence is that the presentations were valuing the Collateral on a liquidation basis and it does not follow that no reliance was placed on the representation that there were 57 Vessels. As set out above, the evidence is that ACE wanted to know that it was not overpaying for the assets and relied on the BORN Summary for an overview of what they were buying.

212. In relation to the Samarinda Land it was submitted for RBI that ACE relied on its own valuation report (the RSR Report) which referred to the fact that 17 and 29 were missing and 16 was in the process of renewal.

213. The representation which is complained of is that RBI stated that "two of the Certificates of Title were in the process of being reissued and one was in the process of being renewed". The RSR Report only set out the position in 2013. The representation by RBI was as at the date the BORN Summary was placed in the data room in March 2015. The RSR Report does not therefore negate reliance on the BORN Summary.

214. It is evident that ACE was relying on the existence of the security over the Samarinda Land: in an email exchange with RBI Mr Liu asked for the original certificates of title to which he received the following response on 13 May 2015:

> "Further to Monisha's email, we confirm that we have the original land certificates no. 32 and 35 in our possession - these are the only 2 we have as security over the other 3 plots of land have not been perfected."

215. It was submitted for RBI that the representation of "no substantial difficulties" was contrived and could not have given rise to an implied representation. This submission appears to conflate the objective question of whether there was an implied representation with the issue of reliance. To the extent it is said that it could not have been relied upon because it was not mentioned in the affidavit of Mr Chan in 2015, I have already noted that this was prepared in a different context and it is not in my view supportive of RBI's proposition.

216. Finally, as to the share pledges over the Samudra Shares, it was submitted for RBI that no questions were asked before 7 May 2015 concerning the pledges. This does not in my view establish that there was no reliance by ACE. As set out above Mr Chan's evidence is clear that ACE was buying the portfolio of Loans and Collateral and relied on the representations in the BORN Summary as to the existence of the underlying assets and the nature and status of the security over those assets as it was only through enforcement of the security interest that ACE could realise the value of the interest in the underlying assets.

Conclusion on Reliance (Issue 3)

217. For the reasons discussed above, I find that ACE relied on and was induced by the representations in the BORN Summary (including those representations found to be false) to enter into the SPA.

Was rescission effective? (Issue 4)

218. The next issue is whether ACE affirmed the SPA (alternatively is it barred from rescission by laches or by an inability to give *restitutio in integrum*) such that it was not entitled to rescind it on the basis of the alleged misrepresentations when it purported to do so?

Affirmation

219. The law on affirmation was common ground:

> "If a party to whom a representation has been made, having discovered the material facts giving rise to a claim in misrepresentations, either (i) expressly (and unequivocally) declares his intention to proceed with the contract, or (ii) does some (unequivocal) act inconsistent with an intention to rescind the contract, then he is bound by his affirmation and the representor will have a complete defence to proceedings for rescission." (*Chitty* 7-133)

220. As to whether there was an express and unequivocal declaration to proceed with the SPA, RBI relied in closing submissions on:

i) Mr Chubb's email of 28 June 2015;

ii) ACE's letter of 13 July 2015; and

iii) the fact of ACE continuing with negotiations after the emails in May and June 2015 identifying deficiencies in the Collateral.

221. Mr Chubb's email of 28 June 2015 to Mr Gonzalez (so far as material) read:

> "Just to let you know, I had a very positive meeting with Fuganto today ahead of the R16 EGM tomorrow. He is extremely pleased and grateful that RBI will tender in the shares so Sinar Mas can fix the situation with Amir. He is also happy that we have reached a good position with regards to the loan and deferred consideration. He does not understand why you want two guarantors when RBI knows Sinar Mas well through your French team and that they are about to pay back the final instalment of a $60m loan to one of their French companies so you know how they do business (repayment in full and on time). Nevertheless, he is discussing with his board who, in addition to GEAR, can be used for this and will have names for you shortly. He also asked me to communicate that the funds to pay for the loan purchase remain available and untouched in Ashurst's account, ready to transfer to you on closing and to reassure you that he intends to honour this deal, especially in light of the good faith displayed by RBI on the loan and deferred consideration. As you know, this money was put in place at very short notice at the cost of several million dollars in lost interest and early redemption penalties. He is keen that the commercial terms of the loan get finalised as soon as possible so he can communicate that with his board and to move the relationship with RBI beyond the current status where there still seems to be a concern at your end about trust. He asked me to reiterate that they are not looking to do anything other than buy the shares and loan as agreed." [emphasis added]

222. It was submitted for RBI that:

i) this was a clear email that Mr Fuganto intended to honour the deal; and

ii) the court should have particular regard to the words "buy the shares and loan as agreed".

223. On 24 June 2015 Allen & Overy had circulated drafts of the supplemental agreements and RBI submitted that reference in that email of 28 June, that Mr Fuganto was "happy that we have reached a good position with regards to the loan and deferred consideration", was a reference to the documents that A&O had drafted

pursuant to which $46 million of the Purchase Price would be paid into an escrow account and the balance would be deferred.

224. Contrary to the submissions for RBI, this email did not state that the Allen & Overy amendment documentation had been agreed or that the "sole outstanding issue" was the identity of the second guarantor. The email refers to having reached a "good position" and "discussing with his board":

> "we have reached a good position with regards to the loan and deferred consideration. He does not understand why you want two guarantors when RBI knows Sinar Mas well through your French team and that they are about to pay back the final instalment of a $60m loan to one of their French companies so you know how they do business (repayment in full and on time). Nevertheless, he is discussing with his board who, in addition to GEAR, can be used for this and will have names for you shortly" [emphasis added]

225. The supplemental documents included a clause that ACE acknowledge that it entered into the SPA without relying on any representation made by RBI. Although there was the email from Mr Chubb of 19 June 2015 (set out above) which appeared to accept this clause, as discussed above, Mr Chan was not copied on the email and his evidence was that he would not accept that clause. Mr Chan's evidence in cross examination on this issue was:

> "A. I remember the A&O document because of the unreasonable request of "as is, where is" provision. I don't remember anything else that were proposed because the document is a non-starter…"

226. Further the evidence of Mr Chan in relation to the email of 28 June was as follows:

> "So firstly, Mr Chan, Mr Widjaja was keen to get the commercial terms of the loan finalised. He was agreed on the A&O deal, wasn't he?
>
> A. No, I don't recall that, I don't recall that at all. I don't know if I was in this meeting, I don't recall this. But Mr Widjaja would share my view which was communicated strongly when I spoke to Ryan Gonzalez and Dr Strobl, and so did Mr Widjaja, that we would like -- of course we would do the deal as agreed, because the deal as we agreed was to pay 70 million and you deliver us all the collateral, but not beyond that. I don't remember -- we negotiate, this is June 28, we negotiate until the date they filed for the winding-up, so obviously we have not agreed. Obviously we have not agreed, because if we did agree, we wouldn't have been negotiating all the way until July -- I forgot the date that they filed the winding-up petition, but if we had agreed, then we wouldn't have been continuing the negotiation in July."
>
> "Q. You were copied in on this email, Mr Chan, and if you had thought that this email misrepresented your position and that in

> fact you weren't prepared to honour the deal because of defects in the collateral, and you weren't prepared to agree to the A&O proposal because of defects in the collateral, you would have said so, wouldn't you?
>
> A. I would have said that and I must have said that to Andrew Chubb probably in private. You don't air your dirty laundry in public. But I want to make sure you understand what is going on. We had a tender offer coming, we have a looming bond default in a week's time, and at the same time Indonesia was blowing up. I think a small matter of our investment bank are saying some nonsense. I don't think it is the top of my priorities. You must know from the materials that there was strike, there was sabotage in Indonesia. That is probably Fuganto's priority, that was my biggest concern. And the bondholders were very concerned, the shareholders were very concerned. Those were the -- those were the issues. A&O, we did not agree and we would not agree, and we did not agree." [emphasis added]

227. The evidence of Mr Chan that ACE's position at that time was that it would not complete unless RBI could deliver title to the Collateral was delivered is supported by for example the email from Mr Hemetsberger (described by Mr Mehigan as a broker with a good relationship with Dr Strobl) on 15 June 2015 to Dr Strobl and copied to Mr Chubb, Mr Chan and Mr Fuganto:

> "Johann just to recapture our talk:
>
> Share sale first which leads actually to lower completion risk for rbi
>
> Senior loan for 50 Mio to creditworthy Sinar MAS entity.
>
> Maturity the shorter of 5 years or proper title to collateral at a favorable interest rate.
>
> More formal term sheet suggestion to follow.
>
> Please ask Ryan to start negotiating the share sale immediately as timing here is crucial." [emphasis added]

228. In re-examination Mr Chan's explanation of this email was as follows:

> "… We were trying to tell RBI, and I think that was to -- to both Dr Strobl -- I notice Mr Gonzalez is not copied here, but definitely separately to Mr Gonzalez, that your collateral -- you don't have proper title to many of the collateral, and we are -- we would be happy to continue and pay for everything that we thought we were going to pay according to what you told us, for 70 million. But since you cannot give them to us today, we will pay you as and when they are ready. If you say they are pending,

> so when you get them, when the title deeds are re-issued or renewed, we will pay you…" [emphasis added]

229. I find that the email of 28 June 2015 from Mr Chubb was not the affirmation of the SPA by ACE:

i) On its face it was not an unequivocal declaration by ACE to proceed with the SPA but at best amounted to positive noises or comfort from Mr Fuganto concerning an amended deal;

ii) On the evidence the draft amended documents circulated by Allen & Overy were not agreed by, or acceptable to ACE.

230. As to the letter of 13 July 2015 sent by ACE this read (so far as material):

> "In response to your 9 July Letter, we confirm that we are ready, willing and able to proceed with the closing of the Sale and Purchase Agreement on condition that you are in a position to convey and transfer all of the Purchased Assets (as defined in the Sale and Purchase Agreement), including all original title documents relating thereto and otherwise to comply with all representations and warranties made by you under and in connection with the Sale and Purchase Agreement...
>
> …
>
> We reiterate that we are ready, willing and able to make the payment of the Purchase Price under the Sale and Purchase Agreement upon our being satisfied that you are able (in form and substance satisfactory to us) to deliver each of the deliverables set out in the Annex. We look forward to working with you with a view to doing so as soon as possible." [emphasis added]

231. Attached to the letter of 13 July was an Asset List setting out the documents that were required to be delivered and that included documents in respect of the Samarinda Land and the Vessels.

232. In relation to the letter of 13 July it was submitted for RBI that the reference to the "condition" was an obligation which ACE said existed in any event under the SPA and thus it was a clear affirmation by ACE of its intention to comply with the SPA.

233. The letter of 13 July has to be viewed in context.

234. On 7 July Mr Gonzalez sent the following email to Dr Strobl:

> "I think that it would be important that you call Fuganto today. I spoke to Kin Chan for longer today. It is not going in the right direction, and we will end up in litigation
>
> Kin offered:

> 1. To pay the remaining $71m subject to everything being perfected. This will not happen as they will argue that there are 15 tugs missing and 3 out of the 5 land plots have issues with the titles. This will be their argument on why they don't have to pay us. Legally, we should be fine here, plus NM Rothschild said that the price was fair as did 99.7% of the independent shareholders. In the info memorandum, which we sent to all investors, this situation was disclosed.
>
> 2. We defer $50m for a period of 5 years (to be paid back earlier) if progress is made on getting the assets.
>
> I told him that both were unacceptable and that there are three options (this has been consistently communicated now for some time):
>
> 1. They pay the $71m
>
> 2. They pay $46m and we agree to defer $25m subject to their signing of an amendment agreement. He said that the amendment agreement was a non-starter as it contains new reps and warranties. These new reps, and warranties make it explicitly that they are happy with the price being paid for the assets, etc. I told them that I do not understand why this should be a non-starter if their intention is to pay us. He talked a lot about how the figure should be $35m and that the gap is not that large between $50 and $35m. I told him that I do not want to negotiate the agreement or the amount. This is good will and they can take or not.
>
> 3. We sue them." [emphasis added]

235. In a letter of 9 July 2015 RBI demanded immediate payment by 2pm on 10 July 2015.

236. It is against that background that the letter of 13 July 2015 is to be construed.

237. Viewed objectively from the position of RBI this letter was not an unequivocal declaration which left RBI in no doubt that ACE intended to complete the SPA. It amounted to a refusal to comply with the demand for immediate payment under the SPA and a counter demand for documents to be produced in relation to the Collateral.

238. In my view neither the email of 28 June nor the letter of 13 July was an express and unequivocal declaration to proceed with the SPA and accordingly I find that there was no affirmation of the SPA by this email or letter.

239. As to whether there was some (unequivocal) act inconsistent with an intention to rescind the contract, RBI point to the work done in May and June to value the assets, to agree an escrow agreement, and to negotiate amendments. It was submitted for

RBI that these actions were consistent only with an intention to continue to perform and therefore to affirm the SPA.

240. In my view the work done towards completion does not amount to an unequivocal act which is inconsistent with an intention to rescind. It is true that the parties were working towards completion in May and early June but on the evidence I have found that the issue of the defects in the Collateral had been raised in early June (at the dinner in Vienna) and none of the acts relied upon by RBI amount to an act inconsistent with an intention to rescind the SPA once the extent of the defects became apparent.

Is ACE barred from rescission by laches or by an inability to give *restitutio in integrum?*

241. It is common ground that rescission is an equitable remedy. It was submitted for RBI that rescission should be refused as a result of the three-year delay before the purported rescission.

242. It was submitted for ACE that although initially RBI sought to wind up ACE in the BVI in September 2015 it then pursued Ashurst, only serving proceedings against ACE after a considerable delay on 1 May 2018. ACE then responded by serving its defence dated 28 June 2018 containing its election to rescind the SPA.

243. On the evidence of the delay in bringing proceedings against ACE it would not in my view be inequitable to allow ACE to rescind by reason of its delay in electing to rescind. I also note that rescission was foreshadowed in its defence of the winding up proceedings in the BVI.

244. It was also submitted for RBI that rescission should be refused because of "the close association" between the two parts of a single overarching transaction and the fact that ACE could not now give restitution of the RBI ARM Shares.

245. I agree that the transaction was originally for the sale of a portfolio of assets including the RBI ARM Shares. However, the transaction was structured ultimately as two separate transactions and RBI received the purchase monies in respect of the RBI ARM Shares. It would not therefore in my view be inequitable to allow ACE to rescind its agreement to purchase the Loans and the Collateral for which a separate consideration had been agreed but had not been paid as a result of a failure by RBI to give correct representations as to the title to the Collateral and in circumstances where no transfer of the Collateral took place.

Conclusion on rescission (Issue 4)

246. For the reasons set out above I find that ACE did not affirm the SPA nor should rescission be refused as a matter of equity and ACE was entitled to rescind the SPA in its Defence served in these proceedings.

Conclusion on claim by RBI for specific performance of the payment of the Purchase Price under the SPA

247. For the reasons discussed above, I find that:

i) to the extent set out above, the BORN Summary contained representations which were untrue;

ii) ACE relied upon those misrepresentations in entering into the SPA; and

iii) ACE is entitled to and has rescinded the SPA by reason of the misrepresentations.

248. Accordingly the claim by RBI against ACE for specific performance of the obligation to pay the Purchase Price under the SPA fails.

Breach of warranty claim (Issues 5-8)

249. In light of the conclusion above, I do not consider it necessary to determine ACE's secondary claim of breach of warranty in clause 13.2 of the SPA.

Relief (Issue 9)

250. As the misrepresentation defence has succeeded and the SPA rescinded, it was accepted for RBI that if the claim for specific performance failed, there was no claim for damages by RBI. [Day 11 page 33]

251. The claim by ACE for an indemnity from RBI is an indemnity in respect of obligations created by the SPA if ACE then validly rescinded it. It was submitted that if ACE is required to do something under the SPA and has spent money on that, it can reclaim the money that it has spent.

252. The court was referred to *Chitty* at 7-130:

> "Assuming that a claimant who wishes to rescind is in a position to make restitutio in integrum, the present position seems to be that he may expect the restoration of benefits and the resumption of burdens which have passed under the contract. Thus, if property has been delivered, it must be restored, and the claimant likewise must make restitution of any property delivered to him; and if obligations have passed to the claimant, these must be resumed by the defendant so that the restoration of the status quo ante may be achieved. In practical terms this means that the defendant must indemnify the claimant against obligations which he has discharged or will become liable to discharge. One problem arises: how is the rule requiring the defendant to indemnify the claimant for obligations assumed by him reconciled with the rule that damages cannot be recovered for an innocent misrepresentation which has not become a term of the contract? The traditional answer has been that the defendant must indemnify the claimant against obligations necessarily created by the contract, i.e. against liabilities to third parties which the contract required the claimant to incur or payments to third parties which it required him to make, but against these only. Thus the court is enabled to stop short of making an award which could be classified as damages." [emphasis added]

253. The sums claimed are set out in Mr Liu's statement and are as follows:

i) Deloitte & Touche Financial Advisory Services Pte Ltd -USD 150,000

ii) Hannam -USD 1,322,738.62

iii) HFW-USD 890,000

iv) Ithuba-USD 583,333.33

v) Walkers- USD 20,816.27

vi) Willie Prasetio Rp- 145,387,000.

The expenses (other than Prasetio) have been apportioned by Mr Liu between the purchase of the ARM Shares and the Loans.

254. It was submitted for RBI that none of the obligations arose by the SPA and therefore were not recoverable.

255. It was submitted for ACE that Mr Liu was not cross examined on these.

256. The evidence of Mr Liu (paragraph 72 of his witness statement) was that:

> "ACE incurred substantial expenses in relation to the purchase of the Loans. This principally comprised costs incurred with respect to valuation and other professional advisors. Given that some advisors were instructed on issues pertaining to the purchase of both the loans and the Ravenwood ARMS Shares, it is difficult in those instances to clearly delineate between the cost of services rendered for the purchase of the Loans and the cost of the services in relation to the Ravenwood ARMS Shares. In other instances, it is clear that the services were directly related to the purchase of the Loans and these expenses can be attributed to the Loans in full."

257. Accepting this unchallenged evidence of Mr Liu, his evidence is that these expenses were incurred "in relation to" the purchase of the Loans. This evidence does not establish that these were payments which the contract required ACE to make or incur (nor does the absence of challenge to this evidence affect their recoverability as a matter of law). In my view the sums claimed are in the nature of damages and not within the scope of an indemnity as these are not amounts which the contract required ACE to make or incur.

258. For this reason I find that ACE is not entitled to the sums claimed by way of an indemnity.

259. The claim for damages by ACE under the Misrepresentation Act does not arise as that was a claim for damages in lieu of rescission.

Claim against Ashurst (Issues 10, 11 and 12)

260. Counsel for RBI confirmed in closing submissions that if RBI's case for specific performance failed, then RBI's case on Issue 10 and 12 of the Amended List of Issues against Ashurst also does not succeed as it is dependent on the Purchase Price being payable by ACE. However RBI's claim based on "loss of a chance" remains. [Day 11 page 41] In the light of my conclusions above, I do not therefore propose to consider Issues 10 and/or 12.

Issue 11 "Loss of chance"

261. Issue 11 of the Amended List of Issues is as follows:

> "Did the warranty in clause (b)(ii) of the Solicitor's Confirmation, on a true interpretation, apply only for so long as the alternative arrangement contemplated by clause 4.2 of the SPA was "pending", and, if so, did it mean that such an arrangement would cease to be "pending" if and when there was no realistic prospect of any such agreement or arrangement being reached, or at some other time?
>
> a If it was contemplated that an arrangement contemplated by clause 4.2 would cease to be "pending" if and when there was no realistic prospect of any such agreement or arrangement being reached, when was there no longer any such realistic prospect and, in particular, was there such a realistic prospect at the time of any or all of the transfers out of the Ashurst client account?
>
> b Was there a real and substantial chance that, had Ashurst not made the relevant transfer(s), RBI would have received the Purchase Price, because ACE and RBI would have reached an agreement that retained the essential terms of the SPA (in particular ACE's obligation to pay the Purchase Price) but which provided a different structure by which ACE could make payment, for example by permitting part of the Purchase Price to be deferred?"

262. Ashurst provided the Confirmation (pursuant to Clause 3 of the SPA) in the following terms:

> "1. We refer to the escrow agreement, the current form of which is set forth as Schedule 2 of the [Sale and Purchase Agreement] (referred to in this letter as the "Escrow Agreement") ...
>
> 2. We confirm that:
>
> (a) we have been put in funds in an amount that is not less than US$85,000,000 (the "Escrow Amount"); and
>
> (b) we have irrevocable instructions as follows:

> (i) to transfer the Escrow Amount to the Escrow Agent upon the signing of the Escrow Agreement in accordance with the terms thereof; and
>
> (ii) in the event that the Escrow Agreement is not signed within 30 days of the date hereof, to continue to hold the Escrow Amount pending agreement by the Parties contemplated by clause 4.2 of the [Sale and Purchase Agreement],
>
> 3. This confirmation and any non-contractual obligations arising out of or in connection with it are governed by English law." [emphasis added]

263. Clauses 4.1 and 4.2 of the SPA provided for the setting up of an Escrow Account in the following terms:

> "4.1 As soon as reasonably practicable, the Purchaser and the Seller shall enter into the Escrow Agreement.
>
> 4.2 If the Escrow Agreement is not entered into by all parties thereto within 30 days from the date of this Agreement, the parties shall discuss in good faith an alternative arrangement to achieve the same commercial purpose." [emphasis added]

264. Issue 11 falls to be considered on the assumption that Ashurst's construction of the Confirmation is correct, that is, that the warranty from Ashurst that it would hold the $85m to pay the Purchase Price applied only for so long as the alternative arrangement contemplated by clause 4.2 of the SPA was "pending" and would cease to be "pending" if and when there was no realistic prospect of any such agreement or arrangement being reached.

265. This gives rise to three issues:

i) what was the "alternative arrangement" contemplated by clause 4.2;

ii) was there a realistic prospect of an alternative arrangement under clause 4.2 being reached when the payments were made by Ashurst out of the account; and

iii) if there was a realistic prospect, what would have happened if Ashurst had refused to release the money in its account when it did.

What was the "alternative arrangement" contemplated by clause 4.2?

266. Clauses 4.2 of the SPA provided that if the Escrow Agreement was not entered into

> "…the parties shall discuss in good faith an alternative arrangement to achieve the same commercial purpose." [emphasis added]

267. The factual context in which the Confirmation is to be construed was as follows:

i) The Confirmation was entered into on 7 May 2015 as was the SPA;

ii) The form of escrow agreement was scheduled to the SPA but by the time the SPA was entered into, the terms of the escrow agreement had not been agreed with the proposed (third party) escrow agent;

iii) On 7 May 2015 Ashurst held $94m in its client account (the "Ashurst Account").

268. It was submitted for RBI (in summary) that:

i) the words "same commercial purpose" are broad;

ii) the meaning is not limited to something which is an "interim payment arrangement" or which is "like an escrow but not an escrow";

iii) the commercial purpose of the Escrow Agreement was to enable the funds in the Ashurst Account to be used to pay the Purchase Price in exchange for the purchased assets.

269. It was submitted for Ashurst in response that:

i) the purpose of the escrow account was to "fill the gap" between the signing of the SPA and the date when the conditions were satisfied and payment was due;

ii) once the date for payment arrived (on or around 30 June 2015) there was no realistic prospect of an agreement being reached because there was no need for the arrangement;

iii) it would be a commercial nonsense to negotiate an alternative agreement after the Purchase Price has fallen due.

270. RBI submitted that the latter is a variant on Ashurst's case that the Confirmation no longer applies when there is no realistic prospect of an agreement being reached. Ashurst submitted in response that it follows from their case that Ashurst was no longer obliged to hold the moneys once there was no realistic prospect of an agreement being reached.

271. The escrow agreement provided (as set out in the draft appended to the SPA) that RBI as seller would deliver the transfer certificates for the Loans to the (third party) escrow agent and ACE would transfer the Purchase Price to the escrow agent, that the escrow agent would hold the documents and funds and release the documents and funds no later than two business days after receipt of a notice signed by RBI and ACE that the conditions precedent under the SPA had been satisfied. The conditions precedent (set out in clause 8.1 of SPA) were the Fairness Opinion and the approval by the independent shareholders (the Rule 16 Resolution).

272. I accept the submission for RBI that the words "same commercial purpose" are broad but also accept the submission that the "alternative arrangement" does have to mean an arrangement with the same commercial purpose as the escrow agreement fulfils within the SPA.

273. Thus the context in which the literal meaning of the words is to be considered is that the escrow arrangement provided a means of ensuring that once the documents and funds had been transferred to it, the escrow agent would act on the joint instructions

of both parties that the conditions had been satisfied and this removed the risk that one party would perform its obligations on completion but not the other. This purpose is consistent with the evidence of Mr Mehigan in his witness statement (at paragraph 130):

> "…In particular, the commercial purpose of the alternative arrangement contemplated by clause 4.2 was to provide a mechanism for payment of the price when the conditions were satisfied…"

274. I note that Mr Mehigan continued:

> "That purpose could only be achieved if the arrangement was put in place prior to the conditions being satisfied. There was no point, the purchase price had already become due and payable and ACE had made it very clear that it had no intention of completing on the basis proposed by RBI." [emphasis added]

275. I do not accept Mr Mehigan's opinion that the need for a mechanism to ensure one party did not default at the point of completion ended once the purchase price fell due. That interpretation seems to me to lack commercial common sense. An escrow agreement removes the risk that one party does not complete. That risk remains until the Purchase Price has been paid. I accept that once the completion date arrived and the Purchase Price was paid there was no need for an alternative arrangement. However until the Purchase Price was paid, even if it was due, there was a purpose in setting up an arrangement in the sense of a mechanism to effect completion and which provided a mechanism to ensure payment was received against transfer of the Loans.

276. An alternative arrangement having the same commercial purposes might have been the provision of a guarantee by a bank or the transfer of funds to a blocked account with RBI. It seems to me that until completion had been effected and both sides had discharged their obligations it would have been open to the parties to agree another mechanism for ensuring completion. In the case of a bank guarantee, the mechanism might well have involved the return of the funds held by Ashurst to its client.

277. Given that I accept that the commercial purpose of the alternative arrangement contemplated by clause 4.2 was to provide a mechanism for payment of the price on completion, I do not accept the submission for RBI that the commercial purpose of the alternative arrangement was to use the cash held by Ashurst to pay the Purchase Price in exchange for the purchased assets. That submission seems to me to confuse the source of the funds for completion with the purpose of the escrow arrangement.

278. In my view therefore an "alternative arrangement" to achieve the "same commercial purpose" was not an arrangement which specified how the funds in the Ashurst account were to be used to pay the Purchase Price. The "alternative arrangement" was any agreement whereby the parties agreed a mechanism which provided a level of certainty that completion would take place (once the parties were satisfied that the conditions precedent had been met) and protection that one side would not fail to, and could not elect not to, complete.

279. However I accept Mr Mehigan's evidence that there was no point in an arrangement (whether escrow or equivalent) being put in place after the conditions were satisfied, if on the facts, as at that date onwards ACE had made it very clear that it had no intention of completing on the basis proposed by RBI. This brings me to the next issue namely whether there was a realistic prospect of such an arrangement at the time of any or all of the transfers out of the Ashurst Account.

When was there no longer any realistic prospect of such an arrangement and, in particular, was there such a realistic prospect at the time of any or all of the transfers out of the Ashurst Account?

280. The relevant factual background is as follows (the transfers out of the Ashurst Account are evidenced by the ledger for the Ashurst Account):

i) On 23 June 2015, Ashurst transferred $39.2m out of the Ashurst Account to an account in ACE's name;

ii) On 24 June 2015 there was a credit to the account of $23 million and on 26 June 2015 a further credit of $25 million;

iii) On 7 July 2015, Ashurst transferred $79m out of the Ashurst Account to an account in ACE's name, leaving a balance of $14.8m;

iv) On 7 July 2015 Mr Gonzalez spoke to Mr Chan and following that conversation sent an email to Dr Strobl in the following terms:

> "I think that it would be important that you call Fuganto today. I spoke to Kin Chan for longer today. It is not going in the right direction, and we will end up in litigation
>
> Kin offered:
>
> 1. To pay the remaining $71m subject to everything being perfected. This will not happen as they will argue that there are 15 tugs missing and 3 out of the 5 land plots have issues with the titles. This will be their argument on why they don't have to pay us. Legally, we should be fine here, plus NM Rothschild said that the price was fair as did 99.7% of the independent shareholders. In the info memorandum, which we sent to all investors, this situation was disclosed.
>
> 2. We defer $50m for a period of 5 years (to be paid back earlier) if progress is made on getting the assets.
>
> I told him that both were unacceptable and that there are three options (this has been consistently communicated now for some time):
>
> 1. They pay the $71m
>
> 2. They pay $46m and we agree to defer $25m subject to their signing of an amendment agreement. He said that the

> amendment agreement was a non-starter as it contains new reps and warranties. These new reps, and warranties make it explicitly that they are happy with the price being paid for the assets, etc. I told them that I do not understand why this should be a non-starter if their intention is to pay us. He talked a lot about how the figure should be $35m and that the gap is not that large between $50 and $35m. I told him that I do not want to negotiate the agreement or the amount. This is good will and they can take or not.
>
> 3. We sue them." [emphasis added]

v) On 13 July 2015, Ashurst transferred $14.8m to an account in the name of Capital Market Finance Investments Limited.

281. It was accepted for Ashurst that by making the payment on 23 June 2015, Ashurst acted inconsistently with the terms of the Confirmation but it is Ashurst's position that further funds were then credited and thus RBI suffered no loss by reason of that payment. I also note that the draft amendment documents (relied on by RBI in this context) were only circulated by Allen & Overy on 24 June. This may have been the reason why RBI focussed in its oral closing submissions on the position in relation to the payment out of the Ashurst Account on 7 July 2015 rather than the earlier payment on 23 June 2015 as RBI's submissions that there was a realistic prospect of an alternative arrangement being reached at the time of the payment out of the Ashurst Account are largely dependent on its contention that the parties had essentially reached agreement based on the draft amendment documents. Accordingly, I propose to consider only the payment out of the Ashurst Account on 7 July 2015.

282. It was submitted for RBI (paragraph 144 of closing submissions) that a deal was a realistic prospect when the payment of $79 million was made on 7 July 2015 and the only reason that the deal stopped being discussed was because the money was released. In particular it was submitted that:

i) at the date of the payment out of the Ashurst Account there were ongoing discussions between the parties as to the terms on which part of the Purchase Price could be deferred; and

ii) the terms under discussion were an alternative arrangement which would have achieved the same commercial purpose as the Escrow Agreement. The deal under discussion did envisage an escrow arrangement and expressly contemplated that it was a deal pursuant to clause 4.2 of the SPA.

283. RBI relied (amongst other things) on the following evidence:

i) On 24 June 2015 Mr Woodworth of Allen & Overy sent an email to Mr Mehigan and Ms Ko attaching a suite of documents to amend the existing agreement to provide for a deferral of $25 million of the Purchase Price and a "deferred consideration payment date" of 14 August 2015 (the "A&O Terms"). The draft supplemental agreement 24 June 2015 provided (clause 3) that:

> "If the Bank has not provided the notification contemplated by clause 3.2 above before 18:00 Singapore time on 29 June 2015, this clause 3 (Amendments) shall lapse and the Sale and Purchase Agreement shall not be amended. For the avoidance of doubt, in such circumstances the entering into by the Bank and Offeror of the Escrow Agreement in the form scheduled to the Amended Sale and Purchase Agreement shall not constitute compliance with Clause 4 (Escrow Arrangements) of the Sale and Purchase Agreement and the Escrow Agreement is not an alternative arrangement as described in clause 4.2 of the Sale and Purchase Agreement.."

RBI submitted that it is to be inferred from this clause that if the amendment agreement did go ahead (albeit with an extension to the date for notification) the amended escrow agreement was an alternative arrangement within the meaning of the SPA.

ii) An email exchange between Mr Gonzalez and Mr Chan on 26 June 2015: Mr Gonzalez wrote:

> "Next week, together, we will continue to work toward implementing the deferred consideration structure as per the documents that A&O circulated."

To which Mr Chan responded:

"We are very close, Ryan."

iii) Mr Chubb's email of 28 June 2015 (set out in full above) which RBI submitted showed that at that point the deferred consideration structure set out in the A&O Terms were broadly agreed, and all that remained was the name of a second guarantor to be supplied;

iv) An email of 30 June from Mr Gonzalez in which Mr Gonzalez said that "RBI remained willing to discuss the deferred consideration concept" and Mr Chan replied that he had been speaking to Mr Fuganto and it remained "our intention to do the deal";

v) on 1 July an exchange where Mr Gonzalez was chasing Mr Chubb for the KYC information for GEAR and the other as yet to be identified guarantor;

vi) the email from Mr Gonzalez to Dr Strobl of 7 July 2015 (set out above), recording his conversation with Mr Chan and in the course of which when Mr Gonzalez said that the deal we have been discussing is paying 46 million with a deferral of 25 million, (which RBI submitted is the terms set out in the supplemental documents), Mr Chan then said (RBI submitted for the first time) that that was a non-starter, because the agreement has got in it the clauses saying there will be no recourse in relation to the Collateral;

vii) the negotiations between the parties continued for some time longer until the petition for winding up ACE.

284. Relying on this evidence it was submitted for RBI that:

i) it was clear that by 1 July 2015, the parties had almost reached agreement on the A&O Terms. The only thing that was outstanding was the second guarantor, and all the signals coming from ACE and Mr Fuganto were that they were very happy with that deal. But once RBI released its security over the shares, which was on 30 June, and on 1 July the Offer became unconditional, at that point ACE saw the opportunity simply to acquire the ARM shares without having to complete the loan purchase. ACE decided to use the alleged defects with the collateral as an excuse to refuse to complete.

ii) Mr Chan only positively started to assert to RBI that it would only complete the deal, if perfected security was provided over the vessels and the land, on the very same day as this money was released (7 July).

285. These submissions for RBI are not borne out by the evidence. Taking first the submission that Mr Chan only positively started to assert to RBI that it would only complete the deal, if perfected security was provided over the vessels and the land, on the very same day as this money was released (7 July).

286. The 26 June email (relied on by RBI in this context) from Mr Gonzalez also contained the following:

> "Please note that we are taking the considerable risk of completing the share sale before the escrow agreement is funded as has been agreed. This has always been a crucial component of the deal. Andrew has also indicated that there were concerns on your side about the confirmation that you accept that you have no recourse to RBI with respect to the loans (other than where we breach the loan sale agreement). Your side has recently expressed concerns that the loans you acquired are less valuable than you anticipated. This is something that I absolutely reject because the documentation signed contains no details of the value of collateral and you did your own DD. We cannot proceed without having some level of comfort that you are not going to try to resist paying the full 120m. This point was accepted when we were talking about the shares first structure that it would contain this no recourse confirmation. But this is now being pushed back on. If I am going to defer the payment of the purchase price, I will need the docs to contain this confirmation." [emphasis added]

287. This email is consistent with the court's finding that the issue of defects in the Collateral was raised at the dinner in Vienna on 3 June 2015. There is also the email of Mr Hemetsberger of 15 June 2015 (set out above) stating that the term of the proposed loan would be:

> "Maturity the shorter of 5 years or proper title to collateral at a favorable interest rate." [emphasis added]

288. Turning then to the second submission that it was clear that by 1 July 2015, the parties had almost reached agreement on the A&O Terms. This submission is not borne out by the evidence including the evidence of the emails relied upon by RBI as supporting this submission:

i) As discussed above under "Affirmation", the email of 28 June 2015 from Mr Chubb does not state and the evidence does not support an inference that as at 28 June 2015 the A&O Terms were broadly agreed by ACE, and all that remained was the name of a second guarantor to be supplied.

ii) The sentence in the email from Mr Gonzalez of 30 June 2015 relied upon by RBI in this regard must also be read in context. It stated:

> "As you requested RBI has tendered its shares and released its security over them. As a result, the conditions to completion of the sale and purchase agreement between RBI and ACE have now been satisfied. We remain willing to discuss the concept of deferred consideration; however, any such discussions are of course without prejudice to our rights arising under or in connection with the sale and purchase agreement at law and in any other manner, which we reserve." [emphasis added]

The response to this email also needs to be read in context: Mr Chan wrote

> "It is absolutely our intention to do the deal with you and there is NO intention of entering into any legal dispute… I am confident that a fair settlement will be reached in due course." [emphasis added]

289. Far from suggesting that the deal was agreed (let alone on the A&O Terms) on the evidence of the correspondence as at 30 June 2015 it appears that Mr Gonzalez was (in effect) hinting at the prospect of litigation to enforce RBI's rights under the executed SPA and the amended deal was not agreed - there was merely the prospect of further discussions.

290. This conclusion based on the contemporaneous documentation is supported by the evidence to the court of Mr Gonzalez and Mr Mehigan:

i) In his 2015 witness statement for the BVI proceedings (paragraph 16) Mr Gonzalez stated:

> "Following entry into the SPA, RBI was ready to execute the Escrow Agreement as required and actively engaged the Com pany to do so. However, the Company refused to enter into the Escrow Agreement and no alternative arrangement in substitution of the escrow was discussed or agreed." [emphasis added]

In cross examination in these proceedings Mr Gonzalez confirmed that that statement was true.

Whilst the issue of what constitutes an alternative arrangement is an objective question of construction, the further evidence of Mr Gonzalez to this court was that it was apparent from 25 June 2015 that the parties were not going to reach agreement. In the context of referring to the debenture executed by ACE to secure its borrowings from Sinar Mas, Mr Gonzalez said (paragraph 37 of his 2015 witness statement):

> "during the period from or around 15 June to 25 June 2015, the Company approached RBI seeking to defer payment of part of the Purchase Price. Shortly after it appeared that no agreement would be reached, it appears that the Company entered into the ACE Debenture"

In cross examination in these proceedings Mr Gonzalez confirmed that the debenture appeared to be entered into on 25 June 2015 and this evidence in his earlier witness statement was correct. [Day 3 page 118]

ii) The evidence of Mr Mehigan (paragraph 130 of his witness statement) was that:

> "If an alternative agreement contemplated by clause 4.2 was still pending prior to 29 June 2015, then it had certainly ceased to be so from this point onwards at the latest… There was no point in an escrow or similar arrangement being agreed after the conditions were satisfied, because from that point onwards, the purchase price had already become due and payable and ACE had made it very clear that it had no intention of completing on the basis proposed by RBI." [emphasis added]

291. There is also the further evidence of the "Status Update" (set out in material part above) prepared for the Management Board of RBI in which Mr Gonzalez said

> "… Ultimately, the parties were unable to agree on a number of points (see Annex) before the Rule 16 vote [on 29 June 2015]."

292. As to the position after 30 June 2015, the Status Update stated:

> "On 29 June, 99.7% of the voting shareholders voted in favour of the loan sale. With this event, both conditions for the loan sale were met. RBI accepted the Offer and on 1 July the acceptance was cleared. After this, ACE has not made any real attempt to put this deferred consideration into place despite repeated attempts on RBI's side to do so, though this was not in RBI's interest." [emphasis added]

293. Counsel for RBI submitted that there was a "realistic prospect of an agreement under clause 4.2 being reached". Given the court's finding as to the meaning of "same commercial purpose" in this context, such an agreement is narrower than an arrangement for the purchase of the Loans and Collateral and is a mechanism to effect completion and ensure payment was received against transfer of the Loans. Accordingly, the only arrangement which was contemplated and which could amount to such an agreement would be the amended escrow agreement proposed as

part of the supplemental documents. For the reasons set out above, I reject the submission that by 1 July 2015, the parties had "almost reached agreement" on the A&O Terms.

294. The exchanges which followed up to 7 July 2015 were at their highest negotiations for the purchase of the Loans on amended terms (but not for a deal on the A&O Terms) and the gulf between the respective parties was made clear in the email from Mr Gonzalez. Mr Gonzalez records that Mr Chan proposed two options:

i) to pay the remaining $71m subject to everything being perfected; or

ii) to defer $50m for a period of 5 years (to be paid back earlier) if progress is made on getting the assets.

295. Mr Gonzalez states that he:

> "…told him that both were unacceptable"

296. Mr Gonzalez also stated in relation to the first option:

> "This will not happen as they will argue that there are 15 tugs missing and 3 out of the 5 land plots have issues with the titles."

297. Mr Gonzalez stated that his position was that:

i) ACE pay in full;

ii) ACE sign the amendment agreement but noted that Mr Chan said that was a "non starter" due to the new representations and warranties;

iii) RBI sue ACE.

298. The extent of the disagreement as at 7 July 2015 could not be clearer. However I also note the evidence of Mr Mehigan which reinforces this conclusion. His evidence in cross examination when asked about his thought process on 7 July 2015, was:

> "A. Fundamentally at that time it was blindingly clear that there was no prospect of an alternative arrangement being agreed…"

299. For the reasons discussed I find that there was no realistic prospect of any alternative arrangement contemplated by clause 4.2 being reached as at 7 July 2015.

<u>What would have happened if Ashurst had refused to release the money in the Ashurst Account when it did?</u>

300. Given my finding above, this third issue does not arise for determination. However for completeness I will deal with it.

301. RBI submitted that there was a real and substantial chance that if Ashurst had refused to release the money when it did, a deal would have been done on the A&O Terms and RBI would have got paid in full:

i) by 1 July 2015, the parties have almost reached agreement on the A&O Terms;

ii) ACE waited until they knew they could get the money out of the Ashurst Account before they refused to complete;

iii) if Ashurst had refused to release the money, then there was a real and substantial chance that the A&O Terms would have been agreed, because otherwise $85 million would have been tied up in a solicitor's account producing, presumably, a relatively low return and there would have been litigation during which time the money would have been tied up;

iv) rather than have all those difficulties and problems, what would have happened is that ACE would have agreed the A&O Terms and $46 million would have been paid immediately, the balance would have been deferred until 14 August 2015.

302. The majority of these submissions have been dealt with under the previous section:

i) on the evidence I have found that the parties had not "almost" reached agreement on the basis of the A&O Terms either at 1 July or 7 July 2015.

ii) the evidence is that the deal on the basis of the A&O Terms had been rejected by 30 June 2015 and thus, to the extent it is said for RBI that the reason that the A&O Terms were not agreed was because the money was paid out by Ashurst on 7 July, the evidence does not support the submission.

303. It seems to me to be inherently unlikely, given the defects which were then known to exist in the Collateral and having regard to the evidence as to the significance of the Collateral and ACE's unwillingness to overpay for the Collateral, that ACE would have agreed to go ahead on the A&O Terms merely to avoid litigation or a protracted delay in accessing the funds and there is no evidence to support this. The A&O Terms would only have given ACE a deferred payment date to mid-August. As set out above, the evidence of Mr Chan (for example when asked about the email of 15 June from Mr Hemetsburger) was that they would only go ahead and pay the full amount once RBI could deliver title to the Collateral.

304. As to the pleaded case that it would have done so to secure "improved terms", the A&O Terms included the representation which ACE would have been obliged to give that it was not relying on any representations by RBI. As discussed above, I have found on the evidence that ACE would not and did not accept such a provision. These were not "improved terms" from ACE's perspective.

305. Given the gulf between the parties' positions as set out in the email of 7 July 2015, there was no real chance that an agreement on the A&O Terms would be reached: as is clear from the email of 7 July, Mr Gonzalez's position was that he would not negotiate the agreement and Mr Chan had stated that the amendment agreement on that basis was a "non-starter". There is no commercial rationale now advanced, or evidence, as to why Mr Chan would resile from this in order merely to obtain a partial deferral of the Purchase Price until mid-August 2015 if it meant that ACE had to accept the Collateral as it was.

306. For all these reasons had it been necessary to decide the point, I would have held that ACE would not have agreed the A&O Terms and no payment would have been made either immediately or with a partial deferral to 14 August 2015. Accordingly, even if there had been a breach of warranty, on the evidence there was no loss of chance.

Conclusion on claim against Ashurst (Issue 11 and 14)

307. In the light of my finding that there was no realistic prospect of an alternative agreement or arrangement contemplated by clause 4.2 of the SPA being reached at the time of the transfers out of the Ashurst Account, I find that there was no breach of the warranty in clause (b)(ii) of the Confirmation as a result of the transfers out of the Ashurst Account and the claim against Ashurst for loss of chance falls to be dismissed.