Case No: HC2000 00718

Neutral Citation Number: [2002] EWHC 2454 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3rd December 2002

Before :

THE HONOURABLE MR JUSTICE LIGHTMAN

- -

Between :

(1) GREAT FUTURE INTERNATIONAL LIMITED
(2) WARDLEY CHINA INVESTMENT TRUST
(3) ASIA PACIFIC GROWTH FUND II LP
(4) CHINA DYNAMIC GROWTH FUND LP
(5) FIRSTEE INVESTMENTS LLC **Claimants**

- and -

(1) SEALAND HOUSING CORPORATION
(in liquidation)
(2) BARRY HANSEN
(3) STUART HANSEN
(4) DREWSON CAPITAL CORPORATION LTD
(in liquidation) **Defendants**

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Mr Leslie Kosmin QC and Mr James Potts (instructed by Messrs Eversheds, Senator House, 85 Queen Victoria Street, London EC4V 4JL) for the Claimants
Mr A Connerty (instructed by Messrs Magwells, 6 Angel Gate, City Road, London EC1V 2PB) for the Defendants

Hearing dates: 11th – 29th July. 24th - 30th October and the 4th November 2002
Judgment 3rd December 2002

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Judgment

ABBREVIATIONS USED IN THIS JUDGMENT

APGF	-	Asia Pacific Growth Fund II LP
BT	-	Bankers Trust
CFI	-	China Fund Inc
CDGF	-	China Dynamic Growth Fund LP

Drewson	-	Drewson Capital Corporation Limited
DB	-	Deutsche Bank
DBTC	-	Deutsche Bank Trust Company
Ellis	-	CB Richard Ellis
Firstee	-	Firstee Investments LLC
GCMI	-	Global Capital Markets Inc
GFI	-	Great Future International Limited
Huaxia	-	Shanghai Pudong Huaxia Industry and Commerce Corp.
H&Q	-	H&Q Asia Pacific
IB	-	Insignia Brooke
ILC	-	International Leisure Consultancy
JSM	-	Messrs Johnson Stokes & Master
LTOA	-	Long Term Occupancy Agreement
Lubo	-	Shanghai Pudong Lubo Industrial Company
NYLI	-	New York Life Insurance Company
PEML	-	Private Equity Management BVI Limited
SAIC	-	Shanghai Agricultural Investment Corporation
Sealand	-	Sealand Housing Corporation
SHTI	-	Shanghai Huaxia Trip International Country Club Co
SLEC	-	Shanghai Links Executive Community Limited
SLGCC	-	Shanghai Links Golf and Country Club Limited
SWWB	-	Shanghai Water Works Bureau
TCI	-	Turks and Caicos Islands
TCS	-	Twa Cochrane Skatfield
USA	-	Unanimous Shareholders Agreement
Wardley	-	Wardley China Investment Trust
Xing Ye	-	Shanghai Xing Ye Housing Corporation

Mr Justice Lightman:

PART I

INTRODUCTION

OVERVIEW

1. The Claimants are investment funds or investment companies. At the time of the investment the subject of these proceedings the First Claimant Great Future International Limited ("GFI") and the Second Claimant Wardley China Investment Trust ("Wardley") were owned or managed by HSBC; the Third Claimant Asia Pacific Growth Fund II LP ("APGF") and the Fourth Claimant China Dynamic Growth Fund LP ("CDGF") were owned or managed by H&Q Asia Pacific ("H&Q"); and the Fifth Claimant Firstee Investments LLC ("Firstee") was owned by Bankers Trust ("BT") now part of Deutsche Bank ("DB").

2. Pursuant to a Subscription Agreement dated the 13th March 1997 ("the Subscription Agreement") the Claimants and the China Fund Inc ("CFI") (thereinafter together referred to as "the Investors") subscribed $50 million for shares in Shanghai Links Executive Community Limited ("SLEC") a company incorporated in the Turks and Caicos Islands ("the TCI"). They subscribed $5 million for 5 million (representing 40% of the issued) Common Shares ("the Common Shares") and $45 million for 45 million (representing 100%) of the redeemable (preference) Class A Shares ("the A Shares"). CFI, which is not a party to the proceedings, as such subscriber subscribed $100,000 for 100,000 Common Shares and $900,000 for 900,000 A Shares. The Claimants aggregate subscription price accordingly was $49 million. (Where in this judgment I refer to dollars, I refer to US dollars). I shall refer to the shares for which the Claimants subscribed as "the Subscription Shares". The First Defendant Sealand Housing Corporation ("Sealand"), which is also incorporated in the TCI and has at all times been owned and controlled by the Second Defendant Mr Barry Hansen, subscribed or agreed to subscribe $20,906,489 for 60% of the Common Shares and $20 million for 100% of the redeemable (subordinated preference) Class B Shares ("the B Shares"). In the Subscription Agreement the Defendants represented and warranted to the Claimants that Sealand paid the total subscription price of $40,906,489 by releasing (in consideration of its allotment of shares) a loan of $40,906,489 originally owed by SLEC to Shanghai Links Golf and Country Club Limited ("SLGCC") and assigned by SLGCC to Sealand for this purpose. The Subscription Agreement was completed on the 31st March 1997 ("the Closing Date"). On the same day the Investors, Sealand and SLEC entered into a Unanimous Shareholders Agreement ("the USA") regulating the management structure and the rights of the three classes of shareholders in SLEC.

3. The project for which SLEC was financed in this manner was the development of certain housing land ("the Housing Land") and (in association with SLGCC) a golf course ("the Golf Course Land") in Shanghai China which SLEC had contracted to purchase from Shanghai Pudong Huaxia Industry and Commerce Corporation ("Huaxia") under two land use rights transfer contracts which I shall call respectively "the Housing Contract" and "the Golf Course Contract" and together "the Land

Contracts". (I shall refer to the development project in respect of the Housing Land as the Housing Project and the development project in respect of the Golf Course as the Golf Course Project and the two projects together as "the Projects"). The purchase price for the Housing Land was $19,969,375 and for the Golf Course Land was $17,614,994. Under the Land Contracts the purchase price was payable by seven instalments and by the Closing Date five instalments in respect of each contract had accrued due totalling $33,596,096 made up as to $17,850,278 in respect of the Housing Land and $15,745,728 in respect of the Golf Course Land. In order to induce the Claimants to enter into the Subscription Agreement, the Defendants falsely represented and warranted that all the five instalments ("the Five Instalments") had been paid in full, and that SLGCC (as part of the loan of $40,906,489) had advanced the sum to SLEC to enable SLEC to pay (and that SLEC had paid) the same sum to Huaxia. No such advance or payment has been made.

4. The Claimants learnt the truth in November 1999. In December 1999 Sealand commenced proceedings in the TCI against SLEC and the non-executive directors of SLEC appointed by the Claimants. The Claimants were joined as defendants in February 2000, and in March 2000 served a Defence and Counterclaim invoking the provisions of Articles 7.1 and 7.6 of the USA. On the 16th February 2000 commenced this action. In view of an overlap between the two sets of proceedings in May 2000 (as the parties agreed was necessary and sensible) the proceedings in the TCI were stayed pending judgment on liability in this action. They were thereafter resumed and culminated on the 28th October 2002 in summary judgment being given for the Claimants under Article 7.1. In February 2000 the Claimants applied in the TCI for the appointment of receivers of SLEC and such an order was made on the 5th May 2000. Two members of the firm of KPMG were receivers from the 5th May 2000 until the 4th April 2001 ("the First Receivers"). They were then replaced by two members of the firm of Lowe Enterprises Community Development Inc ("Lowe") who have continued in office ever since. The ground for the appointment of receivers was the gross mismanagement of the affairs of SLEC by the Hansens and their alleged fraudulent conduct the subject of this action. For the first time the Defendants were dislodged from control of SLEC which they tenaciously retained until that date.

5. Prior to the appointment of the receivers the Hansens dealt with SLEC's assets and administered its affairs with regard only to their own interests and treated its assets as their own. Amongst their acts of maladministration unlawfully they transferred the Golf Course Land from SLEC to SLGCC, a company wholly owned by Mr Barry Hansen. The Hansens also unlawfully caused SPNA to enter into a series of four loans secured by mortgages over the assets of SLEC, the majority of the proceeds of which they diverted to themselves and to Shanghai Huaxia Trip International Country Club Company ("SHTI"), a company they control. After the appointment of the receivers the Hansens were able to retain a role barring the receivers from exercising their powers in full by Mr Barry Hansen refusing to resign as SPNA's registered legal representative in China and by successfully resisting proceedings brought by the receivers in the TCI in effect to remove him from office. The Claimants have at all times had to finance the receivership out of their own pockets.

6. On the 4th April 2001, as part of a scheme for financing the litigation, Wardley and CFI entered into agreements for the sale of their shares in SLEC to GFI and GFI's parent company Private Equity Management BVI Limited ("PEML") agreed to sell GFI to AGPF and Firstee. By the agreements AGPF and Firstee agreed to assume the burden

of the continued financing of the litigation and exploiting and realising the investment in SLEC, and Wardley and CFI in return for their shares in SLEC and PEML in return for its shares in GFI accepted a share of net return obtained by AGPF and Firstee from the litigation and investment in SLEC.

7. After a trial on the issue of liability alone ("the First Trial"), by a judgment given on the 1st November 2001 ("the Judgment") and a consequent order dated the 2nd November 2001 I declared that the Claimants were entitled to damages (as against all the Defendants) for breach of warranty and misrepresentation and (as against the first three Defendants) for fraud. I directed an Inquiry as to Damages ("the Inquiry") and an expedited hearing of the Inquiry. I ordered the Defendants to pay the costs of the action on an indemnity basis and to make an interim payment in respect of costs of £1 million. I also directed that the papers in the case be referred to the Director of Public Prosecutions.

8. The Defendants in their Amended Response to the Claimants' Revised Schedule of Loss re-served on the 13th December 2001, after initially maintaining that damages should be assessed at the Closing Date as contended for by the Claimants, in its place contended that the assessment should be at the date of the Inquiry. On the 16th January 2001 I directed the trial of a preliminary issue as to the proper date for the assessment of damages. The trial however proved unnecessary, for after a short hearing the parties agreed the terms of a consent order dated the 5th March 2002 ("the Consent Order") by which it was ordered that the date for the valuation of the Subscription Shares was to be the Closing Date, but without prejudice to the Defendants' entitlement at the Inquiry to contend that matters taking place after the Closing Date particularised by the Defendants in their Points of Defence should be taken into account in the assessment of the Claimants' loss. On the 2nd November 2001 I granted the Claimants a world-wide freezing injunction securing payment of the £1 million costs order. On the 16th May 2002 in order to secure the sum claimed on the Inquiry I increased the figure to £45.5 million. The hearing of the Inquiry commenced on Thursday the 11th July 2002, and this is my judgment on the Inquiry.

9. A constant theme of the proceedings brought by the Claimants against the Defendants in this country and in the TCI has been the wholesale failure of the Defendants to comply with court orders. The Claimants have prepared a valuable schedule of breaches of orders and failures to comply with disclosure obligations. Not one penny of the £1 million or the sums due under any other order for costs has been voluntarily paid. The Claimants took steps to enforce the £1 million judgment debt against Sealand, the Hansens and the Fourth Defendant Drewson Capital Corporation Limited ("Drewson"). On their applications in the TCI: (a) on the 23rd August 2002 Sealand was placed in insolvent compulsory liquidation. Counsel and solicitors thereupon ceased to act for Sealand on the Inquiry. On the 22nd October 2002, the liquidator of Sealand wrote to this court stating that he would abide by the decision of this court and would make no submissions in the matter; (b) a like winding up order against Drewson was made on the 31st October 2002. Counsel and solicitors thereupon ceased to act for Drewson on the Inquiry and by letter dated the 1st November 2002 the liquidator of Drewson wrote to this court stating that he adopted the same position as the liquidator of Sealand; (c) on the 21st October 2002 the Claimants applied for the appointment of a receiver of the shares held by Mr Barry Hansen in SLGCC, judgment was reserved; and (d) summary judgment was given on or about the 28th October 2002 holding that the liquidation of Sealand constituted Sealand for the purposes of Article 7.1 of the USA Sealand an

Inactive Shareholder, triggering the provisions of that Article.

10. The First Trial was protracted and heavily fought. The Second Defendant, Mr Barry Hansen, has at all times owned and controlled Drewson as well as Sealand and has been the driving force behind all the Defendants' activities under consideration at the First Trial and on the Inquiry. Belatedly Mr Barry Hansen some days after the First Trial had commenced provided a witness statement and subsequently gave evidence. He only did so after I had repeatedly warned that I might draw adverse inferences from his failure to give evidence. Likewise his brother the third Defendant Mr Stuart Hansen gave evidence. (Where in this judgment I refer to the Hansens, I refer to Mr Barry Hansen and Mr Stuart Hansen together). Both proved to be unscrupulous and dishonest as well as totally unsatisfactory witnesses. A large number of other witnesses of fact were called on both sides, as were expert witnesses in a number of disciplines. The Judgment sets out in detail the factual background, the relevant provisions of the various agreements entered into by the parties, the rival contentions of the parties and my findings at the trial. In paragraphs 211-215 of the Judgment I detailed the breaches of warranty and misrepresentation which the Claimants had established. They centred upon the non-payment of the five instalments of the purchase price which had accrued due and payable under the Land Contracts at the date of the Subscription Agreement. To avoid the need to recount again the contents of the Judgment in this necessarily lengthy judgment (which is concerned only with the issues raised at the Inquiry) I adopt as the background to this judgment the contents of the Judgment.

11. The two central issues on the Inquiry are the dates on which the Subscription Shares should be valued and the value at that date of the Subscription Shares. The Claimants contend that on general principles of law and upon the true construction of the Consent Order the value of the shares as purchased should be determined as at the Closing Date. The Defendants contend that it should be determined as at the date of the Inquiry. The Claimants say the value of the Shares was nil or practically nil at both dates. The Defendants say that it exceeded or at least equalled the $49 million paid. This issue is addressed in reports of experts called by the parties. It is common ground that credit must then be given for the proceeds of sale of certain of these shares subsequently sold by the Claimants. The Defendants go on to maintain that for a whole series of reasons, and most particularly by reason of the Claimants' failure to mitigate damage the Claimants have no entitlement to recovery of damages.

12. The Defendants have raised a large number of issues of fact as well as of valuation on the Inquiry. Both parties have served witness statements and Civil Evidence Act notices, and both parties have served expert evidence on the issues of valuation of the land owned by SLEC in China and of the Subscription Shares. The Defendants initially sought and obtained permission to serve expert evidence directed to the issue raised by them whether they had a defence of limitation under Chinese Law. (The Defendants had previously raised that issue unsuccessfully at the trial on liability). After the experts had served their reports on this issue and met to agree a further joint report, the Defendants abandoned this defence. There is accordingly now no provision or scope for any expert evidence as to Chinese law.

13. It is necessary to examine the rights of the parties under the Consent Order, the rights of the Claimants as shareholders in SLEC under the USA and Article 7.4 of the Subscription Agreement, and the rights of Huaxia under the Land Contracts and resolve a number of the issues of fact and law before I turn to the valuation exercises, for these

matters are or may be relevant in the valuation exercises. I propose first, concluding this part of the judgment, shortly to set out the issues raised between the parties. I shall then in Part II deal with three issues of law, namely the appropriate date for valuation of the Subscription Shares, the nature and extent of the Claimants' "duty" to mitigate loss and whether as a matter of pleading, if the Claimant cannot establish that the value of the Subscription Shares is nil, they are debarred from any recovery save nominal damages. In Part III I shall set out the material provisions of the USA and of the Land Contracts. In Part IV I shall give my assessment of the witnesses. In Part V I shall resolve a multitude of issues of law and fact raised by the Defendants. In Part VI I shall focus on the issues of value of the Subscription Shares and the Housing and Golf Course Land. In Part VII I shall set out my conclusions.

LIST OF ISSUES BETWEEN THE PARTIES

14. The key issues to be determined by the court are the following:

(1) what is the amount of the loss suffered by the Claimants as the result of their investment in SLEC?

(2) what was the actual value at the date of valuation of the Subscription Shares, that is to say:

a) the 44,100,000 A Shares; and

b) the 4,900,000 Common Shares

(3) are there any matters subsequent to the date of valuation which have any material impact on the amount of the Claimants' loss?

(4) have the Claimants in any way acted unreasonably and failed to mitigate their loss?

15. The individual points in issue between the parties are:

(1) whether the Claimants' loss in relation to the Subscription Shares is to be assessed by reference to the difference between the price paid for such shares (being the value of such shares on the basis that the representations and warranties provided had been true) and their true value as at the Closing Date or at the date of the Inquiry.

(2) (on the assumption that the relevant date is the Closing Date) whether and to what extent in assessing the value of the Subscription Shares as at the Closing Date the court should have regard to:

(a) the indication that Huaxia is now prepared to settle its claims in relation to the outstanding Land Transfer Fees for the consideration set out in the 4th

April 2002 Agreement, namely a cash sum of $13 million, the provision of 200 golf course memberships and the sale of its holding in SHTI for $2.9 million and waiver of its obligation under the Agreement of Principles to invest $11.7 million in the Golf Course Project;

(b) the rights and remedies of the Claimants under the Shareholders Agreement;

(c) the availability in practical terms of any other legal remedies under the laws of the TCI;

(3) (on the same assumption) whether as at the Closing Date there was any reasonable prospect of SLEC being able to redeem the A Shares in accordance with their terms in the light of the proven fraud;

(4) (on the same assumption) whether SLEC was at any time subsequent to the Closing Date in a position to redeem the A Shares;

(5) whether (on the same assumption) as at the Closing Date there was in reality no real prospect of Huaxia bringing a claim against SLEC for the outstanding monies due in respect of the Land Transfer Contracts;

(6) whether the only credits which the Claimants are required to give are in respect of:

(a) $3,250,000 received by APGF from New York Life Insurance Company Limited ("NYLI"); and

(b) US$1 received by Wardley on the sale of its shares in SLEC to GFI.

(7) whether Article 7.4 of the Subscription Agreement provides SLEC with an indemnity from the Defendants in relation to their breaches of warranty and fraudulent misrepresentations;

(8) whether as a matter of construction paragraph 10.6 of the Long Term Occupancy Agreement ("LTOA") provides an unlimited indemnity from SLGCC in relation to the obligation to pay the purchase price payable under the Golf Course Contract to Huaxia;

(9) whether the LTOA is tainted by fraud and therefore void and unenforceable as part of the bundle of agreements made in March 1997 which were signed by Mr Barry Hansen on behalf of the various companies as part and parcel of the fraudulent scheme whereby the Defendants misrepresented that SLEC had paid the Five Instalments in

relation to the Land Use Rights;

(10) whether and to what extent the court should have regard to the present day value of the Subscription Shares (agreed to be that as at the 31st May 2002);

(11) whether Sealand is liable to contribute $33 million to SLEC and is able to meet that obligation?

(12) whether the expert evidence as to share valuation provided by Mr Best on behalf of the Claimants or Mr Caldwell on behalf of the Defendants should be preferred and to what extent;

(13) whether the expert evidence as to property valuation provided by Mr Wong on behalf of the Claimants or Mr Brooke on behalf of the Defendants should be preferred and to what extent;

(14) whether or not the Claimants have acted unreasonably and have failed to mitigate their loss. In particular:

(a) whether they acted unreasonably in failing themselves to conclude a settlement with Huaxia prior to the commencement of the First Trial in respect of SLEC's liability to Huaxia in relation to the Land Use Rights fees;

(b) whether they acted unreasonably in rejecting the offer made by the Hansens through Richards Butler in March and April 2000;

(c) whether they acted in bad faith in their dealings with Mr Keith Darby ("Mr Darby") in January 2001 and in 2002 by failing to agree to sell their shares to the parties allegedly introduced by him (this is not a pleaded issue);

(d) whether the Claimants acted unreasonably in relation to their dealings with Shanghai Xing Ye Housing Corporation ("Xing Ye") in failing to conclude and complete an agreement for the sale of the Subscription Shares and their claims in this litigation;

(e) whether the Claimants have acted unreasonably in seeking to pursue these proceedings against the Defendants;

(f) whether the First and Fifth Claimants sought to interfere with the Defendants' property valuer, Mr Brooke, for the improper purpose of influencing his expert evidence and in order that they might obtain an unjustified level of damages in the Inquiry.

16. In this judgment I propose to answer each of these questions so far as they require to be answered, but not necessarily in this order or separately from each other. Because of the multiplicity of issues, I regret that I have been unable to avoid a degree of duplication and repetition in this judgment. This repetition is particularly apparent in the assessment of witnesses and the examination of the issues on which their evidence bears.

PART II

ISSUES OF LAW

17. There are raised in this case three general issues of law which require determination. I shall consider each in turn. The first is the date on which (for the purposes of assessment of damages) the Subscription Shares should be valued. The choice before the court is between the Closing Date (as maintained by the Claimants) and the Date of the Inquiry (as maintained by the Defendants). The second (which only arises if the date of valuation is the Closing Date) is the extent of the duty of the Claimants to mitigate damages by a sale of the Subscription Shares or negotiating a deal with Huaxia. The third is whether by reason of their pleadings, if the Claimants fail to establish that the Subscription Shares have a nil value, but nonetheless that they have a value less than $49 million, nonetheless they should obtain no recovery in this action.

NON-ISSUE OF MEASURE OF DAMAGES

18. There is no issue on the Inquiry as to the measure of damages recoverable by the Claimants. It is common ground that the Claimants are entitled as against all the Defendants as damages for breach of warranty to the difference between the value of the Subscription Shares as at the Closing Date on the basis that the warranties were true (which the expert share valuers agreed was the $49 million subscribed) and the actual value of the Subscription Shares (according to the Claimants) at the Closing Date or (according to the Defendants) at the date of the Inquiry. In both cases the shares must of course be valued together with all rights attached to them by the Articles of SLEC and the USA. Since the general principle for the assessment of damages is compensatory, the Claimants are to be placed (so far as money can do so) in the same position as if the terms of the Subscription Agreement had been performed. It is likewise common ground that the Claimants are entitled as against all the four Defendants as damages for misrepresentation and (as against the first three Defendants) for fraud to the difference between the amount subscribed and the actual value of the Subscription Shares again (according to the Claimants) at the Closing Date or (according to the Defendants) at the date of the Inquiry ("the diminution in value measure"). Accordingly on the Inquiry all three causes of action require the same exercise to be undertaken, namely the valuation of the Subscription Shares at the appropriate date, and the starting point is that the Claimants are entitled to the difference between the $49 million paid and the valuation as at that date. No distinction is to be drawn between the Defendants by reason of the fact that there is no claim or finding of fraud against Drewson. Once the difference is ascertained, logically the first step to decide is what adjustments should be made to reflect the sale of SLEC shares by the Claimants. The second step is then to consider each of the matters particularised by the Defendants and determine whether they should be taken into account and (if so)

their impact. But convenience requires a rather different process in this judgment. For the valuations require account to be taken (or not to be taken) of a multitude of facts which are in issue between the parties, and the convenient course is to resolve those issues before proceeding with the valuation. In this way the valuation exercise can be approached more directly and expeditiously on the basis of findings on those issues.

THE VALUATION DATE

19. The Claimants' case is that the Subscription Shares must be valued at the Closing Date for two independent reasons: (1) that is in accordance with ordinary principles; and (2) that is what is provided for in the Consent Order. The Defendants' case is that, whilst ordinary principles require valuation at the Closing Date, general principles do not require damages to be assessed as at the date of breach where assessment at some other date is necessary to place the claimant in the same position as if he had not sustained the wrong for which he is claiming compensation, and that such necessity in this case requires a valuation at the date of the Inquiry, a date agreed for practical purposes as the 31st May 2002. The Defendants go on to contend that the Consent Order can and should be construed as requiring adoption of that date for valuation purposes.

GENERAL PRINCIPLES

20. Whilst the general rule is that the proper date for the assessment of damages for breach of warranty, misrepresentation and fraud is the date of the breach of contract or wrong (i.e. the Closing Date), the general rule is not adhered to rigidly where an alternative date for the assessment of damages better achieves the compensatory object of damages.

21. Guidance on the application of the general principle is to be found in the speeches of Lord Browne-Wilkinson and Lord Steyn in Smith New Court Ltd v. Scrimgeour Vickers [1997] AC 254 ("Smith New Court"). In that case the House of Lords held that the diminution in value measure would not compensate the claimants for their loss since, having bought the shares at above market price with a view to holding them as a market making risk, the claimants could not have sold the shares on the same date and were effectively locked in. The House of Lords held that in the circumstances a different measure of damages would give better effect to the compensatory object of damages, the measure being the difference between the price the claimants paid for the shares in July 1989 and the amount they subsequently realised on the sale of the shares between November 1989 and April 1990. Selection of this measure involved departing from the usual rule that damages are assessed at the date of breach. This approach did not involve imposing on the valuer the task of valuing the shares at a date after the transaction, but of ignoring those factors which have influenced the price which are collateral and have nothing to do with the defendants' fraud. Lord Browne-Wilkinson said (at pages 265-268):

> "Turning for a moment away from damages for deceit, the general rule in other areas of the law has been that damages are to be assessed as at the date the wrong was committed. But recent decisions have emphasised that this is only a general rule: where it is necessary in order adequately to compensate the plaintiff for the damage suffered by reason of the defendant's

wrong a different date of assessment can be selected....

In many cases, even in deceit, it will be appropriate to value the asset acquired as at the transaction date if that truly reflects the value of what the plaintiff has obtained. Thus, if the asset acquired is a readily marketable asset and there is no special feature (such as a continuing misrepresentation or the purchases being locked into a business that he has acquired) the transaction date rule may well produce a fair result. The plaintiff has acquired the asset and what he does with it thereafter is entirely up to him, freed from any continuing adverse impact of the defendant's wrongful act. The transaction date rule has one manifest advantage, namely that it avoid any question of causation. One of the difficulties of either valuing the asset at a later date or treating the actual receipt on realisation as being the value obtained is that difficult questions of causation are bound to arise. In the period between the transaction date and the date of valuation or resale other factors will have influenced the value or resale price of the asset. It was the desire to avoid these difficulties of causation which led to the adoption of the transaction date rule. But in cases where property has been acquired in reliance on a fraudulent misrepresentation there are likely to be many cases where the general rule has to be departed from in order to give adequate compensation for the wrong done to the plaintiff, in particular where the fraud continues to influence the conduct of the plaintiff after the transaction is complete or where the result of the transaction induced by fraud is to lock the plaintiff into continuing to hold the asset acquired...

In sum, in my judgment the following principles apply in assessing the damages payable where the plaintiff has been induced by a fraudulent misrepresentation to buy property: (1) the defendant is bound to make reparation for all the damage directly flowing from the transaction; (2) although such damage need not have been foreseeable, it must have been directly caused by the transaction; (3) in assessing such damage, the plaintiff is entitled to recover by way of damages the full price paid by him, but he must give credit for any benefits which he has received as a result of the transaction; (4) as a general rule, the benefits received by him include the market value of the property acquired as at the date of acquisition; but such general rule is not to be inflexibly applied where to do so would prevent him obtaining full compensation for the wrong suffered; (5) although the circumstances in which the general rule should not apply cannot be comprehensively stated, it will normally not apply where either (a) the misrepresentation has continued to operate after the date of the acquisition of the asset so as to induce the plaintiff to retain the asset or (b) the circumstances of the case are such that the plaintiff is, by reason of the fraud, locked into the property; (6) in addition, the plaintiff is entitled to recover consequential losses caused by the transaction; (7) the

> plaintiff must take all reasonable steps to mitigate his loss once he has discovered the fraud....
>
> In the circumstances, it would not in my judgment compensate Smith for the actual loss they have suffered (i.e. the difference between the contract price and the resale price eventually realised) if Smith were required to give credit for the shares having a value of 78p on 21 July 1989. Having acquired the shares at 82¼p for stock Smith could not commercially have sold on that date at 78p.. It is not realistic to treat Smith as having received shares worth 78p each when in fact, in real life, they could not commercially have sold or realised the shares at that price on the date. In my judgment, this is one of those cases where to give full reparation to Smith, the benefit which Smith ought to bring into account to be set against its loss for the total purchase price paid should be the actual resale price achieved by Smith when eventually the shares were sold."

22. Lord Steyn said (at page 283):

> "It is right that the normal method of calculating the loss caused by the deceit is the price paid less the real value of the subject matter of the sale. To the extent that this method is adopted, the selection of a date of valuation is necessary. Andy generally the date of the transaction would be a practical and just date to adopt. But is not always so. It is only prima facie the right date. It may be appropriate to select a later date. That follows from the fact that the valuation method is only a means of trying to give effect to the overall compensatory rule: Potts v Miller 64 CLR 282, 299 per Dixon J and County Personnel (Employment Agency) Ltd v Alan R Pulver & Co [1987] 1 WLR 916, 925-926, per Bingham LJ. Moreover, and more importantly, the date of the transaction is simply a second order rule applicable where the valuation method is employed. If that method is inapposite, the court is entitled to assess the loss flowing directly from the transaction without any reference to the date of the transaction or indeed any particular date. Such a course will be appropriate whenever the overriding compensatory rule requires it."

23. A vivid example of circumstances requiring a valuation at a later date is furnished by the decision of the Court of Appeal (given shortly before the hearing in the House of Lords in Smith New Court) in Kennedy v. Van Emden 74 P&CR 19 ("Kennedy"). In that case between 1982 and 1987 the claimants purchased leases for substantial premiums. Their solicitors failed to advise them that by reason of Part IX of the Rent Act 1977 the premiums which they had paid were unlawful and that they were themselves prohibited from assigning their leases for a premium. Section 127 of the Housing Act 1988 however as from the 15th January 1989 changed the law and allowed assignments of the leases at a premium. The claimants brought actions against their solicitors for negligence. The critical issue was whether the valuation of the leases should be made at the date of the solicitors' breach of duty (i.e. completion of the

purchases) or at the date of judgment in the action for negligence. The Court of Appeal held that: (1) whilst at the date of the solicitors' breach of duty the claimants had suffered substantial damage and loss, by the date of trial the blot on the claimants' title of the consequence of the defendant's negligence had been totally cured; and (2) in those circumstances the overriding compensatory rule required that damages should be assessed at the date of judgment, and since at that date they suffered no loss the claimants were entitled to nominal damages only. In short as by a windfall the claimants after their purchases had got what they had wanted and all previous loss was wiped out. Accordingly they were not entitled to damages.

24. Illumination of the law both on the choice of date of assessment and also on the duty to mitigate is provided by the judgments at first instance of Chadwick J Smith New Court [1992] BCLC at 1142-3 and of Toulson J in Standard Chartered Bank v. Pakistan National Shipping Co [1999] 1 Lloyds LR 747 at 760.

25. Chadwick J said:

> "(1) Where a plaintiff has been induced by a fraudulent representation to acquire shares, the object of an award of damages in tort is to compensate him for what he has lost by making the acquisition into which he has been tricked. The basic rule is that his loss will be measured by the difference between what he paid and the true value of what he acquired at the time of the acquisition. To this may be added consequential loss (if any) flowing directly from the acquisition; for example, commissions, brokerage and carrying costs.
>
> (2) If the plaintiff has not resold the shares he will not have to give credit for what he might have obtained on a resale; unless, in choosing to retain the shares, he has acted unreasonably or imprudently....
>
> (4) In ascertaining the plaintiff's loss under the basic rule events subsequent to the acquisition can be taken into account only if, and insofar as, they are relevant for the purpose of ascertaining the true value of the shares at the time of the acquisition. A subsequent depreciation in the value of the shares caused by events which have no natural or proximate connection with the circumstances existing at the time of the acquisition must be disregarded....
>
> (6) Events subsequent to the acquisition may be relevant for one or both of two purposes... Secondly, subsequent events may assist, positively, in ascertaining what the true value of the shares was at the time of the acquisition."

26. Toulson J said:

> "Date for assessment of damages
>
> Damages for tort or breach of contract are to be assessed at the date of the breach unless the circumstances are such that the selection of a different date would more justly give effect to the

> overriding compensatory rule. See *County Personnel (Employment Agency) Ltd v. Allan R. Pulver & Co.*, [1987] 1 WLR 916 at pp. 925-926, cited with approval by Lord Browne-Wilkinson in *Smith New Court Ltd v. Scrimgeour Vickers (Asset Management) Ltd.*, [1997] AC 254 at p. 266.
>
> In assessing the damages, credit must be given for benefits received arising out of the transaction for which damages are claimed. Where the benefits received take the form of property or an interest in property, in many cases it will be just to take the value of the interest at the date of its acquisition. It will normally be just to do so where there is an available market of which the plaintiff has a fair opportunity, if so minded, to take advantage.
>
> Where a person who has been fraudulently induced to buy property thereafter freely decides to retain it, he will have adopted the transaction and so the fair measure of his loss will ordinarily be the excess which he has paid over market value at the date of its acquisition, plus any consequential expenses. If he does not wish to retain the property, whether it is fair that he should give credit for its 'market' value at that date or some other date must depend in particular on its marketability and on his state of knowledge. As to marketability, the reference to a plaintiff who is 'by reason of the fraud locked into the property' is not to be taken as if it were a statutory test but as a vivid description of a person who does not have access to an available market."

27. The relevant indisputable facts in the present case are as follows:

a) the Claimants acquired the Subscription Shares as an investment;

b) on learning of the fraud, the Claimants decided to adopt the purchase and (besides commencing these proceedings for damages) to retain their investment, to cultivate it and salvage what they could from it. To this end they pursued proceedings for the appointment of receivers of SLEC and to enforce provisions of the USA;

c) every step that the Claimants took both in England and the TCI has met with a concerted and unprincipled opposition by the Defendants. The cost to the Claimants has been very substantial. The Claimants should shortly be able to take management control of SLEC, (though Mr Barry Hansen retains a role in SPNA's affairs as its registered representative in China) and should shortly be entitled to purchase Sealand's shares in SLEC. These actions may afford a possibility for SLEC once refinanced to have a future;

d) the matters of complaint made by the Claimants in the action (and in particular the non-payment of the instalments of purchase price and the default in respect of Paid-Up Investment) remain unremedied and continue to have the most substantial

depreciatory effect on the value of the Subscription Shares; and

e) any continuing value of/or accretion in value to the Subscription Shares must in whole or at least in part be attributable to the efforts made by the Claimants to protect SLEC and their investment and (as Mr Jacob fairly argued in his submissions leading to the making of the Consent Order: see below) fluctuations in the property market.

28. The legal position is that in accordance with the general rule the Claimants (who have not crystallised their loss by a sale of shares) are entitled to limit the credit to be afforded in respect of the Subscription Shares to their value at the Closing Date unless (as the Defendants contend) justice requires that credit be afforded for the value of the shares at the date of the Inquiry. The value of the shares at the Closing Date reflects the effect on their value of the Defendants' fraud and their control of SLEC and possession of the majority shareholding. Mr Jacob argues that justice to the Defendants requires a valuation at the date of the Inquiry when (with the steps taken by the Claimants) the adverse effects of the Defendants' fraud and control may be alleviated.

29. In my view the Claimants who had purchased the Subscription Shares as an investment were fully entitled to elect to adopt the purchase transaction, retain the shares giving credit on their claim for damages for the value (if any) of those shares at the date of purchase and claim the difference between the purchase price and such value. The purchaser who adopts that course is in nowise unjustly enriched or over compensated. In valuing the property as at that date, he must, of course, have regard to its full potential. I cannot see why the foreseeable consequence of the Defendants' fraud on the value of the Subscription Shares should disentitle the Claimants to a valuation at the Closing Date or entitle the fraudsters to some anticipated advantage arising from the postponement of the date of valuation to the date of the Inquiry. The Claimants have proceeded for years at substantial cost in terms of money and management time and at substantial risk to salvage their investment. This has involved expensive and protracted litigation in England, the TCI and China and the financing to a tune of some $3.4 million the receivership of SLEC. They have faced in their efforts a concerted and unprincipled campaign of harassment and opposition from the Defendants. I do not see why in justice the Defendants should be entitled to claim or seek credit for any increase in the value of the Shares arising over the period that they concealed their fraud and harassed and delayed the Claimants when seeking to enforce their rights in the courts and to salvage their investment. That is the object and effect of the postponement of the date of valuation to the date of the Inquiry which they seek. Beyond this (as Mr Jacob eloquently stated in his skeleton argument on the trial of the preliminary issue as to the date of valuation (see below)) a valuation at the date of the Inquiry would throw up intractable causation problems and is for that reason impractical. This of course does not mean that events subsequent to the Closing Date may not be relevant on the Inquiry or as a head of Defence. This conclusion reflects the provisions of the Consent Order to which I must next refer and what plainly was the thinking and rationale behind it.

30. I should add that I revisited the issue of date of valuation after I had completed this judgment to consider whether the choice resulted in a just outcome, and I reached the firm conclusion that it did.

CONSENT ORDER

31. The second question is one of construction of the Consent Order. On the 16th January 2002 I ordered that there be a trial of a preliminary issue ("the Preliminary Issue") as to which of the rival contentions was correct as to the proper date at which damages are to be assessed, namely the Closing Date (31st March 1997) or the date of assessment. I went on to direct skeleton arguments on the Preliminary Issue. The Claimants in their skeleton maintained that there was no reason to depart from the general rule that damages should be assessed as at the date of breach or wrongdoing. The Defendants in their skeleton also argued for application of the general rule:

> "23. It is not possible to take the simple approach taken in Kennedy v. Emden in this case, because there are two representations in respect of which the claimant seeks compensation. It cannot be right to take the date of valuation as at the date of assessment, because the value will have been affected over the 5 years between the Closing Date and the date of assessment by the fluctuations in the market in the intervening period. The fluctuations are not related to the contract between the parties and the misrepresentation, and it would be inappropriate for one party or the other to gain or lose by reason of them.
>
> 24. The date of valuation (on the basis of various hypothetical assumptions) must therefore be the Closing Date. It is the hypothetical assumptions that must be adjusted to take account of the change in circumstances by the date of assessment."

32. In their skeleton in response to the Defendants' skeleton the Claimants stated that the Defendants now accepted that damages were to be assessed as at the Closing Date. In a further supplementary skeleton the Defendants appeared to retract from this position. It was accordingly necessary to explore the matter further with Mr Jacob at the trial of the Preliminary Issue. Mr Jacob made it clear to me that his case was and always had been that all share valuation exercises should be undertaken as at the Closing Date, but that the choice of such date should not preclude the court in assessing damages at the Inquiry having regard to subsequent events, which are relevant to damages and affect or may affect the Closing Date Valuation (see transcript of hearing at pages 9-11 and 19). I directed Counsel on both sides to prepare a minute of order and Counsel prepared and signed a Consent Order to that effect.

33. The relevant provisions of the Consent Order read as follows:

> "It is ordered by consent that the date for the valuation of the Subscription Shares is the Closing Date, 31st March 1997, without prejudice to the Defendants' entitlement at trial of the Inquiry to contend that matters subsequent to the Closing Date which have been fully particularised in their Points of Defence shall be taken into account in the assessment of the Claimants' loss.
> IT IS DIRECTED that:
>
> 1. The Claimants and the Defendants each have permission to adduce expert evidence on property valuation and on share valuation limited to one expert in relation to each of the two

> disciplines on each side ....
>
> 5. The Defendants do within 28 days of the service of the Points of Claim:
>
> Serve and file Points of Defence:
>
> to give full particulars of each and every matter subsequent to the Closing Date upon which they rely as a factor to be taken into account in the assessment of the Claimants' loss ....
>
> state the effect of each such factor on the valuation of the Subscription Shares at the Closing Date ..."

34. The Defendants argue that the Consent Order merely requires that there has to be a valuation as at the Closing Date to determine the price that would have been payable for the shares had the representations and warranties been true; it does not require a valuation of the shares as they are at that date; it provides for or admits of the matters particularised by the Defendants justifying adoption of an alternative date to the Closing Date and an alternative method of assessment.

35. In my view the self evident purpose of the application leading to the Consent Order and of the Consent Order itself was to determine the relevant date or dates of the two valuations required for the exercise required to be undertaken at the Inquiry, namely the ascertainment of the difference between the cost and value of the Subscription Shares and this accords with the terms of the Consent Order itself. But the order left it open to the Defendants to contend on the Inquiry that pleaded subsequent events could be taken into account. For example it might be relevant in the valuation at the valuation date to take into account certain subsequent events. Thus in Buckingham v. Francis [1986] 2 All ER 738, Staughton J after stating that the task of the court was to ascertain the value of the shares in question in that case at the valuation, went on to say:

> "The company must be valued in the light of facts which existed at [the date of valuation] ... But regard may be had to later events for the purpose only of deciding what forecasts for the future could reasonably have been made on [the valuation date]"

36. To like effect are passages in the decision of the High Court of Australia in Kizbeau v. WG&B Pty Ltd [1995] 184 CLR 281 (a decision given on the basis that as a matter of law the date of the wrong had to be the valuation date).

37. Subsequent events might be indicative of the value of the Shares at the Closing Date. Likewise they might establish defences e.g. contributory negligence. But they could not alter the basis of the Inquiry that the Shares should be valued as at the Closing Date. The explanation for Mr Jacob's change of front is plainly expediency: he perceived belatedly a possible advantage in the choice of a later date as the date of valuation. There is no scope for any error on his part in his earlier submissions: his choice of the Closing Date was clear and unequivocal. The Inquiry (and most particularly the Claimants) proceeded on the basis of the Consent Order. No application was ever made to discharge that order. The Defendants' experts did in their reports make alternative valuations at the Closing Date and at the date of the Inquiry and the Claimants whilst maintaining that valuations at the latter date were irrelevant did respond to such

valuations. But throughout the Claimants have stood firmly on their construction of the Consent Order. The Defendants in turn argued for their alternative construction. I have no doubt that the Claimants' construction is correct.

MITIGATION

38. The Defendants have contended that the Claimants have unreasonably failed to mitigate their loss by selling their shares, doing a deal with the Defendants and with Xing Ye and concluding a settlement with Huaxia. I deal with each of these issues and their factual bases later in this judgment. The law merely imposes on the Claimants the responsibility to act reasonably and prudently and take steps to avoid loss which are reasonably available to them. If the Claimants could reasonably and prudently have taken action to avoid the loss claimed in this action, the loss will not be held to be caused or attributable to the Defendants' wrongdoing. The question whether the Claimants have acted reasonably is a question of fact. This applies in respect of the Claimants availing themselves of opportunities for resale and negotiating a deal. The onus is on the Defendants to establish that the Claimants having adopted their purchase rejected an opportunity to conclude an available sale which considerations of prudence require them to conclude. The onus is not a light one in particular in a case such as the present where the Claimants were induced by fraud to make the original purchase, but the authorities show that the circumstances may justify this conclusion: see e.g. Patel v. Hooper [1999] 1 WLR 1792. The facts in that case were exceptional. As the passages which I have cited in the judgment of Chadwick J and Toulson J make clear, the path of the Defendants is not an easy one. The onus of establishing that the Claimants could and should have concluded a deal is likewise not lightly discharged. The argument that the Claimants should as reasonable claimants have done a deal with Huaxia and paid Huaxia appears to me to extend the obligation of the Claimants to mitigate damages beyond its permissible legal limits, since the Claimants had no power to commit SLEC to a contract and to impute an obligation on a claimant by way of mitigation to make a substantial payment to a third party (let alone as in the circumstances of this case a sum of some $13 million) must be totally exceptional, if ever justifiable.

PLEADING "ALL OR NOTHING"

39. Mr Jacob's Closing Submissions for the 2nd to 4th Defendants raised for the first time a pleading point relating to valuation which I should address at this stage. He says that the Claimants' plea is that the value of the Subscription Shares is nil, that evidence was not addressed to any more modest quantum, and that in consequence, if I am not convinced by Mr Best's evidence that the value is nil, I have no option but to hold that the Claimants have failed to prove their loss and that they are entitled to nominal damages only. This is a remarkable submission. No hint was ever given at any earlier stage (let alone in his original skeleton argument) that any such line was intended to be or might be taken. The Claimants' case throughout has been that they are entitled to the difference between the subscription price of $49 million and the value of the Subscription Shares at the Closing Date whatever that might be. All parties at all times proceeded on this basis throughout the trial until this point was taken on the 14th October 2002. The submission lacks any merit and would produce a grossly unjust result. I would only accede to the submission if compelled by authority to do so and even then only if this obstacle to justice could not be overcome by any other means e.g. by recalling the expert witnesses.

40. Mr Jacob seeks support for his submission in the judgment of the Court of Appeal in Senate Electrical Wholesalers Ltd v Alcalel Submarine Networks Ltd [1992] 2 Lloyds Rep 423 ("Senate") paragraphs 37 and 50-55. The critical passage reads as follows:

> "50. A plaintiff must plead the damage claimed and set out the method by which he arrives at the claim. An alternative approach should also be pleaded. In *Anglo-Cyprian Trade Agencies v. Paphos Wind Industries* [1951] 1 All ER 873 ["Anglo-Cyprian"] at 875 G-H Devlin J said
>
> '...in my view the special damage which is pleaded should make quite clear to the other side what measure of damage is being relied on. If the plaintiff wishes to say that the goods are valueless, the special damage will be pleaded in the way in which it was done in this case, but, if he also wishes to say that, if they are not valueless, they have depreciated substantially in value, then it is his duty, I think, to plead in the alternative that they have depreciated in value, and to set out the method of calculation by which he arrives at the figure claimed in the alternative, so as to enable the defendant to know what is the case against him and to obtain evidence for his defence.'
>
> and:
>
> '54. ... while we sympathise with the judge's view that having found that there was a breach of warranty and thinking that some modest loss should be attributed to it, he was anxious not to send the plaintiff away empty handed, we think that he should have resisted the temptation to do so. The plaintiff deliberately adopted a high risk policy of aiming at jackpot damages. We have little doubt that it was part of that policy not to offer the judge a much more modest alternative."

41. The authorities cited have no application to the facts of this case. In the Anglo-Cyprian case the claimants pleaded that wine sold to them by the defendants was unsound, unmarketable and of inferior quality and claimed back by way of special damages the full purchase price. The defendant contended that the taint was so slight that it could easily be put right and that there was no breach as there was no real defect or should be compensated for by trivial damages viz. the cost of removing the defect. In the course of the trial the claimant amended his pleading to claim damages on this alternative basis and he was awarded £52. The issue arose whether the claimant should be ordered to pay the costs of the action. Devlin J held that the claimant should be so ordered, for that amendment was necessary as it raised a new case, and in default of such amendment the claimant could only recover nominal damages. In Senate, the claimant claimed damages for breach of warranty and asserted that damages should be assessed by applying a price/earnings ratio derived from the actual transaction in relation to the difference between the warranted and actual profit. The defendant contended that the claimant had suffered no loss. The trial judge did not accept the basis of assessment adopted by the claimant, but to rescue the claimant without any prior warning to the defendant in his judgment adopted a totally different approach. The Court of Appeal held that the trial judge was not entitled to take this course without first giving the defendant a proper opportunity to meet this new case.

42. There can be no question of any new approach being adopted. The underlying principle is that a party should not without prior warning unfairly take his opponent by surprise and spring a new case on him without a full and fair opportunity to answer it. The Claimants and their expert Mr Best made plain the basis of their claim, namely the difference between $49 million and the actual value of the Subscription Shares. The Claimants' expert valued them at nil. The Defendants and their experts had every opportunity to present their case showing any higher value they could justify. If the Defendants can establish a positive value, the Claimants must give credit for that figure. The Defendants cannot and do not say that they are taken by surprise by the Claimants' contention, that if the court decides that the Subscription Shares have a positive value but a value less than the subscription price paid, they should be awarded the difference between the price paid and that positive value by way of damages. The only surprise sprung on a party in this case is the surprise sprung by the Defendants on the Claimants by making this late totally unmeritorious submission.

PART III

CRITICAL DOCUMENTS

43. There are two critical documents in this case which require examination, namely the USA and the Land Contracts.

THE USA

44. The USA begins in Article 1 with definitions of terms used in the USA. For present purposes it is sufficient to say that the term "Qualifying Shareholder" for all practical purposes in this action means the Investors personally and does not extend to third party purchasers from them. The USA goes on to provide that each of the shareholders in SLEC agrees to exercise the roles attaching to their shares and to use their best efforts to cause their nominees to the Board of Directors to act at all times so that its provisions should govern the affairs of SLEC. It is expressly provided in Article 2.6 of the USA that in the event of any conflict between the provisions of the USA and the provisions of the Memorandum and Articles, the provisions of the USA should prevail.

45. Article 3 of the USA provided that Sealand can appoint four and the Investors three of the maximum number of seven directors of SLEC; that the directors shall manage SLEC in accordance with applicable laws and the Annual Business Plan; and that decisions of the Board of Directors and shareholders should be decided by a majority of the votes cast. Sealand accordingly had management control. As a safeguard for the Investors, the prior approval of the Qualifying Shareholders is required for certain specified decisions.

46. The Terms and Conditions of the A Shares and B Shares are set out in Schedule 5 to the USA. The B Shares carry no right to dividends or voting. The only rights arise on redemption and redemption can only take place after the A Shares have been redeemed in full; and if the holders of the A Shares have not received the aggregate amount of $45 million by the end of the 60th Month after the Closing Date, 50% of the B Shares are to be redeemed for the aggregate sum of $1; and if the holders of the A Shares have not received that sum by the end of the 72nd month after the Closing Date, the remaining B

Shares are to be redeemed for the aggregate sum of $1.

47. I shall later consider in detail the provisions relating to redemption of the A Shares. It is sufficient at this stage to say that Article 3.8 of the USA provides that SLEC shall use all reasonable efforts to redeem the A Shares on or before the Scheduled Redemption Date. Article 5.7 makes provision for default in redemption within six years of the Closing Date:

> "5.7 Voting Rights. In the event that the Class A Shares are not redeemed in their entirety by the end of the 72nd month after the Date of Funding, Sealand agrees to transfer to the holders of the Class A Shares, in accordance with their Proportionate Class A Interest, all voting right appertaining to the Common Shares then held by Sealand, to be exercisable by the holders of the Class A Shares for so long as any Class Shares remain outstanding and shall do all such things as are necessary to ensure that, during such period, such voting rights are exercised by the holders of Class A Shares as aforesaid. Upon redemption in full of the Class A Shares, the voting rights appertaining to the Common Shares registered in the name of Sealand shall revert to Sealand."

48. Article 7 gives the Claimants power to take control of SLEC in certain eventualities, and in particular if Sealand becomes an "Inactive Shareholder" or the Hansens (referred to as "The Sponsors") are to be deemed "Defaulting Sponsors":

> "7.1 Inactive Shareholders
>
> (1) A Shareholder shall be deemed to be an Inactive Shareholder immediately following the occurrence of any of the following events (each a 'Triggering Event"):
>
> ...
>
> (c) if the Shareholder is declared bankrupt or makes a proposal in bankruptcy or becomes the subject of bankruptcy or other similar proceedings;
>
> (d) if the Shareholder makes an assignment for the benefit of creditors or otherwise acknowledges its insolvency;
>
> (e) if a Shareholder suffers its Shares to be liable to seizure; and
>
> (f) if a Shareholder ceases paying its debts as they mature (other than those being contested in good faith and by appropriate proceedings).
>
> (2) Each Shareholder shall give notice in writing to the Company promptly following the occurrence of a Triggering Event.
>
> (3) From and after the date that a Shareholder becomes an

Inactive Shareholder, the right of such Shareholder to appoint any Directors shall be suspended and any appointed Director of such Inactive Shareholder shall resign from the Board of Directors; and the votes of such Shareholder or its appointed Directors or both of them, as the case may be, shall be excluded for purposes of determining whether a decision, action or matter has been approved and the other Shareholders should be entitled to increase the number of Directors appointed by them proportionately as may best reasonably be done to maintain the rights and representation of the other Shareholders.

7.2 Irrevocable Option to Purchase Shares of Inactive Shareholder

(1) Each Shareholder hereby grants to the other Shareholders an irrevocable option (which option shall not be revoked by the death of such Shareholder or a Sponsor) (the 'Purchase Option'), exercisable in the event that it becomes an Inactive Shareholder, to purchase all but not less than all of the Shares held by it, directly or indirectly (the 'Purchased Shares')....

7.3 Purchase Price for Shares

The purchase price (the 'Purchase Price') for the Purchased Shares of the Inactive Shareholder (the 'Vendor') shall be the product obtained by multiplying the number of Purchased Shares by the Fair Market Value of the Shares determined in accordance with the provisions of Article 10....

7.6 Material Breach by Sponsors

(1) The Sponsors shall be deemed to be Defaulting Sponsors for the purposes of Section 7.6(3) immediately following the occurrence of any of the following events (each a 'Material Breach'):

> (a) a breach of (i) Section 3.1, 3.2, 3.4, 3.6, 3.7 or 7.6(2) of this Agreement or (ii) Section 5, 6, 7.3 or 7.4 of the Subscription Agreement giving rise to a claim under the Subscription Agreement, which has an adverse economic effect on the interests of the Shareholder in the Company and, in either case, such breach (if capable of cure) is not cured or any claim resulting from such breach is not paid or otherwise satisfied within a period of sixty (60) Business Days after the Sponsors receive notice of such breach from the Company or otherwise becomes aware of such breach; and
>
> (b) a breach of a Management [i.e. Employment] Contract by any of the Sponsors which has a material adverse effect on the Company.

> (2) The Company shall give notice in writing to the Sponsors and/or the Sponsors shall give notice to the Company and the other Shareholders promptly following the occurrence of a Material Breach.
>
> (3) During such time that the Sponsors are Defaulting Sponsors, and have not redeemed or paid compensation agreed to or assessed in judicial or arbitration proceedings in respect of the relevant material breach, the Directors appointed by the Qualifying Shareholders, if any, shall be entitled to increase the number of Directors of the Company and to nominate such additional Directors such that the Directors nominated by the Qualifying Shareholders shall control the Board of Directors."

49. It is to be noted that Article 7 draws a distinction between the rights conferred on shareholders for the time being (including the Claimants' successors in title) and rights conferred on Qualifying Shareholders. The rights conferred both by Article 3 and Article 7(6) on Qualified Shareholders accordingly do not pass to any purchaser from the Claimants.

50. Schedule 4 to the USA provides for SLEC to enter into five year employment agreements with Mr Barry Hansen and Mr Stuart Hansen commencing on the 24th March 1997 as respectively President and Vice President. Such contracts were duly entered into.

LAND CONTRACTS

51. By the Land Contracts Huaxia agreed to transfer the Land Use Rights in respect of the Housing Land for the term of 70 years and the Golf Course Land for the term of 40 years to SLEC (described as the subsidiary of Sealand). The consideration payable in respect of the Golf Course Land was $17,615,082 and in respect of the Housing Land was $19,936,375. Both Contracts provided that the purchase price was payable by seven instalments on dates which were the same in the case of both Contracts. The instalments and their dates of payment were as follows:

	Date	Golf Course Land	Housing Land
(1)	Before 17th February 1995	$194,182	$1,800,000
(2)	15 June 1995	$8,613,359	$8,184,689
(3)	15 December 1995	$2,309,093.75	$2,617,708
(4)	15 June 1996	$2,309,093,75	$2,616,708
(5)	15 December 1996	$2,320,089	$2,617,708
(6)	15 June 1997	$934,633.18	$1,059,548
(7)	15 December 1997	$934,633.18	$1,059,549.

Articles 19 of both the contracts provide as follows:

> "If the transferee shall assign the land use right of the land, on the same conditions as are contained herein the transferor has the priority over any third parties."

52. Huaxia's rights as unpaid vendor were preserved by the provisions of Article 29 which provided:

> "Delay in Payment.
>
> If the transferee cannot pay the land transfer fee according to the schedule, the transferor will be required to provide the transferee a Payment Default Notice. The Transferee will be allowed six months to cure any default, provided that the Transferee pay the Transferor 24% annual interest on the outstanding payment calculated for each day late, payable quarterly or upon curing the default. If the default is not cured within six months, the Transferor has the right to demand that the Transferee sell the Grant of Land Use Rights with priority payment given to monies, and interest and liquidated damages owed to [Huaxia], with any residual applied to repayment of [SLEC's] total investment."

This provision affords Huaxia a form of hypothec.

53. Articles 35 of both contracts provide that liquidated damages are charged at the rate of $300 per day from the day the breach has actually taken place until the breach has been corrected. Article 39 provides that the liquidated damages shall be paid no later than ten days after the responsibilities are cleared. Article 40 provides that any party paying the liquidated damages after the ten days have expired shall pay an overdue fine of 0.1% of the amount that has not been paid.

PART IV

EVIDENCE

WITNESSES OF FACT

(1) Claimants' Witnesses of Fact

54. The Claimants called as witnesses of fact Mr Roeloffs of DB (formerly of Bankers Trust), Mr Bruce Morrison ("Mr Morrison") of Deutsche Bank Trust Company ("DBTC") and Mr Chih Chien Wang ("Mr Wang") of H&Q and (on the issue of contempt alone) Mr Tyler Goodwin ("Mr Goodwin") also of DB.

55. The area where the evidence of the first three came most fully and directly under challenge was where they maintained the good faith of the Claimants in pursuing the proceedings and subsequent negotiations to sell the Subscription Shares and achieve a settlement. I shall in Part V examine the issues in this regard, but I should say at once that they were all impressive witnesses and witnesses of truth.

56. Mr Roeloffs

Mr Roeloffs is now the managing director of DB (Tokyo Branch). He was previously employed by Bankers Trust, who acted for a considerable period as advisers to Sealand in attempting to raise capital for the Housing Project. He was an important witness at the First Trial. In his witness statement Mr Roeloffs explained the circumstances in which the Claimants had invested in SLEC. He pointed out that the Class A shares had not been redeemed for the simple reason that SLEC was (and remains) close to insolvency. It has always lacked the cash resources to redeem the shares and had never made a profit. Mr Roeloffs emphasised that there is no basis for the Defendants' allegation that there has been no attempt on the part of the Claimants to conclude a settlement of the claim by Huaxia. Whilst he was not personally involved in the detailed negotiations carried out on behalf of the Claimants with Xing Ye, he confirmed that these had never resulted in any binding agreement of sale owing to the inability of Xing Ye to show it had the necessary funds.

57. Mr Roeloffs gave evidence about the attempts made by the Claimants to mitigate their loss. In his evidence in chief he referred to an offer sent by Richards Butler ("the Richards Butler Offer") of $70 million for the Claimants' shares in SLEC. He confirmed that at a Board meeting on the 6th April 2000 Mr Barry Hansen had disclosed that the investor allegedly behind the offer was one of SLEC's directors, Mr Reynold Chan, who was not known to be wealthy but earned an income from SLEC of $140,000 per year. No financial institutions had been identified by the Hansens as backing the offer, about which there was always an air of mystery. Mr Roeloffs made the important point, which explains the reaction of the Claimants to many of the supposed offers made to them in the recent period, that as reputable financial institutions the Claimants can only deal with persons they can identify, in order to ensure they are dealing with legitimate parties, not becoming involved in money laundering and, as a matter of prudence, in order to ensure that the parties with whom they are engaged are capable of completing the transaction. (It is to be noted that in paragraph 39 of his Reply to the Claimants' Closing Submissions Mr Jacob conceded that the reasons given by Mr Roeloffs why the Claimants wished to know the identity of a possible purchaser of their shares was reasonable). Mr Roeloffs regarded the Richards Butler Offer as implausible. No further information was supplied by the Defendants to satisfy the basic ground rules for entering into any kind of commercial discussions.

58. Mr Roeloffs was cross-examined by Mr Jacob over three separate days, (12th, 15th and 16th July), primarily on the subject of the Claimants' alleged failure to mitigate their loss. Mr Roeloffs explained that he had not been able to advance discussions with the Defendants' witness, Mr Darby, because he would not disclose on whose behalf he was acting. Mr Roeloffs insisted that the Claimants have always been interested in finding a negotiated settlement or some other way out of this litigation if it can be achieved and if it can actually be executed, but they have a duty not to enter into transactions or contracts with unknown parties with unknown ability to complete transactions.

59. He refuted the Defendants' suggestion that the Claimants have, since August 1999, single-mindedly pursued the objective of obtaining control of SLEC and removing the Hansens. He made the points that the Claimants had explored every approach to resolve the matter but to no avail and that they have been left in the situation of having invested in a company that is on the brink of insolvency, under-capitalised and with managers who had to be evicted as the result of their proven fraud and lack of regard for the interests of investors.

60. Mr Roeloffs was asked about the agreements in April 2001 referred to in paragraph 6 of this judgment whereby H&Q (through AGPF) and DB (through Firstee) purchased from GFI and Wardley (in effect from HSBC) their shares purchased in SLEC for $2. He explained that the reason the consideration paid was nominal, with a promise to share the ultimate proceeds of the litigation and realisation, was that the current value of the Housing Project was largely offset by the liabilities and was completely uncertain. He testified that he considered that few, if any, persons would actually wish to buy the interests of the Claimants as they would simply be inheriting the same predicament as faced the Claimants with the same difficulties regarding the Hansens. Had the true facts been known at the Closing Date he was convinced that the Claimants would have walked away from the deal because an essential feature of a start-up company in a venture capital setting is the character and perceived ability of management. (Similar evidence was later provided by Mr Best and Mr Caldwell). Moreover, the Claimants would have appreciated that the quantum of the required investment was much greater than envisaged. Mr Jacob challenged his evidence in this regard as inconsistent with the view which he both took and expressed to the other Investors prior to the Closing Date and in particular the view that the Housing Project had its own internal momentum. Mr Roeloffs convincingly explained that his view prior to the Closing Date was attributable to the false picture painted by the Defendants and that his earlier view could not survive the emergence of the true picture and the disclosure of the true facts and most particularly the failure of the Defendants to have made the expenditure which they had represented that they had made.

61. Mr Roeloffs had to be recalled at a late stage of the hearing to answer the allegation of contempt, to which I will subsequently refer. I deal with that issue in detail later. It is sufficient at this stage to say that he had no responsibility for or part in the critical telephone conversations between Mr Goodwin and Mr Brooke and the suggestion of impropriety on his behalf was shown to be baseless. His evidence on this issue was clear and convincing and his cross-examination merely reinforced that picture. Mr Roeloffs was an honest witness, who tried his utmost to assist the court as far as he could on the many and varied questions raised by Mr Jacob. He gave clear and truthful evidence, which can be accepted without reservation.

62. Mr Chih Wang.

Mr Wang, who was also a witness at the First Trial, is the Senior Vice President and the representative of H&Q based in Beijing, China. He gave evidence in his witness statement of the discussions that had taken place with Xing Ye for the possible sale of the Claimants' interests in SLEC and the present litigation since September 2001. He explained that a critical factor in the discussions was the need to satisfy the Claimants that the intended purchaser had the financial capability to effect the payment of the purchase price. It later emerged in late 2001 and early 2002 that Xing Ye was in serious financial difficulties and would have difficulties in completing any purchase of a

substantive nature. The parties were therefore unable to come to any agreement on the date for a payment of a deposit or a date for completion.

63. Under cross-examination Mr Wang was extensively questioned about his conversations and meetings with Mr Bao of Huaxia. Much of this testimony covered matters which had already been explored at the First Trial. Mr Wang was then questioned about his dealings in the period since October 2001 with representatives of the Pudong authorities. He was asked by Mr Jacob about the meeting on the 14th May 2002 when mention was made of the fact that Xing Ye now had an investor partner whose identity could not be disclosed. He specifically denied the suggestion made to him that representatives of the Pudong authorities had offered to give a guarantee of the performance of any contract for the sale of shares. It is clear that the local authority wanted the dispute resolved and the development completed, but left it to the parties to conclude a deal if they could.

64. Mr Wang was also asked about the "subject to contract" letter signed by him on the 30th October 2001 referring to a sale to Xing Ye of the Claimants' interests in SLEC and settlement of their claims in this litigation for $70 million. He explained that it was clearly understood that there was no binding contract between the parties. Mr Jacob expressly stated that he was not suggesting that this document created a legal obligation. It is worthy of note that the Defendants have adopted the opposite standpoint in the court proceedings in the TCI.

65. Mr Wang was accused in cross-examination of not negotiating seriously with Xing Ye but just adopting a stance to keep the Chinese authorities happy. He refuted this suggestion, but made the point that until Xing Ye's third party financial partner was identified there was no point in embarking upon serious negotiations.

66. Mr Wang dealt with all the questions put to him with proper care and thoroughness. He had a good recollection of the various meetings, which was backed up by his notes of the discussions. I accept Mr Wang's evidence as that of an honest and reliable witness.

67. Mr Morrison

Mr Morrison is a Managing Director of DBTC. He joined Bankers Trust in 1965 and has been involved in the funding of property investments since the late 1970s. Mr Morrison, who does not speak Chinese, gave an account in his witness statement of the settlement negotiations between the Claimants and Huaxia in April and May 2001. He referred to the difficulties that the Claimants had experienced in trying to resolve matters with the Hansens by means of conciliation and of the assurance given to Huaxia that, while the Claimants would pursue a course of litigation, they were willing to look at other means of settling the dispute. Mr Morrison also referred in outline to the discussions with Xing Ye and the eventual failure in or about February 2002 of Xing Ye and its nominated purchaser, Hoh Bond Oil Limited, to prove that they had the financial capability to complete the transaction. In the witness box he confirmed that further discussions had taken place in May 2002 with Xing Ye but to no avail. He explained that he had not mentioned these later discussions in his witness statement because they had been entered into on the understanding that the mere existence of the meetings, the discussions and what was discussed were agreed to be entirely confidential.

68. Mr Morrison was cross-examined about the role allegedly played by Mr Darby in trying to effect a settlement between the Claimants and the Hansens in later 2000 and early 2001. He was asked a number of questions about his meetings with Mr Darby, in particular about the one held on the 19th January 2001, which formed the basis of an allegation that the Claimants were not really trying to settle or mitigate their loss. He explained that, when it became apparent that Mr Darby was not in fact representing anyone, but was simply putting himself forward as someone trying to see if a deal could be put together without a mandate from any party, he was told that there was no purpose in discussing matters with him. He further denied the suggestion made by Mr Darby that the Claimants were only prepared to pay the Hansens $1 for their interest in the Projects and put a remark to that effect in proper context.

69. Mr Morrison was also asked about his meeting with representatives of Xing Ye in May 2002, at which meeting he was dependent upon translation provided by Mr Wang. He explained the gist of his personal attendance notes. He explained the attempts that had been made to conclude a settlement of this matter involving a sale to Xing Ye. He stated that he had not attended the first meeting which had taken place on the 14th May 2002 because he was not authorised to do so unless the name of Xing Ye's financial partner or investor was divulged. Although this condition had not been met, he had nevertheless attended the later meetings in order to explore the potential for a settlement. The offer of a deposit of US$7 million had been rejected for the reason that one of the conditions of the contract was that this litigation be terminated, whereas the Claimants were not willing to lose the trial window for the Inquiry unless a settlement had been concluded and the money paid or a letter of credit provided. A confidentiality agreement had been drafted by the Claimants but not signed by Xing Ye and the Claimants had never been told the name of the third party investor. When Mr Morrison was expressly asked by Mr Jacob whether the Claimants would accept US$73 million for their entire interest in the Housing Project, he did not flinch but replied that he believed that they would.

70. At the end of his cross-examination Mr Morrison was shown a few pages of documents provided for the first time by Mr Darby on a confidential basis as to the identity of the alleged third party investor. When shown the name, which in deference to Mr Darby was not used in court, Mr Morrison recognised it as that of a substantial real estate company with its headquarters in Hong Kong. This was the first occasion on which the Claimants had been told of the identity of Mr Darby's alleged client.

71. Mr Morrison gave his evidence in a clear, direct and forthright manner. He was an entirely reliable factual witness, whose involvement with this dispute had arisen in its later stages. His account of the steps taken by the Claimants to mitigate their loss is entirely convincing and reliable.

72. Mr Goodwin

Mr Goodwin is a vice president of DB's Real Estate Opportunities Group based in Hong Kong. The Defendants at a late stage in the trial raised the allegation that, in the course of a telephone call on the 10th June 2001, Mr Goodwin "lent on" Mr Brooke, the Defendants' expert on property values, and threatened to withhold work from Insignia Brooke ("IB"), the firm which he founded and to which Mr Brooke is now a consultant, if he supported the Defendants with his expert evidence. I deal with this issue in Part V of this judgment, but I should make it clear at once that I accept his evidence without

any qualification. Mr Goodwin at all times acted in respect of Mr Brooke with total propriety: and the charge made against him was groundless. It was one of the several examples in this litigation of recourse by the Defendants to foul tactics where success could not be achieved by recourse only to fair tactics.

73. Other factual witnesses of the Claimants

In addition, the Claimants served and filed witness statements from Mr Patrick Cowley of KPMG and Mr James DeFrancia of Lowe accompanied by Civil Evidence Act notices.

74. Mr Cowley

Mr Cowley is a manager of KPMG resident in Hong Kong. He worked for the First Receivers until their release and discharge on the 4th April 2001. Mr Cowley's evidence was largely directed to establishing Huaxia's continuing assertion of its right to full payment of the outstanding purchase price under the Land Transfer Contracts in respect of which the Defendants raised an issue, only to drop it at a very late stage. Mr Cowley confirmed that, as evidenced by the Joint Receivers' reports to the TCI Court, there was no point at which SLEC was in the financial position where it could have redeemed the A Shares.

75. Mr DeFrancia

Mr DeFrancia is one of the Second Receivers. His witness statement confirms that, in his dealings with Huaxia, Huaxia have insisted that they were still owed monies under the Land Contracts. He also confirms that, during the period that the Receivers have managed SLEC, it has never been in a financial position to redeem the A Shares, and is not now in such a position.

76. The evidence contained in these witness statements is clear, precise and beyond challenge as to its truth and accuracy.

(2) Defendants' Witnesses of Fact

77. The Defendants' witnesses who appeared for cross-examination on their witness statements were:

a) Mr Zhang Ning, a lawyer acting for Shanghai Agricultural Investment Corporation ("SAIC");

b) Mr Alex Qing Cai, a lawyer acting for Xing Ye ;

c) Mr Jeffrey Palmer, the acting manager of the Golf Course; and

d) Mr Darby.

78. The evidence of each of these persons will be considered in turn. But it is to be noted immediately that the two key witnesses, whose evidence would have thrown a host of light on the central matters in issue on the Inquiry, namely Mr Barry Hansen and Mr Stuart Hansen, did not attend to give evidence. Material was produced during the hearing to indicate that Mr Stuart Hansen was unwell and could not travel from China. He had provided a witness statement, the contents of which will be considered below. At one stage the question arose whether Mr Stuart Hansen might give his evidence by video link, but the Defendants took no steps to enable Mr Stuart Hansen to do so and made no further mention of it.

79. Mr Barry Hansen

Mr Barry Hansen, the principal protagonist in the case and the primary witness on all issues of fact, has neither appeared nor served any witness statement nor provided any satisfactory explanation for his absence. I reminded Mr Jacob on the first day of the hearing of the manner in which evidence had been produced by Mr Barry Hansen at the First Trial, with a witness statement being produced during the course of the Trial. I asked whether he was proposing to give evidence as Mr Stuart Hansen's witness statement mainly gave hearsay evidence in relation to matters on which his brother could give first hand testimony. Mr Jacob replied that Mr Barry Hansen would not be coming because he was his brother's "only relative in Shanghai" and "He [Stuart Hansen] does not want to be left on his own with Mr Barry Hansen over here". Another reason put forward was that Mr Barry Hansen needed to stay in China with his brother because he was needed to liaise in Chinese with the various medical authorities in respect of his brother's ill-health. In fact, Mr Barry Hansen had previously informed this court at the First Trial that he could not speak Chinese. This issue, when raised by Eversheds in correspondence, was left unanswered. Mr Jacob summarised his position in his Reply to the Claimants' Closing Submissions on Mr Barry Hansen's non-attendance as follows:

> "It is for the Claimants to prove their case on their evidence. Mr Hansen is not the only witness supporting the Defendants' case and their case does not rest on his testimony."

80. It is quite plain that Mr Barry Hansen made the deliberate decision not to assist the court and indeed to thwart all efforts by the court to ascertain the true facts. If any doubt existed in this regard, that is removed by a consideration of his persistent default in compliance with court orders relating to disclosure and the many dishonoured promises of evidence from the TCI lawyers Twa Cochrane Skatfield ("TCS") and their partner Mr Twa. These lawyers have acted throughout for Sealand, SLGCC, SLEC and the Hansens and operate trust accounts in the TCI for SLEC and SLGCC. Despite repeated promises, both prior to and in the course of the hearing, TCS has made none of the information requested of it available to this court, despite an undertaking given by Mr Barry Hansen to use his best endeavours to secure it. Yet throughout the First Trial and the Inquiry TCS has continued to provide material when it is perceived to assist the Defendants on the Inquiry. As a result of past experiences of the firm and of Mr Twa adopting a like attitude at the First Trial, it is quite clear to me that the firm is in the pocket of Mr Barry Hansen and acts at his bidding. I can place no faith in what it says unless independently corroborated and I do not think that Mr Barry Hansen has made any serious effort to obtain its cooperation with the court. I have no doubt that Mr Twa would cooperate if Mr Barry Hansen really wanted him to do so.

81. Mr Barry Hansen deliberately made a decision not to give evidence or assist the court and (in the absence of any other reliable evidence) I am entitled to draw a number of adverse inferences including the following:

a) Mr Barry Hansen is not prepared to stand by and support the case pleaded in the Defence where he himself is the only competent witness;

b) there is no substance to the claims concerning the alleged provision of finance for SLEC and the project by the Dino Moretti ceramics business in China;

c) there is no substance in the claim that $18 million was defrayed in land tax;

d) there is no substantive evidence to support the claim that $7.5 million was actually spent on engineering and administration for SLEC; and

e) the Richards Butler Offer made on the 7th April 2000 on the instructions of Mr Barry Hansen was contrived and worthless and merely a tactical device to divert the attention of the court at the resumed hearing of the Claimants' application in the TCI for the appointment of receivers of SLEC which was due to commence on the 10th April 2000.

82. Mr Stuart Hansen

Mr Stuart Hansen gave evidence in his witness statement on selected topics, omitting topics on which quite obviously he could give first hand evidence if he wished. Mr Stuart Hansen in his statement is merely acting as the mouthpiece for his brother and (in particular having regard to his performance as a witness at the First Trial) untested by cross-examination his evidence can carry no weight unless corroborated. On the alleged issue of 100 golf club memberships given to Huaxia, Mr Stuart Hansen referred to a conversation with Mr Twa of that firm on the 18th June 2002 about this matter. It is to be noted that Mr Hansen gave no explanation as to why Mr Twa has been so uncooperative in meeting the court's request made in October 2001 and repeated in March 2002 for details of the SLGCC trust account administered by his firm, though Mr Twa is prepared to assist the Defendants when it suits him and them.

83. Mr Stuart Hansen acknowledged that it is SLGCC that has paid the deposit of $500,000 payable by Xing Ye to Huaxia under their agreement of the 4th April 2002. The benefit of that agreement was assigned by Xing Ye to SLGCC on the 8th April 2002. This evidence shows clearly that Xing Ye acted as nominee for SLGCC in its dealings with Huaxia and that it was so short of funds that it had to turn to SLGCC to finance its deal with Huaxia. This is the clearest possible evidence that the Claimants were wise not to become further embroiled with Xing Ye once its poverty of resources became apparent. There can therefore be no complaint that they have failed to mitigate their loss by refusing to deal further with Xing Ye. (I may add that the payment by SLGCC of the $500,000 was clearly a breach of a Freezing Injunction granted against Mr Barry Hansen and Sealand.

84. Mr Stuart Hansen purported to give evidence about the $18 million land tax, $7.5 million allegedly spent on engineering and administration, the sale of golf club

memberships and funds from Dino Moretti. It is noteworthy that at the First Trial he was unable to answer any questions about the funding of the Projects or of SLEC, all of which were dealt with by his elder brother.

85. Mr Stuart Hansen referred to a report and valuation dated July 2001 of International Leisure Consultants ("the ILC Report") about the golf club in support of his figures for the sale of memberships. Mr Stuart Hansen however withheld from the court the critical fact that he was the source of this information and not Mr Jeffrey Palmer ("Mr Palmer") the acting manager, as became apparent when the latter gave evidence.

86. Mr Stuart Hansen referred to TCS having a single client account "which they used for all their clients including Sealand, SLGCC and SLEC". In fact, there is in the trial bundles documentary evidence of a separate trust account for SLGCC. Moreover, Mr Stuart Hansen went on to acknowledge that payments out in respect of monies owed by SLEC were "then made from time to time at Barry's direction", confirming that it was Mr Barry Hansen who controlled the payments made and who gave the instructions to Mr Twa. This fact makes the failure of Mr Barry Hansen to give evidence all the more lamentable and increases the unreliability of Mr Stuart Hansen's witness statement.

87. Mr Stuart Hansen deals with the Richards Butler Offer, which he insists was "a genuine offer which we would have been able to make good had it been accepted". There is no basis for this suggestion. The offer was plainly the creation of Mr Barry Hansen.

88. At the First Trial I found Mr Stuart Hansen to have given perjured evidence and to have committed fraud. In the light of his past record and these obvious deficiencies, his evidence, untested in cross-examination, should be regarded as thoroughly unreliable.

89. Mr Zhang Ning

Of the Defendants four witnesses of fact, the first was Mr Zhang Ning, a recently qualified Chinese lawyer with very little experience. He was appointed at the end of 2000 by his firm Jin Mao to act as Legal Counsel to SAIC, a 10% shareholder in Shanghai Pudong Lubo Industrial Company ("Lubo"), the Chinese Government owned organisation responsible for the reclamation of the Housing and Golf Course Land. The other two shareholders are Shanghai Water Works Bureau ("SWWB") (a 50% shareholder) and Huaxia (a 40% shareholder). He only became in any way involved in January 2001. The thrust of his evidence was to the effect that Lubo owned the whole project, that only Lubo could sue or make the decision to sue SLEC for payment of the outstanding instalments of the purchase price under the Land Contracts and that Huaxia could not do so without the consent of the other two shareholders which would not be forthcoming. I found his evidence practically worthless. It was a cocktail of three inadmissible constituents, namely opinion evidence on matters of Chinese law, opinion evidence on the meaning of various documents and conclusions drawn from conversations and discussions with unnamed and unidentified company executives. He never attended a Lubo board meeting. He had no direct knowledge of the events prior to 2000 and any indirect knowledge was exiguous and of no assistance in this case. His attempted interpretation of Lubo board minutes was totally unconvincing and was inadmissible. He had not read the Judgment and knew nothing of the critically important Assignment Agreement to which I must later refer. His questionable source of information was Mr Stuart Hansen. He told me that SAIC was happy that SLEC should pay the outstanding instalments so long as they were paid to Lubo and not

Huaxia. Yet the sole and exclusive beneficial entitlement of Huaxia to the purchase price payable under the Land Contracts is spelt out clearly and unequivocally in those contracts. I reject the suggestion that Huaxia is not solely and exclusively entitled to the instalments and cannot at its own will enforce that entitlement. (The Defendants served a Civil Evidence Statement of Mr Yang Gao Qing, a general manager of SAIC no doubt intended to support the message in Mr Zhang Ning's witness statement. It likewise contains no admissible evidence of any value).

90. Mr Alex Cai

The Defendants' second witness was Mr Alex Cai, an experienced lawyer and a senior partner in the law firm Concord & Partners. Since 2002 he has acted as outside legal counsel for Xing Ye. From April 1995 until the removal of the Hansens from management of SLEC in August 1999, he acted for SLEC and SPNA. He acted for the Hansens at the time of the Subscription Agreement. The thrust of his evidence was directed at the course of negotiations involving Xing Ye in 2002. Whilst professing a neutral stance, he plainly aligned himself in the litigation with the Hansens: he helped them with the choice of expert, Professor Jerome Cohen and Professor Cohen's assistant Professor Donald Clarke, the instruction of the expert and preparation of the expert report. He told me that, as Xing Ye was not a party to the proceedings, he could be selective in the evidence that he gave, and this he was. He deliberately gave the false impression that, when Xing Ye entered into the April 4th 2002 Letter of Undertaking (to which again I must subsequently refer), Xing Ye was doing so on its own account and paid out of its own resources the deposit of $500,000. He concealed the existence of the Assignment Agreement (though he had himself prepared it) and the fact that SLGCC had provided the $500,000. He was evasive in his evidence about the sole agency agreement of November 2001 whereby Xing Ye agreed to instruct Mr Darby. He at first insisted that Xing Ye had the resources to pay $70 million for the interest of the Claimants in SLEC and only under persistent questioning did he concede that Xing Ye had financial difficulties. His selective and misleading evidence added nothing of value in this case. His part in the Global Capital Markets Inc ("GCMI") transaction to which I must subsequently refer throws a further cloud over his character and evidence.

91. Mr Jeffrey Palmer

The Defendants' third witness was Mr Jeffrey Palmer who was appointed manager of the Golf Club in 1998. His evidence was directed at establishing the truth of facts and matters which formed the basis for the grossly misleading ILC Report. He explained that the ILC Report had been prepared to attract future investors in SLGCC. Transparently an honest witness, in cross-examination he established the false factual basis and assumption on which the ILC Report was based and which undermined its value. He told me that Mr Stuart Hansen had checked the Report but not corrected the patent errors. Perhaps the most significant false statement in the ILC Report was to the effect that each house on the Housing Project paid a monthly charge of $500 and each apartment a monthly charge of $250 producing an annual income for SLGCC of $5 million. There has never been any such payment or any agreement or provision for such payment. Mr Palmer told me that the Golf Club breaks even for eight months a year and incurs losses in the other four. It is not a profit making venture. He knew nothing of the transfer of the Golf Course Land in December 2001 from SLGCC to SHTI: he was kept in the dark.

92. Mr Darby

The Defendants' fourth witness was Mr Darby, formerly of CB Richard Ellis ("Ellis") and now self employed. I made clear to the Defendants before Mr Darby left Shanghai to give evidence here that Mr Darby should bring with him his full file relating to his instructions and settlement proposals. The only documents he brought with him however were a few pages of correspondence produced as evidence of an alleged offer currently available for acceptance from an unnamed third party but rejected (it was said unreasonably). The explanation proffered for this failure was that the Defendants' solicitors had been unable to make contact with him to pass on my direction before his flight. This explanation is totally inadequate. I am not satisfied any real effort was made to pass on my direction to him: the Hansens could have ensured that he received it. In any event any responsible professional man in the position of Mr Darby called to give evidence would have brought his file with him, or at least sought confirmation from the solicitors whether he should do so. No effort was made at any time thereafter to send the file or any further documents after his flight had left Shanghai or after he had concluded his evidence. The documents which he did bring were quite inadequate to support the evidence he gave.

93. Mr Brooke

Mr Brooke was the Defendants' expert land valuer. I consider the unsatisfactory character of his expert evidence when I turn to expert witnesses and when I deal with the valuation issues. He was also a witness of fact in respect of a dispute with Mr Wong, the Claimants' expert on land values, as to what was said at a meeting between them. I will later consider that dispute in the context of their expert evidence. I unreservedly prefer the evidence of Mr Wong on this issue: it appears to me that Mr Brooke's evidence on this issue is an effort at self-justification. More importantly Mr Brooke was the central witness on the issue of contempt, maintaining that Mr Goodwin in a telephone conversation on the 10th June 2002 tried to lean on him. I deal with this issue in Part VI of this judgment, but at this stage it is sufficient to say that I found him a profoundly unsatisfactory witness. A fundamental part of the case made by him and the Defendants was that his expert report was private work undertaken by him in respect of which IB had no role, input or interest. It is quite clear from any examination of the Report that it was prepared and presented as a report by him as a consultant to IB, and it is equally clear that his wife (the CEO of IB) and Mr David Faulkner of IB provided substantial input into the report; and Mr Brooke finally conceded in answer to a question from me the previously concealed and obviously embarrassing fact that prior to the engagement he entered into an agreement with IB to share his fee with IB, giving IB one third of the fee. The Report was in law and fact a joint venture between Mr Brooke and IB. Mr Brooke was casual in the preparation and swearing of his affidavit, and his performance as a witness was highly unsatisfactory.

Other factual witnesses of the Defendants

94. The Defendants adduced Civil Evidence Act statements from a number of witnesses besides Mr Stuart Hansen. I have carefully studied them. I do not think that they advance the Defendants' case in any material respect, most particularly in the absence of the primary witness Mr Barry Hansen.

EXPERT WITNESSES

95. Both parties called expert witnesses on the issues of the value of the Subscription Shares and the value of the Housing Land and (in the case of the Defendants' expert) of the Golf Course Land. The Claimants' expert on share valuation was Mr Best and the Defendants' expert was Mr Caldwell. The Claimants' expert on land valuation was Mr Wong and the Defendants' expert was Mr Brooke.

96. It is sufficient to say at this stage that I found both Mr Best and Mr Wong highly impressive, properly instructed and conscientious witnesses. I found Mr Caldwell and Mr Brooke none of these. The practice of the Defendants of providing their experts with limited and often incorrect information and unsatisfactory instructions no doubt played a part in the poor performance of the Defendants' experts.

DEFENDANTS' APPROACH TO THIS LITIGATION

97. Before I proceed further, I must say a word about the way the Defendants have conducted this litigation and most particularly the hearing of the Inquiry which throws some light on their character and which has added substantially to the length, expense and complication of the hearing. The Defendants have used the scatter gun approach taking every available line of defence and issue irrespective of its merits and (unless halted) whether or not open to them and whether pleaded or not. They have felt free to make the most serious allegations against the Claimants (e.g. of bad faith and contempt of court) regardless of the soundness of any foundation for them. They have fed false information to their experts. They have taken the greatest care to feed to the court the material which appeared to serve their interest, but withheld all that might militate against it (e.g. the papers and records held by TCS and the oral evidence of Mr Barry Hansen). What they have fed, they have fed as and when it suited them. They have sought by one means or another to obtain an unfair advantage and take the Claimants by surprise. An example is furnished by Mr Brooke's oral evidence to which I shall subsequently refer. At this stage it is sufficient to refer to one other vivid example, which was sprung when on their behalf on Friday the 25th October 2002 Mr Jacob was making his closing speech. He produced and applied to admit in evidence as relevant to the valuation of the Subscription Shares a Memorandum of Understanding ("the Memorandum") dated the 17th August 2002 between Mr Barry Hansen and Global Capital Markets Inc ("GCMI") to form a limited liability partnership as a special purpose vehicle to acquire the assets of and shareholdings in SLEC and SLGCC. Mr Jacob wished to rely on the terms of this agreement as a guide to the value of the Subscription Shares. He did not however want the parties' valuers to be recalled to consider the significance of this material. I immediately gave directions that, if the application was to be proceeded with, detailed evidence be given of the circumstances in which the Memorandum was made, with any relevant witness attending for cross-examination. Notwithstanding failure to comply with my directions, on the 29th October 2002 Mr Jacob proceeded with the application. Many features of the Memorandum revealed on the application, and of the application itself, are highly disturbing. These include: (1) the totally inexplicable and inexcusable failure to give notice of any such application earlier, and most particularly in time for Mr Roeloffs to comment on it when he was recalled to give evidence on the 27th October 2002; (2) the clear fact disclosed on examining the Legal Due Diligence Report dated the 26th September 2002 that the proposition made to GCMI included exactly the same

fraudulent misrepresentations regarding due payment of the Five Instalments to Huaxia as founded the claim in this action and valuations which reflected these and other misrepresentations revealed in the course of the Inquiry prior to the end of July; (3) the use of Mr Brooke's valuations in his report to this court notwithstanding the clearest provisions in the report requiring his consent for any such use: no notice was given to him of their use, let alone any consent obtained; (4) no reference is made to the Judgment or the receivership of SLEC or the other proceedings pending in the TCI. This is startling since the receivers must be involved in any such sale as is provided for; (5) the fact that Mr Darby witnessed the Agreement; (6) the involvement of Mr Alex Cai as advisor to Sealand; and (7) the total non-compliance by the Defendants with the directions which I gave on the 25th October 2002 in respect of the application if the application was to be pursued. I refused to admit the Memorandum as evidence of value of the Subscription Shares by reason of the non-compliance with the directions, the absence of any sufficient or proper explanation for the delay, the absence of any evidence as to the circumstances in which the Memorandum was executed and the fact that without such supporting evidence and a recall of the experts no significance could be attached to the Memorandum for valuation purposes. But that ruling did not of course preclude reference to the contents of the Memorandum and accompanying documents for the purposes of considering the good faith of those involved, and I received submissions from both parties on this issue. What the application and Memorandum and accompanying documents confirmed were the shamelessness of the Defendants, their willingness to repeat their earlier frauds and their commitment to have recourse to any tactic (however dishonest or improper) to advance their perceived interests.

PART V

THE INDIVIDUAL ISSUES

CONTEMPT – INTERFERENCE WITH MR BROOKE

98. A telephone conversation took place between Mr Goodwin (of DB) and Mr Brooke, the Defendants' land valuation expert on the 10th June 2002, four days after Mr Brooke had given his final report. It is the Defendants' contention that in the course of this telephone conversation Mr Goodwin said that DB might not instruct IB, the firm to which Mr Brooke is a consultant on future assignments if Mr Brooke continued to act for the Hansens in this action and by so doing "lent on" Mr Brooke to cease to act. Mr Goodwin's account of this conversation is at odds with that of Mr Brooke. On the first day of the Inquiry Mr Jacob told me that the Defendants intended to commence proceedings for contempt against GFI, Firstee, DB and Mr Goodwin in respect of the alleged attempt to interfere with Mr Brooke's evidence. I directed that, if this was so, the Defendants should issue the application by 4 p.m. on the 14th July 2002 and serve it with the supporting evidence. Mr Brooke swore a skeletal affidavit in support of the application on the 11th July 2002, but the Defendants did not issue the application until the 17th July 2002. On the 17th July 2002, but before the application was issued, the question was raised what course should be followed in respect of this alleged contempt. Mr Jacob pressed that I allow him to ventilate the issues in the proposed contempt proceedings during the trial and in particular in the cross-examination of the Claimants' witnesses (who did not include Mr Goodwin). I ruled that I would not allow the merits

of the dispute to be pursued by cross-examination or otherwise investigated on this Inquiry: the proper forum was the impending committal application. Mr Jacob objected to this ruling on the ground that the cross-examination and investigation might throw light on the good faith of the Claimants (a factor relevant on the issue of mitigation) and their credibility. I did not think that the cross-examination and investigation which Mr Jacob wished to pursue would do so or afford any assistance on the multitude of issues already raised on the Inquiry: and I was firmly of the view that even if (contrary to my view) a flicker of light might be provided it would not be sufficient to justify the requested preliminary run of the contempt proceedings (with the consequent cost and delay and possible prejudice to the respondents to the application). The seriousness of the incident (at least as perceived by Mr Brooke) may be measured by the fact that he took no action between the 10th June 2002 and the 2nd July 2002 even to mention the incident to the Defendants or their solicitors. I directed that the committal proceedings be heard as soon as practicable after I have given judgment on the Inquiry. Mr Jacob appealed and the appeal was allowed on the 25th July 2002. The Court of Appeal held that the Defendants should be allowed to call Mr Brooke to give evidence on this issue and to cross-examine the Claimants' witnesses on this topic as it went to the Claimants' good faith.

99. At the end of July 2002 immediately after the decision of the Court of Appeal I gave directions for the resumed hearing setting down a timetable for this further evidence. This included a direction that Mr Brooke should give evidence on the 24th October 2002, his evidence to be immediately followed by that of the Claimants' witnesses. The Defendants' solicitors waited ten days until the 9th August 2002 when they wrote to Mr Brooke requesting him to keep the 21st and 22nd October 2002 "provisionally free" and made no further contact with Mr Brooke until early October 2002. The most generous interpretation of the terms of the letter and lack of further contact with Mr Brooke is that the solicitors were grossly incompetent. Perhaps equally remarkably Mr Brooke on receipt of the solicitors' letter did not acknowledge it and without any prior or subsequent notice to the solicitors undertook commitments which precluded his attendance here during the week commencing the 21st October 2002. The result was that, when the Claimants sought confirmation from the Defendants' solicitors that he would be attending, the Defendants' solicitors learnt from Mr Brooke that he would not be available until the 4th November 2002. The Defendants thereupon applied to me for an order to adjourn the resumed hearing of the Inquiry. This would have disrupted the arrangements for the resumed hearing. The Claimants reluctantly but generously agreed that the Defendants should have the indulgence of allowing Mr Brooke to give his evidence on the 4th November 2002 and accordingly on the 11th October 2002 I made an order to this effect. I directed that Mr Roeloffs give evidence on the date fixed namely the 22nd October 2002 (later changed to the 24th October 2002) and Mr Brooke (together with Mr Goodwin whom DB made available for this purpose in view of the seriousness of the allegation) attend on the 4th November 2002 to give evidence. The Defendants did not require the attendance of Mr Morrison who also gave a witness statement to the effect that he had no responsibility for the critical telephone call.

100. In July 2002 the respondents to the committal application applied for security for costs. The hearing of this application was fixed for the 1st October 2002. The Defendants insisted that the committal application would go ahead as late as the 25th September 2002, but suddenly on the 30th September 2002 the Defendants again, without any adequate explanation for the change of front, suddenly announced that they were abandoning the application. They were ordered to pay the costs of the committal

application on an indemnity basis and to make interim payments of £10,000 each to the two sets of defendants to the application. It goes without saying that not a penny has been paid.

101. Mr Roeloffs duly gave his evidence on the 24th October 2002. Mr Brooke and Mr Goodwin gave evidence on the 4th November 2002 and both parties prepared written submissions on this issue on the 6th November 2002.

102. The sequence of events leading to the critical telephone call cannot be in doubt. On Friday the 31st May 2002 Mr Brooke sent his draft report to the Defendants' solicitors, who served it on the Claimants' solicitors. On or about Thursday the 6th June 2002 Mr Montelibano of DB (who was concerned about a potential conflict of interest) asked their solicitors Messrs Johnson Stokes & Masters ("JSM") whether it would be alright for DB to instruct IB for market research work on two projects in China, and JSM replied that it would. On the 6th June 2002 Mr Montelibano asked Mr Roeloffs his opinion whether he could use IB for the projects, pointing out that Mr Brooke would not be involved, but a small team (including Mr Faulkner) would be. The same day Mr Montelibano asked Mr Faulkner whether IB had done since 1995, or were doing, any work on Shanghai Links. Mr Faulkner said that Mr Brooke was appearing in court as an expert witness, but that it was a personal appointment. Remarkably (if not disturbingly) he did not disclose that Mr Faulkner and Mr Brooke's wife, the CEO of IB, had assisted with the report or that Mr Brooke had entered into an agreement to share with IB the fee for the work, one third for IB and two thirds for Mr Brooke. Mr Faulkner stressed that the team working on the projects would be kept separate from any work Mr Brooke was doing on Shanghai Links. On the same day Mr Brooke's final report was sent to Eversheds, DB's Hong Kong office and Mr Roeloffs in Japan.

103. On Friday the 7th June 2002 Mr Goodwin, who had only the most tenuous understanding of this action, decided to telephone Mr Brooke regarding the potential conflict of interest. Mr Brooke was not available and Mr Goodwin left a voicemail of some three or four sentences requesting him to telephone back. The same day Mr Montelibano met Mr Robinson, Mr Lee and Mr Faulkner of IB, in the course of which meeting Mr Robinson stated that, whilst Mr Brooke was a consultant with IB, he was acting for the Hansens in a purely personal capacity: the firm was not instructed. (Again no mention was made of the full facts of the arrangement).

104. On Sunday the 9th June 2002 Mr Roeloffs flew from Japan to Singapore to attend (with other DB executives) the REIT Conference and read Mr Brooke's report on the flight. He formed the view that the report was prepared by Mr Brooke on behalf of IB and that it was substandard and of poor quality. He was well justified in taking this view. The appearance and contents of the report indicate plainly that it was an IB report prepared for IB by its consultant Mr Brooke and the quality was substandard and poor, as Mr Brooke conceded in his cross-examination and as is apparent on any examination of it.

105. On Monday the 10th June 2002 at the Conference Mr Goodwin met Mr Roeloffs. He did not mention his telephone message to Mr Brooke. Whilst they were talking they saw in the distance Mr Faulkner, and Mr Roeloffs expressed to Mr Goodwin his poor view of the quality of the report. Later the same day Mr Goodwin had the critical telephone conversation with Mr Brooke. Mr Goodwin later passed on to Mr Montelibano the "clarification" which he received from Mr Brooke in the course of that call that his work in relation to SLEC was carried on by him in his personal capacity and not on behalf of IB. Mr Goodwin did not however report on this telephone

conversation to Mr Roeloffs. At lunch time that day Mr Roeloffs told Mr Faulkner that he was not inclined to hire IB until the Inquiry was completed and judgment had been given.

106. I begin by considering the voicemail of the 7th June 2002. Having seen Mr Goodwin in the witness box and reviewed the evidence, I am satisfied that on impulse and on his own initiative (and in particular without any instigation or authority from Mr Roeloffs, Mr Morrison or anyone else at DB) he decided to speak to Mr Brooke because he knew him and wanted to clarify whether any conflict of interest precluded DB instructing IB. Having seen and heard Mr Goodwin and Mr Brooke I am clear that on the 7th June 2002 Mr Goodwin left a message in a friendly tone requesting Mr Brooke to telephone back to help resolve the question whether his work could raise a problem of conflict in respect of the two proposed assignments.

107. I turn now to the telephone conversation of the 10th June 2002 when Mr Brooke telephoned back. According to Mr Brooke's affidavit (which he stated had been prepared in a rush): (1) Mr Brooke told Mr Goodwin that he had been instructed by a firm of London solicitors to prepare on behalf of SLEC (plainly a careless mistake as the reference should have been to the Hansens) a report as to the value of the assets of that company and had undertaken, if necessary, to attend court in London to give expert evidence and that he could not see how or why his appointment should in any way affect the consideration of IB for another assignment; (2) Mr Goodwin replied that he and his colleagues might view things differently and Mr Brooke's involvement could well affect the decision whether or not to appoint IB for the assignment under consideration and indeed future work for the Bank; (3) Mr Brooke reiterated that he did not think that this was not fair and reasonable; (4) Mr Brooke obtained the clear impression that the purpose of Mr Goodwin's call was to try and persuade Mr Brooke to cease to be involved in the London litigation; and (5) Mr Brooke's delay in reporting the episode to his solicitors or clients was because this kind of approach was not unusual in the geographical area in which he worked.

108. Mr Goodwin in his witness statement stated that in the course of the call: (1) he discussed with Mr Brooke the possibility of a conflict of interest and Mr Brooke explained (what Mr Goodwin had not appreciated) that he was carrying out the work relating to SLEC in a personal capacity. Mr Goodwin thanked him for the clarification and indicated that he would convey this to Mr Montelibano; (2) Mr Brooke (and not Mr Goodwin) raised the question of future work for DB. Mr Brooke said that he hoped that his work in respect of Shanghai Links would not impact on IB's chances of obtaining the contract relating to the Chinese study. Mr Goodwin replied that he was not in a position to comment but would convey his views to Mr Montelibano, which he promptly did; (3) Mr Goodwin had no desire to influence Mr Brooke's behaviour as an expert witness in any way or to persuade him to cease to give evidence or alter any evidence that he proposed to give.

109. The evidence that Mr Goodwin acted on his own initiative, given by Mr Roeloffs, Mr Morrison and Mr Goodwin is plainly established. There is no scope for the Defendants' conspiracy theory that Mr Roeloffs or others in DB put him up to it. It is common ground that nothing said by Mr Goodwin had any effect on Mr Brooke's evidence or his continuing willingness to act in the litigation. The timing was scarcely calculated to put any meaningful pressure on him since he had already submitted his report. The charge made is accordingly improbable. But since Mr Jacob has proceeded with it to the end, I

must examine it carefully.

110. It is necessary to concentrate on what Mr Goodwin and Mr Brooke said, their states of mind and the likely impact of what was said. Crucial to all these questions is the credibility of Mr Goodwin and Mr Brooke. I am fully satisfied (as I have already stated) that Mr Goodwin is a witness of truth and I fully accept his evidence. His intervention in this affair was well intentioned if ill-advised; it was to clarify an uncertainty in his mind and (as he understood it) in the mind of DB. He had no intention to have any effect on the position of Mr Brooke as an expert witness, and I do not accept that Mr Brooke had or has any cause to make or maintain the serious allegation which he has made. It is inconceivable in the circumstances (and in particular the absence of any role in or any real knowledge of the litigation and his relatively junior position at DB) that Mr Goodwin should undertake any such exercise as Mr Brooke alleges. Mr Brooke's account of the telephone call strains credibility. Remarkably he made no contemporary note of any kind. Further his explanation for his failure to disclose the conduct of Mr Goodwin to his solicitors or clients until a meeting with Mr Jacob on the 2nd July 2002 is remarkable. He told me that as a matter of course he told his clients when "lent on" in Hong Kong in respect of his evidence in proceedings before the Lands Tribunal or arbitrators, but he distinguished the incident in this case on the ground that the proceedings were in London and (incomprehensibly) not "contemporaneous". He told me that at the time he regarded the incident as very serious, but he also told me that it was Mr Jacob at the meeting on the 2nd July 2002 who told him that the matter was very serious and required him to record what had happened. Yet he accepted that this was a unique experience in any court case in which he had acted as an expert witness. I was troubled by his performance as a witness, most particularly his deliberate suppression until pressed on this point of his fee sharing agreement with IB (a matter which he acknowledged could raise serious anxiety) and the involvement of IB in the preparation of the Report and his insistence in his evidence, notwithstanding the clearest evidence to the contrary, that his report did not have the appearance of a report by IB. I did not find him a satisfactory witness and in respect of the telephone conversation of the 10th June 2002 I did not find him a credible witness and certainly I prefer the evidence of Mr Goodwin. I accordingly reject the allegation of contempt and of pressure being placed on Mr Brooke. The only explanation for the charge being made on the tenuous evidence of Mr Brooke lies in the tactics of the Defendants in this case to have recourse to any line of defence or allegation which may embarrass the Claimants in this action. An innocent telephone call was seized upon as a stick with which to beat the Claimants: I cannot conceive that any reputable litigant would ever have adopted this line of attack on the opposing party. Mr Brooke allowed himself to be used for this purpose. I obtained the impression from his performance in the witness box that he was embarrassed by the position he had placed himself in, but it was too late to withdraw his allegation. The embarrassment may explain his remarkable behaviour when he received the solicitor's letter requesting him to keep the dates in October provisionally free in failing to acknowledge the letter and (without any notice) failing to keep the dates free.

111. Some anxiety on the part of the Defendants and their solicitors that Mr Brooke might have second thoughts may well be the explanation for their extraordinary and unexplained decision not to disclose to Mr Brooke before he came to London to give evidence on this episode the abandonment of the committal application. The Defendants certainly kept him in the dark when it suited their purpose, e.g. about use of his report in the efforts to induce Global Capital Markets to invest.

DEFAULT OF DIRECTORS AND RECEIVERS REGARDING REDEMPTION OF THE A SHARES

112. The Claimants at an early stage of the Inquiry applied to strike out paragraph 11(2) of the Amended Points of Defence on the ground that it was vexatious and it failed to disclose a reasonable ground of defence. The application was occasioned by the Defendants' manifested intention to seek to require the court to undertake a protracted investigation in the course of the Inquiry into the good faith of the Second Receivers. After full and detailed argument I acceded to the Claimants' application. I said that I would set out my reasons in this judgment and this I now propose to do.

113. The Claimants seek on the Inquiry to recover (as part of their loss) the $45 million paid for the A Shares which they say were valueless on the Closing Date and indeed are valueless today. The Defendants in their Defence contend that this claim is not maintainable (amongst others) for the reasons set out in paragraphs 11(1) and (2) of the Amended Points of Defence which read as follows:

> "(1) As appears from the shareholders agreement, 90% of the moneys paid by the minority shareholders was by way of investment in SLEC, priority redeemable preference shares, entitling the holders only to the return of their principal and interest at a fixed rate from a date. There was no purchase of shares from the Hansens or any Hansen entity. There was no payment to the Hansens of any moneys. These shares gave no right to any dividends or share in the equity of SLEC at any time. There was a right only to the return of the principal and interest on redemption. In this respect the transaction really resembles a loan which (in accordance with the findings of Lightman J.) was procured by fraud. In such case there is no loss unless and until there has been no repayment of the loan.
>
> (2) Accordingly a question is why the Class A shares have not been redeemed. It is for the Claimants to prove that the Class A shares have not been redeemed by reason of the Defendants breach of contract or misrepresentation. At no stage was any payment made to Huaxia by SLEC or any reserves of funds in SLEC created which impacted upon the ability of SLEC to redeem shares. The failure to redeem was unconnected with any possible legal claim by Huaxia (the likelihood of which was minimal). Further the Defendants aver that the Company through its receivers has failed to use all reasonable efforts to redeem the Class A Shares on the Scheduled Redemption Date in accordance with its obligations under Condition 7(a) of the Class A Share Conditions. The Defendants further aver by reference to the valuations of the land as at the Closing Date that the likelihood as at the Closing Date was that the Company's assets would be sufficient to enable it to redeem the Class A shares on the Scheduled Redemption Date. In this respect the Defendants will assert (in reliance upon paragraph 9. of a report of Charles Nicholas Brooke dated June 6, 2002) that the value of the Housing land as at the Closing Date on the basis that the five instalments had been paid was $150,000,000 and on the basis

that they were unpaid, $125,000,000 and that loans to fund the ongoing construction of the Project could have been raised against the Housing Project which was saleable at the time. The Company failed to use all reasonable efforts to redeem the Class A Shares on the Scheduled Redemption Date in accordance with its obligations under Condition 7(a) of the Class A share conditions. The Defendants assert that the following (possibly among other) reasons led to the failure to redeem:

(a) Boardroom disputes involving matters unrelated to Huaxia's claim which paralysed the Company;

(b) the appointment of Receivers for reasons unrelated to Huaxia's claim;

(c) the New Joint Receivers and Managers, appointed in March 2001, have allied themselves with the interest of the Claimants.

PARTICULARS

(i) the JRMs have a personal interest in the project.

(ii) They have put themselves into a position of conflict

(iii) They have concealed their personal interest and indeed have lied, and lied upon oath, about its existence.

(iv) The JRMs have used coercion or improper pressure to obtain a statement from Ricky Tang in an attempt to refute the Defendants' evidence. The JRMs are using company property for purposes unconnected with the company's business.

(v) The JRMs are not being even-handed in the way they deal with the Defendants and the Minority Shareholders.

(vi) The JRMs' reports to the TCI Court have been extreme in their language, and actuated by bias.

Reliance will be placed on the affidavits filed on behalf of the Defendants in support of their application to change the receivers in the TCI proceedings and served on Messrs Misick and Stanbrook, the Claimants' TCI lawyers.

(d) The strategy adopted by the Claimants and referred to in paragraph 23 below."

114. This plea requires an examination of the rights attaching to the A Shares under the provisions of TCI law and in particular the TCI Companies Ordinance (Cap 122) ("the Ordinance"), the Articles of SLEC ("the Articles") and the USA.

115. The A Shares do not entitle the Claimants as holders to any dividend or participation in

the profits of SLEC other than on redemption by way of return of capital and to interest at the rate of 15% per annum from the date of expiration of 18 months from the Closing Date. The A Shares were to be redeemed prior to the 31st March 2000 ("the Scheduled Redemption Date") at "the Class A Redemption Amount" i.e. the aggregate of the paid-up capital of the A Shares ($45 million) and an amount equal to a return of 15% per annum on the paid-up capital (calculated daily and compounded annually) from and including 18 months after the Funding Date (i.e. on or about the 30th September 1998). On a winding up the A Shares carry the right to the Class A Redemption Amount in priority to the holders of Common Shares and B Shares; and no dividends are to be paid on the Common Shares until the A Shares have been redeemed in full.

116. SLEC is an Exempted Company under Part VII of the Ordinance, and under section 198(3)(f) of the Ordinance shares may only be redeemed out of its profits or the proceeds of a fresh issue of shares. Section 198(5) provides that an exempted company may, if authorised by its articles, make a payment in respect of the redemption otherwise than out of its profits or the proceeds of a fresh issue of shares. Article 18 of SLEC's Articles does not authorise a payment in respect of redemption of shares otherwise than out of profits. Under section 198(6) of the Ordinance a payment out of capital by an Exempted Company for the redemption of its own shares is not lawful unless immediately following the date of the payment out of capital proposed to be made the company is able to pay its debts as they fall due in the ordinary course of business. Paragraph 7(a) of the USA obliged SLEC to use all reasonable efforts to redeem the Class A Shares prior to or on the Scheduled Redemption Date (the 31st March 2000) paying the Class A Redemption Amount. The obligation is of course qualified by the need for SLEC to comply with the statutory restrictions contained in section 198 of the Ordinance and the fiduciary obligation of the directors to have regard to the impact of redemption on SLEC. For completeness (though it is irrelevant on the facts of this case) the USA gave the Class A Shareholders the option to require redemption at any date after 18 months from the Closing Date out of "Available Redemption Cash" if and so far as certain specified liquidity conditions were satisfied and "all applicable laws" (i.e. those set out above) were complied with (conditions which have never been satisfied).

117. The proposition advanced in paragraph 11(1) of the Amended Points of Defence is that the A Shares, though securities, and not a debt, have resemblances to a debt, and that there was no loss occasioned by the Defendants' fraud unless and until there has been no repayment of the loan. I do not think the drawing of analogies with or resemblances to debt are of any assistance. The A Shares are an equity investment, not a debt. The critical issue for valuation purposes is the value of the A Shares and for this purpose to assess the prospect of their redemption in whole or in part.

118. The substance of the complaint in paragraph 11(2), as expressed, not once but twice, is that SLEC through its receivers failed to use all reasonable efforts to redeem the Class A Shares on the Scheduled Redemption Date (i.e. the 31st March 2000) in accordance with its obligations under Condition 7(a) of the Class A Share Conditions. The allegation is a nonsense. The Hansens were in control of SLEC until May 2000, when their gross ill-management and apprehended (and later proved) fraud compelled the Claimants to apply for and obtain from the Supreme Court of the TCI an order for the appointment of the First Receivers. Accordingly any "default" in redeeming on the Scheduled Redemption Date was a default by the Hansens: there was no receiver at the time. For the first time in the course of Mr Kosmin's opening, Mr Jacob told the court

that the words "on the Scheduled Redemption Date" in subparagraph (2) were a mistake for "after the Redemption Date" and he had only just noticed it. I find this observation incredible: it is to be noted that the formula in the pleading is "on the Scheduled Redemption Date in accordance with its obligations under Condition 7(a) of the Class A Share conditions". If there was a mistake, it was a gross and inexplicable one. Mr Jacob went on to say that he has no complaint against the First Receivers: his complaint is against the Second Receivers appointed to replace them on the 5th March 2001 and (without ever amending the pleading) he proceeded with his case on the basis that the complaint be treated as one that there was a default by the Second Receivers in failing to redeem after the 5th March 2001.

119. The particulars relied on in support of the complaint about redemption are fourfold. The fourth is (in effect) of exaggerated demands by the Claimants and a breach by them of their duty to mitigate damage. I need not consider that element of the defence in this context: I shall consider (and reject) it in the context of the claim that the Claimants have failed in their duty to mitigate damage. That allegation cannot be material to the redemption of the Class A Shares. All the other three particulars are unparticularised and the Defendants blandly ignored all applications made by the Claimants for particulars. At the commencement of this hearing Mr Jacob (without any satisfactory explanation for their inclusion or the refusal of particulars) abandoned the first two, and stated that his case concentrated on the third, namely that the Second Receivers had allied themselves with the interests of the Claimants. This allegation is relied on by the Defendants in a pending application in the TCI Court for the removal of the Second Receivers. It is plainly undesirable that this court should undertake an investigation into allegations of dishonesty and breach of duty against officers of the TCI Court (most particularly when those issues are shortly to be adjudicated on there and the Receivers are not legally represented here) unless it is necessary to do so. The Claimants maintain that it is totally unnecessary and this was the basis of their application to strike out the pleading.

120. Mr Jacob disavowed any suggestion of any conspiracy between the Second Receivers and the Claimants: as he confirmed to me, there is no plea of any agreement or collusion between the Second Receivers and the Claimants. His complaint is of the free-standing misconduct of the Second Receivers. Mr Jacob insisted that this court should allow a first run of this issue at this trial.

121. In my judgment paragraph 11(2) of the Amended Points of Defence discloses no reasonable ground of defence and is an abuse of process for a multitude of reasons: (1) I cannot see how the alleged misconduct of the Second Receivers (who are not agents of the Claimants but are officers of the TCI Court) can be relevant on this Inquiry. If the Second Receivers have been in breach of duty, a claim may be available against them at the instance of SLEC in the TCI: it cannot prejudice the entitlement of the Claimants on this application; (2) there is no conceivable basis on which it can be maintained that the Second Receivers (whether biased or not) could have possibly redeemed the A Shares at any date after their appointment. As the annual reports and evidence of the First and Second Receivers makes plain, at all times since the appointment of the First Receivers SLEC have never had the means to redeem the A Shares. In nowise could SLEC have surmounted the legal and financial hurdles to redemption of the A Shares (i.e. the existence of the available profits and the solvency of SLEC after redemption). The Business Plan and evidence before me indicated that SLEC should have been able to redeem on the due date if the Defendants' representations and warranties were true and

(most particularly) the Five Instalments had been paid. The falsity (and in particular the non-payment) made the default practically inevitable. Mr Jacob made a half hearted effort to argue that the Housing Project had an independent momentum of its own such that it could have produced the necessary funds. He relied for this purpose on a letter dated the 14th November 1996 from Bankers Trust to the Claimants when prospective investors. The letter bears no such weight, not least because it was premised on the truth of the Defendants' representation (now shown to be false) that at that date Sealand had expended $26 million since the beginning of reclamation in early 1995, excluding all soft development costs i.e. the fees of engineers, architects, planners and designers and that it exaggerated the works already completed. The optimistic picture painted by the letter must be entirely discounted in the light of the true facts now revealed. Mr Jacob also relied on an ambiguous passage in Mr Brooke's Report to the effect that loans could be raised on the security of the Housing Land, but Mr Brooke under cross-examination made plain that he was referring to the possibility of loans being obtained by purchasers of the Housing Land and not by or on behalf of SLEC. It may be noted that at no time did the Defendants ever suggest to the Second Receivers that they could or should redeem, let alone prior to the pleading on the Inquiry. In the circumstances I held that it was unnecessary to investigate the allegation of alliance with the Claimants (which in any event appeared on the evidence before me to lack substance) and I directed that paragraph 11(2) of the Amended Points of Defence be struck out.

REDEMPTION OF THE A AND B SHARES

122. Mr Jacob had no option but to concede in the course of the closing submissions that SLEC could not at any time to date redeem the A Shares. The only prospect of redemption can arise when and if the Claimants take over SLEC and recapitalise it and cause it to make profits. It has made no profits to date. It is plain beyond question that as at the Closing Date SLEC had no reasonable prospect of redeeming the A Shares. Subsequent events (i.e. the history of SLEC to date) makes the position clear beyond any doubt. Since any redemption of the B Shares is postponed until after redemption of the A Shares, even more clearly there has been and there is no prospect of redemption of the B Shares.

ADVANCE OF $7 MILLION

123. I have already said that an issue raised at the First Trial was whether SLGCC advanced the sum of $33,596,096 to SLEC to put SLEC in funds to pay Huaxia the Five instalments, and I held that it did not do so. It was not relevant at the First Trial whether SLGCC had advanced the balance of the alleged loan of $40,906,489 and if so how it was expended. The Defendants had represented and warranted that this sum of $7,310,393 had been lent by SLGCC to SLEC to enable SLEC to pay for "pre-development and development activities". Whether SLGCC did make the advance is relevant on the Inquiry. There is a dispute between the parties whether the onus is on the Claimants or the Defendants on this issue. In my view the onus is upon the Defendants to establish this loan and how it was applied. But the outcome on this issue cannot turn on onus. If the balance was loaned and applied in development of the Housing Land, the Hansens would know and be able to explain and document the transactions. Neither Hansen has attended the Inquiry. The Defendants have adduced no evidence of any value or substance of the loan of $40 million or any part of it or of

the application of the monies. The Hansens and Mr Twa could provide the relevant evidence if it supported the Defendants' case, but they have deliberately refrained from doing so. The SLEC 1997 Business Plan (warranted by the Defendants as being complete and accurate in all respects) provided that the total cost of construction of the golf course was budgeted at $12.1 million, approximately $3.1 million for phase 1 of the club house and that only $4 million additional funds needed to be raised; that the cost should be funded entirely through membership sales (see paragraph 4) and that (as at the 1st December 1996) 110 memberships had been sold raising total funds of approximately $8 million (paragraph 3). The ubiquitous TCS certified that as at the 18th November 1996 some $7-8 million received in membership fees were held in a trust account for the sole benefit of SLGCC for the construction of the golf course. Yet as appears from the evidence of Mr Roeloffs (Day 4/58/18-67/3) and the accounts for SLGCC for the year ended 31.12.96, SLGCC in fact only had $134,000 in cash at the end of 1996, and accordingly totally insufficient to pay for construction of the golf course. The compelling inference is that recourse was made to the $50 million paid by the Investors for the Subscription Shares. I am satisfied that, if and so far as moneys were "advanced" by SLGCC to SLEC, the moneys were part of these trust moneys: they could not lawfully be so advanced by SLGCC, let alone assigned to Sealand or released by Sealand. If they were so advanced, they were repayable by SLEC to SLGCC with interest. I am not satisfied that there was any such advance, assignment or release.

PAID UP INVESTMENT

124. In paragraphs 211-2 of the Judgment I included amongst the misrepresentations and breaches of warranty which I held to be established a misrepresentation and breach of warranty contrary to Article 9(c) of the Subscription Agreement that the actual paid up investment in the Group net of any appraisal surplus as at the Closing Date was at least $40,900,000 as stated in the Investment Statement: there was such a misrepresentation and breach of warranty by reason of the fact that SLGCC had not advanced any part of the sum of $33,596,096 to SLEC in relation to the Land Use Rights. In respect of this breach of warranty on the Inquiry the Defendants contended that the paid up investment included three elements which did not involve investment of actual cash. The Claimants do not rely on this misrepresentation or breach of warranty as adding to the other claims for damages for fraud, breach of warranty and misrepresentation. The Claimants do however submit that the existence of this misrepresentation and breach of warranty is relevant on the issue of date of valuation of the Subscription Shares, for these wrongs have never been rectified as was the wrong the subject of the claim in Kennedy v. Van Emden (above). For the reasons already given I am satisfied that the date of valuation is the Closing Date without any need for recourse to this argument, but I accept that this matter does provide further support, if (contrary to my view) further support is necessary. In the circumstances I think that I should deal briefly with the issues raised.

125. "Paid up investment" in this context means real liabilities of SLEC owed to Sealand, which were waived by Sealand in consideration for the issue and allotment of shares to Sealand. The purported consideration for the allotment to Sealand was the alleged loan by SLGCC to enable SLEC to pay $33,596,096 for the Land Use Rights and $7,310,393 for "pre-development and development activities" both of which had been assigned to Sealand. Paid up investment cannot include any of the three elements relied

on by the Defendants. In any event, even if the "elements" could be included, this would not affect the Claimants' entitlement on the Inquiry. I shall however consider each element in turn.

DISCHARGE OF TAX LIABILITY

126. The Defendants have claimed that SLEC paid and discharged a liability for tax by transferring part of the Housing Land to the Pudong Government. There is no evidence which supports this contention though the evidence must be available to the Hansens and TCS if it exists. (A passage in Mr Stuart Hansen's witness statement on this topic is uninformative). The available evidence establishes that any liability for the tax in question rested on Huaxia alone, and Huaxia's Land Use Right Certificate expressly provided that 15% of the land use area shall be submitted (i.e. surrendered) by Huaxia to the Government. Clause 10(c) of Agreement of Principles dated the 4th November 1994 made between Huaxia and Sealand provided for written confirmation by the Government that Sealand would not have to pay any additional Land Transfer fees and that the Government had accepted the transfer of 161 Mou in lieu of all Land Use Right Transfer fees and (when read with Clause 1) that the 161 Mou to be transferred to the Government was distinct from the 2136 Mou to be transferred to SLEC. It should be noted that SLEC's 1995 and 1996 audited financial statements make no reference to the payment of tax through a donation of land. I reject the Defendants' suggestion that SLEC made any contribution to the Housing Project in this manner and that there was any paid up investment arising in this manner. In his closing submissions Mr Jacob submitted as follows:

> "There is no dispute but that land tax was paid by Huaxia by way of transfer of land. Whether this was on their own behalf or on behalf of the Defendants is a matter of construction. The Defendants accept that there was no valuation of the land transferred at any particular price."

It is quite plain that Huaxia made the transfer to discharge its own liability. There is no basis for saying that it was made on behalf of SLEC.

EXPENDITURE ON ENGINEERING AND ADMINISTRATION

127. Paragraph 10 of the Amended Point of Defence pleads that $7.5 million was spent on engineering and administration, the money coming from golf club membership sales and funds from the Dino Moretti ceramics business in China. This allegation is supported by Mr Stuart Hansen's evidence. There is a certificate from TCS that they held $7-8 million representing the proceeds of the sale of club memberships on trust to apply to complete the construction of the Golf Club. This can only be the money referred to. Indeed in his written response to my observations dated the 21st October 2002 Mr Jacob stated that about $7.5 million came from Golf Course memberships. If and so far as this money was applied as alleged, it was in flagrant and deliberate breach of trust denuding SLGCC of the monies required to construct the Golf Course. As Mr Jacob acknowledges, there is no evidence (beyond the uncorroborated word of Mr Stuart Hansen) of any contribution of Dino Moretti and no documentation showing any disbursement to contractors. I had to consider the alleged channelling of $7.5 million to

China and the phantom presence of Dino Moretti in the First Judgment. I accept that the Hansens wrongfully applied the SLGCC trust monies or part of them for their own purposes and purposes connected with SLEC, but (in the absence of supporting documentation and evidence) I am unwilling and unable to find what (if any) part was spent on the Housing Project. Monies misapplied in breach of trust in this way cannot constitute paid up investment and must in any event be repayable to SLGCC.

MANAGEMENT

128. The Defendants plead and Mr Stuart Hansen in his witness statement says that the Hansens made an investment of spent management time on behalf of SLEC. This time has never been costed. It is conceded that they spent some time on matters connected with SLEC. Such expenditure of time again (at any rate in the absence of some agreement to the contrary) cannot constitute paid up investment.

129. In the Defendants' skeleton argument in reply to the Claimants' skeleton argument recognising the inevitable, Mr Jacob stated:

> "The Defendants do not seek to allege that the items referred to … amount to paid up investment, but that amount in value in the hands of the Company which must be reflected in the value of the Company's assets and therefore in the value of the shares."

130. This (unpleaded) alternative approach is hopeless. For the reasons given there is no basis for considering that the items gave rise to any added value, let alone any added value not reflected in other valued assets of SLEC.

ARTICLE 7.4 OF THE SUBSCRIPTION AGREEMENT

131. Article 7.4 of the Subscription Agreement provides that the Defendants shall indemnify SLEC to the extent that the amount of paid up investment in the Reviewed Liability Statement is less than that stated in the Investment Statement and the liabilities of the Group as stated in the Reviewed Completion Liability Statement exceed those disclosed in the Completion Liability Statement.

132. It is common ground that the amounts stated in the Reviewed Statements are the same as those stated in the Investment Statement and Completion Liability Statement due to the fraud by the Hansens and Sealand, and accordingly since the indemnity only required the Defendants as warrantors to provide the difference between the two figures and there was no difference, the provision for the indemnity gave rise to no liability on the part of the Defendants. The Defendants submit however that the remedy for inaccuracy set out in Article 7.4 still applies and that it is SLEC, and not the Claimants, that is entitled to be paid the shortfall, and that the Claimants have accordingly suffered no loss by reason of the misrepresentations and breaches of warranty relating to the inaccuracy of the Completion Liability Statement and Investment Statement. In my view this proposition cannot stand for a series of reasons. First of all by reason of the fraud, misrepresentations and breaches of warranty, the Claimants (as is and must be common ground) are entitled to be placed in the same financial position as if they had not entered into the Subscription Agreement. The rights (if any) of SLEC under Article 7.4 are relevant and only relevant (if at all) to the value of the Claimants' shares: the

provisions cannot detract from their entitlement to the difference between the price paid and the market value of those shares. Secondly the value of the right was a matter for the experts. It is however clear that any claim against the Defendants was valueless for the reasons that the Defendants' fraud frustrated the operation of the provision and the Defendants had no assets of any value, leaving aside the fact that they were until the appointment of the receivers in management control. This is confirmed by the fact that the Defendants have made no payment or offer of payment to SLEC.

ARTICLE 9.4 OF THE SUBSCRIPTION AGREEMENT AND THE PAYMENT OF THE SUBSCRIPTION MONIES

133. Article 9.4 provides that the $45 million paid for the A Shares is to be used as to $43 million solely for construction costs and the balance entirely by way of investment in SLEC in accordance with the first Business Plan. The Defendants submit that it is not suggested that the monies were not used for the purpose set out in the Subscription Agreement (save for the small amounts in respect of which false invoices were held in the Judgment to have been raised and paid) and in the circumstances SLEC's assets rose by an amount at least equal to the consideration given by the Claimants for the A Shares. The answer to this contention is that, whatever the provisions of the Subscription Agreement, the Articles or the USA or the relevant law, at the Closing Date and thereafter SLEC was under the control of crooks, Mr Barry Hansen and Mr Stuart Hansen, who applied SLEC's and SLGCC's monies irrespective of any duty imposed on them as suited their interest. The $50 million, if secure, would and should indeed be recognised as an asset of that value, but at the Closing Date was under the likely lengthy stewardship of the Hansens. In the circumstances the payment to SLEC was like pouring water into a colander or placing funds in the pockets of the Hansens: the monies were scarcely more than a notional and certainly a vanishing asset of SLEC. This is confirmed by examining what did happen: the money has disappeared without trace. Mr Twa and the Hansens have withheld all evidence (oral and written) as to how or where the monies went. No doubt to avoid being required to give an account of their stewardship, Mr Twa and Mr Barry Hansen have refused to attend this hearing.

INDEMNITY FROM SLGCC

134. Under the Land Contracts SLEC was liable for the purchase price for the land use rights in respect of the Housing Land and the Golf Course Land. The Defendants submit that under the provisions of the LTOA under which SLEC granted to SLGCC a right of occupation of the Golf Course Land, SLEC agreed to indemnify SLEC in respect of the full liability of SLEC under the Golf Course Contract in respect of the payment of the instalments of purchase price due to Huaxia. The construction of the LTOA must be approached in the light of the terms of the contemporaneous 2 Party Assumption Agreement made between SLEC and SLGCC, 3 Party Assumption Agreement between SLEC, SLGCC and Huaxia, and the terms (and in particular paragraphs 200-204) of the Judgment when I considered the questions of the validity and construction of the 2 Party and 3 Party Assumption Agreements.

135. The relevant provisions of the 2 Party Assumption Agreement made between SLEC and SLGCC read as follows:

> "WHEREAS
> A. SLEC entered into agreements (Contract No. 27 and Contract

> No. 28) on December 19, 1994 with Shanghai Pudong Huaxia Development Co., Ltd. ("Huaxia") for the transfer of certain land use rights from Huaxia to SLEC (the 'Huaxia Agreements');
> B. Pursuant to the Huaxia Agreements, SLEC agreed to pay Huaxia an aggregate consideration of $37,584,459 as land use transfer fees for the transfer of the said Land Use Rights;
> C. As of December 31, 1996, SLEC has paid Huaxia a total of $33,596,096 pursuant to the Huaxia Agreements and Huaxia has acknowledged the receipt of the same;
> D. For financing purposes, SLEC has entered into a lease agreement with SLGCC for the lease and possible transfer of the land use rights transferred under said Contract No. 27 to SLGCC for nominal consideration (the 'Lease Agreement') [i.e. the LTOA];
> E. In consideration of the Lease Agreement, SLGCC undertakes, among other things, to assume the obligations of paying Huaxia the outstanding land use transfer fees under the Huaxia Agreements being $3,988,363.
> IN CONSIDERATION OF mutual promises and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:
> 1.1 In this Agreement, the following definitions apply:
> ...(c) 'Obligations' means the obligations to pay the balance of the land use transfer fees to Huaxia under the Huaxia Agreements in accordance with the following schedules and amounts:
>
> | Time | Amount |
> |---|---|
> | On or before June 15, 1997 | $1,994,181 |
> | On or before December 15, 1997 | $1,994,182 |
>
> ...
>
> ARTICLE 2
>
> ASSUMPTION OF THE OBLIGATIONS
>
> 2.1 Subject to the terms and conditions of this Agreement, SLGCC hereby assumes the performance of the Obligations of SLEC and releases SLEC from the performance of the Obligations to Huaxia."

136. The 3 Party Assumption Agreement made between SLEC, SLGCC and Huaxia recited that under the 2 Party Assumption Agreement SLGCC had agreed to assume all obligation to Huaxia under the Land Contracts and on this basis Huaxia agreed to the novation of the obligations to pay transferring the liability from SLEC to SLGCC.

137. I held in the Judgment that the provisions of both agreements were designed to deceive and defraud the Claimants into believing that SLEC had paid the first Five instalments and that for this reason the 3 Party Assumption Agreement was illegal and void under Chinese Law. There was accordingly no novation. I also held that as a matter of construction of the 3 Party Assumption Agreement (if contrary to my view valid), any novation was limited to the last two instalments.

138. Paragraphs 10.6 and 10.8 of the LTOA read as follows:

> "10.6 HUAXIA AGREEMENT
>
> The Grantee [SLGCC] shall, during the Term [of the LTOA] perform all obligations of the Grantor [SLEC] under the Huaxia Agreement which have not already been performed, with respect to the construction and operation of the Golf and Country Club and shall indemnify the Grantor in respect of all obligations arising under the Huaxia Agreement in respect of the Property [the Golf Course Land] and the operation of the Golf and Country Club....
>
> 10.8 ... the parties hereby acknowledge that the Grantor [SLEC] is not, by this Agreement, transferring, assigning or otherwise disposing the Land Use Rights to the Grantee [SLGCC]...."

139. The Defendants claim that the indemnity granted by Clause 10.6 of the LTOA extends to all the obligations of SLEC under the Golf Course Contract to pay the instalments of purchase price for the Golf Course Land. This is totally untenable. It was no part of the LTOA to deal with payment of the instalments: the LTOA was drafted on the basis that all but the final two instalments had been paid and the rights of SLEC and SLGCC were governed by the 2 and 3 Party Assumption Agreements and paragraph 10.8 makes clear that the land use rights are to remain vested in SLEC. The 2 and 3 Party Assumption Agreements and the LTOA were all executed by Mr Barry Hansen on behalf of SLEC, SPNA and SLGCC on the same day and as part of the same transaction. The language of the LTOA is plainly directed at limiting the indemnity to the performance by SLGCC of the obligations assumed by SLEC in respect of the construction and operation of the Golf Course. In any event the execution of the LTOA was the consideration for the entry into the 2 Party Assumption Agreement (see recitals D and E), it was (as Mr Kosmin submitted) part of the fraudulent scheme designed to deceive and which did deceive the Claimants, and in accordance with the findings in the Judgment it is plainly (like the 3 Party Assumption Agreement) illegal and void under Chinese Law.

ATTITUDE OF HUAXIA

140. Valuation of the Subscription Shares could (though in fact it does not) involve valuing the assets and liabilities of SLEC at the Closing Date. The significant assets of SLEC are the Land Use Rights and the most significant liability is the price payable to Huaxia. The Defendants accept (as they must) the legal liability to Huaxia to pay the full purchase price, interest and penalties, but they contend that a discount should be allowed to reflect the likelihood or otherwise of Huaxia settling the claim and of bringing proceedings to enforce the claim.

141. In the Judgment I had to consider the attitude taken by Huaxia regarding payment of the purchase price at the Closing Date. After a careful review of the detailed evidence, I made the following finding of fact:

> "188. Huaxia have not served a default notice under the Contracts or taken steps to commence arbitration proceedings as

> provided for in the Contracts as they are entitled to do in case of default of payment of the Five Instalments (or indeed the Two Instalments). But Huaxia has however throughout insisted on its right to full payment; until shortly before this action the Hansens acknowledged to Huaxia the liability of SLEC to pay and promised to pay; and since the due date for payment of the first instalment Huaxia have made repeated demands for payment and maintained and reserved their right to take remedial action against SLEC by reason of the failure to pay and therefore under the Contracts (unless Chinese law otherwise provides) SLEC's primary asset is at risk."

I held in the Judgment that Chinese law does not otherwise provide.

142. Having reviewed the matter in the light of the evidence adduced on the Inquiry I am satisfied that this view is correct: indeed that view is confirmed. The evidence of the receivers establishes that Huaxia has insisted on Huaxia's right to, and SLEC's obligation to make, full payment throughout the receivership and there is no reason to believe that the situation is likely to change. There have been negotiations with Huaxia, but these have resulted in no finally concluded agreement. In such negotiations Huaxia have expressed willingness to accept, instead of full payment in cash, payment partly (e.g. $12 million) in cash, partly in release of an obligation to make a financial contribution of $11.7 million under the Agreement of Principles and partly in the form of club memberships, the total value of which (taking account of the disguised payments of £3.4 million already made) approximates to the contract debt. I do not consider that there is any reason to anticipate a settlement with Huaxia below payment of the full purchase price, and there must be a real question whether Huaxia will insist on its full entitlement to interest and penalties. Certainly a prudent purchaser could and would not safely proceed on a more optimistic evaluation of the situation. I think that it is important to bear in mind that Huaxia has had a long close (indeed too close) relationship with the Hansens, even to the extent of entering into sham transactions to assist the Hansens procure further investment in the Projects. Either Huaxia has not fully appreciated their dishonesty or has been willing to further their dishonest schemes. This relationship may account for Huaxia's quiescence and negotiating stance to date. There can be no assurance (and a purchaser in particular could not assume) that this state of affairs will continue once (with a sale of SLEC) the Hansens pass from the scene or on a liquidation of SLEC.

143. Mr Jacob has submitted that the liability to Huaxia should be discounted in particular for three reasons. The first reason is the absence of proceedings to date to enforce payment. But Huaxia has at all times insisted on their full entitlement and insisted on this entitlement in court proceedings in China (see Bundle 9C/892-7 and 906-13); and whilst plainly for Huaxia enforcement proceedings are a last resort, I do not think that Huaxia's attitude allows for any or any substantial discount on this score. The second reason is that, because Huaxia is a partner in SHTI and accordingly interested in the success of the entire development, Huaxia will forego its entitlement in full. But its interest does not preclude Huaxia's insistence on a forced sale and Huaxia has throughout maintained its entitlement in full. The third relates to the position of Shanghai Agricultural Investment Co ("SAIC").

144. The Defendants maintain that Huaxia held the Land Use Rights on trust for Lubo or alternatively Huaxia could never have brought proceedings without the authority (inter alia) of SAIC, which would not have been forthcoming. In support of this contention the Defendants rely on the witness statements of Mr Zhang Ning and Mr Yang Gao Qing. It is important to note that neither gave evidence as expert witnesses on Chinese law: they were witnesses of fact. The thrust of Mr Zhang Ning's evidence was to the effect that in his opinion Huaxia (a 40% shareholder in Lubo) can only enforce payment of any sum due from SLEC with the authority of its two fellow shareholders in Lubo, SAIC (a 10% shareholder) and SWWB (a 50% shareholder) or of Lubo itself and such authority which will not be forthcoming. As I stated in my assessment of him as a witness in Part IV of this judgment, his evidence was a cocktail of three inadmissible elements, namely of evidence of Chinese law, his personal construction of various documents and personal views on various matters and a distillation of things he had learnt from (unnamed) executives of the companies. What did emerge in cross-examination was that neither he nor SAIC had read the Judgment or knew of the side agreement between Xing Ye and SLGCC, that Mr Stuart Hansen had asked him to provide his witness statement on the Inquiry, and that Lubo did not object to Huaxia taking action to obtain payment so long as the payment was made to Lubo and not Huaxia. In short he was a most unsatisfactory witness and his evidence did not advance the Defendants' case. Since he is not giving evidence as an expert his views of Chinese law are of no assistance to the court.

145. Mr Yang Qing is a general manager for SAIC and representative of that company in Lubo. His witness statement is to like effect: he states that it is for the shareholders in Lubo to decide whether to take action to enforce payment of the purchase price and no authority to do so has been or will be given. Likewise, his evidence as to Chinese law in this regard is of no value or assistance.

146. In his concluding written Response Mr Jacob conceded that the documentation was insufficient to support his contention on this issue. What is plain is that: (1) by clause 9 (a) of the Agreement of Principles Huaxia warranted that it was the legal and beneficial owner of the Land Use Rights and had the unimpaired rights to transfer them pursuant to the Agreement of Principles; (2) by Article 7 of the Land Contracts Huaxia warranted that (a) it could sue in its own name and had legal civil capacity and could take external civil responsibility for all the assets that it owned; and (b) it was the legal and beneficial owner of the Land Use Rights with an unimpaired right to transfer the Land Use Rights; (3) these warranties were confirmed by the Acknowledgement Agreement between SLEC and Huaxia (Bundle 9A page 193); and (4) Huaxia made what was accepted to be a multitude of valid legal demands for payment. The Defendants' contention lacks substance or merit.

MITIGATION

147. The Defendants maintain that the Claimants failed in their duty to mitigate their loss by unreasonably failing after they learnt of the fraud to sell the Subscription Shares and to negotiate a deal with Huaxia. This claim faces substantial hurdles on the facts and on the law. I have set out in Part III of this judgment the legal principles governing mitigation. As regards mitigation by sale, it is to be borne in mind that the Claimants purchased the Subscription Shares as an investment and after learning of the fraud decided to adopt the purchase. In those circumstances the question of a failure to mitigate by sale can only arise if a situation arose giving rise to an opportunity to sell

and where as a matter of common prudence the Claimants could and should have taken that opportunity but did not do so. As regards negotiations with Huaxia, it is to be remembered that the Claimants were 40% shareholders only and never in control of SLEC.

148. Before I look at the specifics I should first deal with what has been the overarching contention of the Defendants, namely that the Claimants since discovery of the fraud have pursued the scheme of seeking to obtain control of SLEC and the Defendants' shares in SLEC and thereby to obtain for themselves the full value of the company and its assets; and that in pursuit of this objective the Claimants have refused any sale or deal which may stand in their way; and at the same time they have pursued claims for maximum damages against the Defendants. In short they contend that the Claimants have failed to act in good faith in mitigating their loss or allowing any just credit to be given to the Defendants against any loss otherwise established by the Claimants. This is a most serious allegation against anyone, let alone institutions of the standing of the Claimants. It was in support of this contention that the Defendants made their charge of contempt by interfering with the evidence of Mr Brooke. I have already found that there was no substance in that charge, and I find likewise that there is no basis for the broader allegation. In my view the Claimants have at all times acted with total honesty and propriety. The Defendants' conduct in making this groundless allegation is disgraceful.

149. It is clear that all the steps taken by the Claimants in this country and in the TCI were honest and reasonable endeavours to recoup their loss and safeguard their investment. The proceedings in the TCI to appoint a receiver and enforce the rights attaching the Subscription Shares were essential to extricate SLEC from the control of the Defendants and limit the continuing scope for their dishonest management and to protect the value and facilitate the realisation of the value of the Subscription Shares. It is likewise firmly established (most particularly by the evidence of Mr Roeloffs) that the Claimants have at all times been willing to sell the Subscribed Shares and (together with such sale) release their claims the subject of this action if they could obtain a reasonable offer from an identified bidder who could establish that the deal would be a legitimate deal and that the bidder had the means to complete the deal. The dual needs for proof of the legitimacy of any deal (which was directed at ensuring that there was no money laundering) and of the availability of funds to complete and for identification of the bidder/investor were conventional in transactions such as were in mind. Neither proof was ever given: rather all offers were clouded with an air of mystery, and the Hansens appeared at all times to be behind every bid. Despite a misleading indication to the contrary in a note of the meeting of the 14th May 2002, I fully accept the evidence of Mr Roeloffs and Mr Wang that the Chinese authorities (though they were anxious that a settlement be reached and apparently had confidence in the bidder/investor) declined ever to give a guarantee of payment by the bidder/investor.

RICHARDS BUTLER OFFER

150. The first failure to sell alleged by the Defendants relates to an offer made by the Defendants' solicitors Richards Butler dated the 7th April 2000. In the period immediately preceding the application in TCI by the Claimants for appointment of a receiver and manager of SLEC and to head off that application, the Defendants' solicitors wrote a series of letters to the effect that the Hansens were prepared to offer $70 million for the Claimants' shares in SLEC. By a without prejudice letter dated the

31st May 2002 they stated that the offer was supported by two significant (unnamed) institutions. On the 5th April 2000 Mr Reynold Chan faxed a "without prejudice and subject to contract" memorandum to (inter alios) Mr Roeloffs stating that an (unnamed) third party financier had offered an interim facility to buy the Claimants' shares prior to a purchase of shares in SLEC by an (unnamed) internet related company due for a listing in London within two months, which planned to exploit the possibility of rebranding the housing project as a Cyberport. He stated that the prospective investors were known entities with an impressive track record in internet-related start-ups and venture capitals. On the 6th April 2002, during or after the Board Meeting of that date which he attended by telephone, Mr Roeloffs asked Mr Barry Hansen the identity of the investor. Mr Barry Hansen replied that it was Mr Reynold Chan and his family. By an open letter dated the 7th April 2000, the solicitors offered $70 million for the shares and in settlement of all claims open for acceptance until 5pm Friday the 14th April 2000 immediately ahead of the Claimants' expected court application for the appointment of receivers of SLEC.

151. The hearing did proceed on that date and judgment was reserved. On the 25th April 2000 the solicitors repeated the offer but provided that the offer automatically expired on any order for appointment of a receiver. The Claimants replied by letter dated the 3rd May 2000 rejecting the offer for a series of reasons which included: (a) that the offer was a prelude to the acquisition by a third party of an interest in SLEC and that the corporate opportunity should be made known and available to the Board of SLEC; (b) that Mr Reynold Chan and his family, who were made out to be the principals could not conceivably pay the price: Mr Chan earned less than $140,000 p.a.; (c) that no other investor was identified; and (d) that the history of the Defendants' dishonesty and fraud directed at the Claimants precluded further dealing with them. Mr Wang in his unchallenged evidence stated that he took the view that the offer was not genuine. Mr Roeloffs added in his evidence that the whole Cyberport scheme lacked plausibility, not least because of the inherent difficulties of obtaining a listing in case of the injection of a real estate company into the business, and at a time of the precipitate drop in the internet market. The Defendants at the time adduced no evidence that funds were available to proceed. Mr Stuart Hansen in his witness statement (partially supported by Mr Albert Ye in his witness statement) purports to identify sources for $100 million for this project. Neither attended for cross-examination and neither produced any documentation relating to the alleged offer. I do not accept that there ever was a real or credible offer, let alone an offer capable of leading to a completed transaction.

RESALE TO XING YE

152. Negotiations proceeded in 2001 and 2002 between the Claimants, the Hansens, Huaxia and Xing Ye for the sale of the Subscription Shares to Xing Ye, a party introduced by Mr Barry Hansen. The Claimants properly and reasonably made it clear from the outset that it was a pre-condition of entering into any agreement with any potential purchaser that the purchaser satisfied the Claimants of the purchaser's financial capability to fund the purchase, a decision subsequently vindicated by events. No binding contract for sale was ever concluded, as Mr Jacob rightly accepted.

153. By an agreement subject to contract dated October 2001 ("the October Agreement") H&Q on behalf of the Claimants agreed the sale of the Subscription Shares and the release of all claims for $70 million. The agreement provided for preparation, agreement and execution of a formal contract. By a letter of undertaking dated the 4th

April 2002 ("the April Agreement") made between Xing Ye and Huaxia, Xing Ye agreed to deposit $500,000 with Huaxia pending negotiation of a binding closing agreement. The closing agreement was to provide for payment to Huaxia of $13 million, for the entitlement of Huaxia to 100 golf memberships each with a face value of $100,000, and for the release of Huaxia from its investment obligation in respect of the sum of $11.4 million under the Agreement of Principles and in return for the release by Huaxia of all claims in respect of the unpaid instalments of purchase price and the purchase by Xing Ye for $2,448,000 of Huaxia's 20.4% interest in SHTI.

154. This agreement is significant in three regards: (1) the agreement on any fair reading according to English law (and there is no expert evidence on Chinese law in this regard) is merely an agreement to enter into negotiations for a concluded legal agreement: it has no legal effect on the rights of Huaxia to payment; (2) the agreement stated in its recital that the Claimants had agreed to the proposed sale. This was a reference to the October Agreement; and (3) by a collateral Assignment Agreement ("the Assignment Agreement") between Xing Ye and SLGCC and dated the 8th April 2002, Xing Ye agreed to confirm to Huaxia acceptance of the April Agreement, to pay to Huaxia the sum of $500,000 provided by SLGCC as the required deposit and to assign the benefit of the April Agreement to SLGCC, and in return SLGCC agreed to provide the $500,000 and indemnify Xing Ye against all liability under the April Agreement. It is quite plain from the documents themselves (and the Defendants have provided no disclosure or evidence relating to this remarkable transaction) that the substance of the transactions was that Xing Ye agreed to act as a front for the Hansens. The negotiations and proposed deal floundered (as it necessarily would flounder) when it became apparent that Xing Ye did not have the financial resources or recourse to resources to proceed with the purchase. Mr Darby, who acted for Xing Ye, acknowledged that Xing Ye was not in the financial position to complete a purchase itself unless the Chinese Government put it in funds and it never did so. The evidence before me establishes that Xing Ye was in financial difficulties. Mr Best carried out a credit check which revealed that according to its balance sheet Xing Ye did not have much in cash and its current liabilities significantly exceeded its current assets. Mr Roeloffs in his evidence emphasises the importance of the fact that Xing Ye and its subsidiary Hohbond Oil Ltd were not able to prove to the Claimants that they had the financial capability to complete the transaction (they needed to obtain it from SLGCC) and hence the negotiations between the parties ceased in February 2002. There is no basis for any complaint that the Claimants acted otherwise than fairly and responsibly in respect of this possible route for mitigating the Claimants' damages.

GOOD FAITH IN DEALINGS WITH MR DARBY

155. Mr Darby first became involved in the dispute during 2000. Mr Darby (on behalf of Ellis) attempted to broker in return for a success fee a deal between the Claimants and the Defendants enabling the Housing and Golf Projects to proceed freed from the constraints imposed by the existing state of affairs. He secured a degree of interest from three investors and disclosed the names of two of them to the Claimants. Both of these dropped their interest shortly thereafter. Mr Darby refused to disclose the identity of the third investor, apparently on the ground that a confidentiality obligation precluded him from doing so. The Hansens informed him of what they wanted as the price for selling out. Mr Darby did not think it necessary or prudent to pass on this information to the Claimants.

156. At a meeting between Mr Roeloffs, Mr Morrison and Mr Wang on the 19th January 2001 in the course of tough negotiations Mr Darby said that the Hansens would settle on the basis of receiving $20 million, a large plot of housing land and 100 golf club memberships. In response to this exaggerated demand and as a counter offer at one point of the meeting the Claimants stated that they would settle on terms that the Hansens gave up their interests in the Projects in return for $1 and the Claimants dropped their claims in this litigation. This was clearly not the Claimants' final position and Mr Darby knew this. The parties could not surmount the differences between them. The Claimants by now perfectly reasonably adopted the view that Mr Darby's efforts as broker were of no assistance (he represented no-one who was prepared to do a deal), and so informed Mr Darby. Mr Darby's efforts as a broker thereupon ceased.

157. Thereafter on the 21st November 2001 Ellis (by Mr Darby) entered into a Sole Service Agency Agreement with Xing Ye entitling Ellis to a commission if it found a purchaser for Xing Ye's 40% shareholding in SLEC on the basis that Xing Ye planned to sell such shareholding for $73 million. (This Agency Agreement was replaced by a further Agency Agreement on the 26th April 2002). Notwithstanding the terms of the agreement Mr Darby insisted in his evidence that Xing Ye was a long term investor and was financially capable of completing the purchase of the Subscription Shares. Negotiations between the Claimants and Xing Ye resumed and a meeting took place on the 14th May 2002 when there was under consideration a proposal to buy the Subscription Shares and obtain a release of all claims in this action for $70 million. The matter could not proceed because, though Xing Ye offered to pay a deposit of $7 million, Xing Ye did not have the necessary resources, the identity of its alleged financial partner or investor was not disclosed and the Chinese authorities would not provide a guarantee of performance by Xing Ye. The proposed deal required the Claimants to terminate this litigation, and the Claimants (again perfectly reasonably) were not willing to lose their trial window unless a settlement was concluded and the money paid or a letter of credit provided. Plainly the Claimants would have accepted $70 million if that sum could have been secured: Xing Ye could not however do so. Mr Darby did not find a purchaser and did not earn his commission.

158. Mr Darby in his evidence attributed the failure to achieve a deal to a lack of good faith on the part of the Claimants. Yet he acknowledged in his evidence that Xing Ye was not in a financial position to complete a purchase itself unless the Chinese Government made the necessary financial arrangements, which it never did or agreed to do. This complaint was in my view "sour grapes". He failed to produce an identified investor with the means to complete a purchase prior to the commencement of the Inquiry and accordingly failed to earn his commission. In his evidence he took out his resentment on the Claimants and made the allegation of bad faith without any justification. His evidence is biased and unreliable. I cannot place weight on it unless independently corroborated. This view of him as an ally of the Hansens hungry for fees at any cost finds corroboration in his role in the GCM transaction.

FAILURE TO SETTLE WITH HUAXIA IN RELATION TO OUTSTANDING INSTALMENTS

159. Paragraph 24 of the Amended Points of Defence reads as follows:

> "24. There has been no attempt to conclude a settlement of any claim by Huaxia. The Minority Shareholders have used the

> potential claim by Huaxia to try to gain control of the company and as the foundation for their claim to damages instead of agreeing to settle or negotiate with Huaxia as would have been in the best interests of the company."

160. Mr Jacob in his submissions elaborated on this plea contending that the Minority Shareholders in mitigation of damages should not merely have concluded a settlement with Huaxia but out of their own pocket paid off Huaxia. This submission is so extraordinary as to be absurd. SLEC was at all material times under the control successively of the Defendants and the receivers. They alone could and (if any duty existed) should have concluded any deal. The Claimants never had authority to do so. The notion that the Claimants as minority shareholders were required to pay out of their own pocket the sum needed to make good the fraudulent representations of the Defendants regarding payment of the outstanding instalments of the purchase price (in effect) for the benefit of SLEC and all its shareholders (and in particular Sealand as majority shareholder) is plainly ridiculous. I shall however consider in detail the Defendants' contentions regarding the availability of a settlement.

161. The Defendants contend that a settlement of Huaxia's claim was from the outset "eminently achievable" and was capable of achievement by the Claimants at a figure of around $13 million. This is not correct. In this regard it is to be remembered that the Defendants procured the payment of at least $4.7 million in disguised Land Use Rights payments, made repeated attempts to reach a settlement by use of grossly misleading documentation such as the DOH Promissory Notes and took five years until April 2002 before they reached any indirect conditional agreement with Huaxia. After their appointment the receivers were in a position to conclude a deal with Huaxia if such a deal was available and either party was at liberty to apply to the TCI Court for directions to be given to the receivers in this regard. No such application was ever made.

162. One month after discovering the Defendants' fraud on the 1st November 1999, on the 1st December 1999 Mr Wang met Mr Bao of Huaxia to clarify Huaxia's position. There were no discussions between SLEC and Huaxia during 2000.

163. During 1999 there was a dialogue between the Hansens and Huaxia. Mr Barry Hansen drafted the Concept Paper dated the 12th May 1999 as part of a design to conceal from Goldman Sachs (who were in discussions regarding a recapitalisation of SLEC) the non-payment of the Five Instalments. I deal with this episode in paragraphs 178-181 of the Judgment. No deal was concluded. The episode does not (as suggested by the Defendants) advance the Defendants' case on mitigation and neither does the Status Quo Report dated the 23rd May 2001, an internal document produced by Huaxia. That document purports to record (but records inaccurately) a meeting of the 22nd May 2001 between Mr Wang and Mr Morrison with Mr Ning and Mr Bao in an attempt to resolve matters. The position taken by the Claimants was the quite reasonable one that in default of some satisfactory settlement the Claimants had no option but to pursue their remedies against the Defendants. The Claimants put settlement proposals to Huaxia: Huaxia stated that they needed approval from the Pudong Government. Huaxia never proceeded with the matter further. In acting as they did, as it seems to me, the Claimants more than fully did all that could reasonably be expected of them to mitigate damage.

CREDITS TO BE GIVEN BY CLAIMANTS

164. It is common ground that in respect of their claim for damages the Claimants must give credit for the price received on sales of shares forming part of the Subscription Shares and that account should be taken of the value of securities held in respect of the Defendants' liabilities. Accordingly it is common ground that APGF must give credit for the $3,250,000 consideration received on the transfer of part of its shareholding in SLEC to NYLI one day after the Closing Date. The transfer took place with the approval of Sealand and Mr Barry Hansen. It is also common ground that account must be taken of the value of the B Shares the subject of a mortgage dated March 1997 whereby the Defendants secured all liabilities the subject of the Inquiry on the B Shares. But the B Shares were at the Closing Date and are today valueless. Accordingly the value of the security is nil and no credit need be given in respect of the mortgage. The position regarding the sale of Wardley shares to GFI requires some elaboration.

165. By three agreements dated the 4th April 2001 (1) Wardley agreed to sell to GFI all 1,440,000 A Shares and its 160,000 Common shares; (2) CFI agreed to sell all its 900,000 A Shares and its 100,000 Common shares to GFI; and (3) GFI's parent company PEML agreed to sell GFI (now holding its own 16,785,000 A Shares and 1,865,000 Common shares, as well as those transferred by Wardley and CFI) to AGPF and Firstee.

166. Mr Kosmin has prepared a full, valuable analysis of the agreements which it is unnecessary to set out in an already overlong judgment. Under each agreement the sale of shares was for $1 and for a reduced portion of the net receipts (whether from dividends, other distributions, sale proceeds or the litigation) obtained by APGF and Firstee referable to the shares in SLEC directly or indirectly transferred to them. In a word Wardley, CFI and GFI surrendered to APGF and Firstee 60% of that to which they would otherwise have been entitled in right of their shares in return for AGPF and Firstee accepting sole and full financial and management responsibility for the litigation and realisation of the Investors' investment in SLEC.

167. The necessary exercise of calculating whether any and if so what additional consideration is payable can only be undertaken some way into the future when it can be seen whether there will be receipts and how much they will be, and whether they will exceed deductible expenses.

168. The agreements were an arrangement between the Claimants as how to finance the litigation and realisation exercise which had been made deliberately and unnecessarily expensive and protracted by the Defendants' unscrupulous behaviour inside and outside court. The arrangement let the HSBC entities off the hook for further expenditure of funds and management time and rewarded H&Q and DB entities for assuming sole responsibility in relation to all such expenditures with a share of the recoveries to which (by virtue of their shareholding) the HSBC entities would be entitled.

169. I cannot see in principle or in justice why the arrangement made should have any effect on the Claimants' total entitlement to damages. The Defendants' wrongdoing and the Defendants' denial of liability created problems for the HSBC entities in the litigation. The method adopted between the Claimants as to how to resolve these difficulties is

plainly reasonable and proper, and there is no reason why it should operate as a windfall in favour of the Defendants in this litigation.

170. Accordingly, so far as the sale by Wardley is concerned, the credit to be given (if anything) is limited to $1. It is common ground (as is clear) that no credit is to be given for any dealing in the shares of GFI.

PART VI

VALUATION

PRELIMINARIES

FACTS IN ISSUE RELEVANT TO VALUATION

171. For the purposes of valuation and in examining the reports of the experts a number of issues of fact which may not previously have been sufficiently examined need to be considered and resolved. I shall consider these in turn.

(a) The financial condition of SLEC, SLGCC, Mr Barry Hansen and Mr Stuart Hansen.

172. At the First Trial I had to consider the financial worth and sources of funds of the Hansens, SLEC and SLGCC. The evidence satisfied me then and the evidence before me satisfies me now that the Hansens entered into the Projects with no funds and no source of funds of any substance and the situation was likewise for Sealand, SLEC and SLGCC. Some monies may have been channelled into SLEC, but the absence of any satisfactory evidence from the Defendants and the refusal of the Defendants and their TCI lawyers to make disclosure of the relevant documentation notwithstanding court orders and assurances to the court leaves me in the position where I can find no basis for believing that any of them had any substantial means beyond the subscription monies paid to SLEC (a substantial part of which was wrongfully paid over to SLGCC to finance the construction of the Golf Club), the monies received on sales of memberships of the Golf Club and the monies raised and paid over to them (on the unlawful transfer of the Golf Course by SLGCC to SHTI) by SHTI on execution of unlawful mortgages of the Golf Course. I have already stated in paragraph 133 of this judgment (under the heading Article 9.4 of the Subscription Agreement and payment of the Subscription Monies) referred to the inability of the Hansens to distinguish between their own funds and funds in their stewardship and the propensity of monies in their stewardship to disappear without trace. As a consequence any legal liability of the Hansens or any entity controlled by them cannot ever have been and cannot now be expected to be discharged unless the Hansens see it as in their interests to discharge it. These conclusions cannot seriously be doubted, and are confirmed (so far as confirmation is required) by the lack of any account of dealings with the monies, the refusal of the Hansens and Mr Twa to assist or provide records, the compulsory liquidation on grounds of insolvency of Sealand, the fact that the Golf Club has traded at a loss, the failure of Mr Barry Hansen to comply with the order of the TCI Court to repay monies unlawfully extracted from SPNA (being monies raised by SPNA on the security of assets of SLEC), and the continuing default of the Defendants to pay one

penny of the costs ordered to be paid by them. Accordingly any rights of SLEC against SLGCC or the Hansens to recoup monies misappropriated or to any indemnity or contribution were on the Closing Date and on the date that the fraud was uncovered and are today practically valueless.

(b) The rights and remedies available on discovering the Defendants' Fraud.

173. The Claimants had suspicions that a fraud had been perpetrated on them in August 1999, but no direct evidence. That evidence became available in November 1999 some two and a half years after it had been perpetrated on them. SLEC was under the control pursuant to the USA of Mr Barry Hansen and in addition Mr Barry Hansen was (and even today remains) in a position of power as registered legal representative in China.

174. The Claimants had a series of courses available to them. Firstly the Claimants could have sought rescission and repayment by SLEC of the purchase price paid. It is to my view plain that SLEC could not and would not have made any substantial repayment: instead the Claimants decided to adopt their purchase of the Subscription Shares. Secondly, in view of the decision to adopt the purchase, the primary remedy available to the Claimants was the commencement of proceedings for damages for fraud, misrepresentation and breach of warranty. The Claimants availed themselves of this remedy. Thirdly the Claimants as "Qualifying Shareholders" could seek to take control of the Board under Article 7.6 on the ground that the Hansens were "Defaulting Sponsors". Fourthly the Claimants could seek to invoke the Inactive Shareholders Provisions of Article 7.1. The Claimants by way of counterclaim in the proceedings commenced by Sealand in the TCI invoked the provisions of both Articles, though the counterclaim could be expected to be and was protracted and expensive. Fifthly the Claimants (subject to the hurdle of the need for compliance with the pre-emption provisions in favour of Sealand contained in Articles 5.1, 5.2 and 6) could resell their holding if an adequate offer to purchase was received: the offer could not reflect any entitlement of a purchaser to the protection afforded to the Claimants alone as Qualifying Shareholders under Articles 3 and 7.6. The Hansens could be expected to spare no effort to prevent the Claimants surmounting the hurdle arising under the pre-emption provisions save on terms satisfactory to themselves. If it could be surmounted, (as the evidence and common sense make plain) the Claimants as reputable financial institutions in respect of any proposed sale could only deal with persons whom they could identify in order to ensure that they were dealing with legitimate parties and not becoming involved in money laundering and (as a matter of prudence) in order to ensure that the parties with whom they were engaged were capable of completing the transaction. Those conditions were never satisfied. Sixthly the Claimants could have sought an agreement with Sealand for the sale of the entire shareholding in SLEC. Meaningful co-operation from the Hansens and a fair and proper deal (having regard to the Hansens' history of deception and disregard for the law) could not reasonably be expected. Seventhly the Claimants could apply in the TCI for the appointment of a receiver of SLEC. The Claimants did so apply. The proceedings were protracted and vigorously and unscrupulously defended, though eventually successful. Eighthly the Claimants and any purchaser from them could have petitioned in the TCI Court for the winding up of SLEC on just and equitable grounds of SLEC. (The TCI Companies Ordinance does not provide any "unfair prejudice remedy"). This is a notoriously lengthy and expensive form of proceeding, most particularly when the defendants are as tenacious and unscrupulous as the Hansens and

in particular in a jurisdiction such as the TCI where there is a single permanent judge available to conduct judicial business. No criticism is made in their pleadings by the Defendants of the Claimants for taking the courses which they did or for failing to petition to wind up though Mr Jacob did make a criticism in his submissions of the failure to petition to wind up SLEC: on no basis could such failure have constituted a failure to mitigate. In summary the options available to the Claimants were uninviting on any common sense basis, most particularly because the Defendants could be expected to cause as much trouble as they could, to litigate at the cost of using funds of SLEC and to default on any judgment and in particular on any order for costs. For an informed reputable purchaser invited to pay any sum to share a bed with established fraudsters such as the Hansens and undertake expensive and protracted litigation in order to preserve or extract value from the minority holding, such a prospect must be wholly unattractive, indeed daunting, if not totally forbidding prospect.

(c) Mr Roeloffs' Advice to Investors

175. The Defendants seek to deduce from Mr Roeloffs upbeat advice to the prospective investors prior to their investment that the Projects today are highly valuable. The advice given at the time was indeed to the effect that the Projects had the prospects of making substantial profits; that the Housing Project should be self financing through a securitisation process involving raising on the security of leases money which could be used for further building; and that finance was needed as an accelerator, and not an initiator, to bring forward the dates when profits could be made. This contention lacks any substance or reality. It was apparent that by the summer of 1996 the securitisation process could not proceed and the finance required needed to be raised by an equity financing with financial institutions: see paragraph 116 of the Judgement. As Mr Roeloffs explained in his evidence (and in any event as is totally obvious) the advice given by Mr Roeloffs was based on the dishonest information directly and indirectly furnished to Mr Roeloffs by the Hansens.

(d) Mr Morrison's "Offer".

176. In the course of his cross-examination Mr Morrison was asked whether the Claimants would accept $73 million for the Subscription Shares and in settlement of the Claimants' claims in this litigation. Mr Morrison answered in the affirmative. Mr Jacob submitted that this answer pointed to, if it did not establish, the substantial value of the Subscription Shares. It establishes no such thing, let alone any substantial value at the Closing Date. There has been no indication (as the question appeared to suggest) that an offer of this sum is ever to be forthcoming.

RIGHTS TO BE VALUED

177. The valuation exercise required to be undertaken as at the Closing Date is of the minority holding of 40% of the Common Shares and the holding of all the A Shares and the rights attaching to both those shares. Accordingly: (1) the A Shares have to be valued together with the rights attached by Article 5.7 in default of redemption of the A Shares by the end of 72 months after the Date of Funding, namely the voting rights appertaining to the Common Shares then held by Sealand; (2) the Common Shares had to be valued together with the rights conferred by Article 7(1) to appoint directors and

under Article 7(2) to purchase Sealand's shares upon Sealand being deemed to be an Inactive Shareholder; (3) the Common Shares should be valued together with the rights conferred on "Qualifying Shareholders" (in effect the Claimants, but not purchasers from them) by Article 7(6) in case of the Defendants becoming "Defaulting Sponsors" to take control of the Board. Rightly or wrongly and without protest by either side both experts proceeded on the basis that the valuation should take into account the rights conferred by Article 7(6) notwithstanding a purchaser who could not take advantage of those rights would not take those rights (which are in effect personal to the Claimants) into account in the purchase price which he would be willing to pay. Mr Jacob referred to this matter in his closing submissions, but he did not request that the experts (and in particular Mr Best) be recalled to reconsider their evidence in the light of this factor. The nature of this complaint and the thrust of the evidence as a whole make crystal clear that the existence of the personal right of the Claimants under Article 7.6 cannot sensibly materially affect the valuation.

EXERCISE TO BE UNDERTAKEN

178. The experts are agreed that in the circumstances of this case the market value of the Subscription Shares if the representations and warranties were true and the price paid (namely $49 million) are the same. The parties are agreed that the first exercise to be undertaken is to determine the value of the shares as at the Closing Date ascertained on the basis that the representations and warranties were untrue as I held in the Judgment. If the value is less than the price paid, the Claimants show a (prima facie) loss. Both parties agree that the Claimants must then give any necessary credits. I have already held that the only credit that must be given is for the $3,250,000 received by the Third Claimant AGPF in respect of the sale of part of its holding to NYLI and that no credit save for $1 need be given in respect of the agreement entered into by Wardley in respect of financing this litigation. I have rejected all the other claims of the Defendants to reductions in the Claimants' entitlement.

VALUERS' REPORTS

Share Valuation

Course of hearing

179. Expert evidence was provided to the court as to the market value of the Claimants' shares in SLEC:

a) on the basis that if the warranties and representations had been true; and

b) on the basis that the warranties and representations were false and that the Claimants learnt that they were false immediately after the Closing Date.

180. In accordance with the court's directions the parties served consecutive expert reports. The Claimants served the First Report of Mr Best dated the 28th March 2002 valuing the Subscription Shares at the Closing Date at nil. In view of the terms of the Consent

Order he was not instructed at that stage to make a valuation as at the date of the Inquiry. On the 6th June 2002, the Defendants served a report of Mr Caldwell valuing the shares in excess of $49 million at both dates. Thereafter, Mr Best produced a Reply dated the 27th June 2002 addressing valuation at both dates.

181. Further, in accordance with the court's directions, the experts met to try to narrow the issues between them and produced a Joint Memorandum of Matters Agreed and Not Agreed dated the 5th July 2002. Subsequently, during the course of the Inquiry, at my request, they produced a further joint memorandum on the facts dated the 16th July. These documents are of considerable assistance to the court.

182. Mr Best gave oral evidence on Days 6 and 7 of the Inquiry. Mr Caldwell gave oral evidence on Day 8 of the Inquiry.

Value of the Subscription Shares as at the Closing Date

183. Both Mr Best and Mr Caldwell agreed that the market value of the Subscription Shares as at the Closing Date, had the warranties and representations been true, was the price paid for them, namely US$44.1 million for the A Shares and US$4.9 million for the Common Shares.

184. The experts also considered the true value of the Subscription Shares (on the basis that the warranties and representations were false) as at the Closing Date. In his Report, Mr Best concluded that their value was nil. Mr Caldwell, on the other hand, considered that based on the assumptions he had been instructed to make the Subscription Shares were worth more than the price paid for them.

185. Mr Best's reasoning is set out in section 5 of his First Report where he draws attention to the following factors:

a) the Housing Project and the Golf Course Project were at risk of a forced sale by reason of the non-payment of the instalments due under Land Contracts;

b) the funds injected into SLEC by the Investors were specifically to be applied as to US$43 million for the construction of the infrastructure and the first 100 houses at the Housing Project, the balance being allocated to general purposes;

c) if the first 100 houses could not be built in accordance with the Business Plan, SLEC would not therefore generate the revenues and cashflows projected in the Business Plan;

d) SLEC had to pay US$33 million to US$45 million to secure the Land Use Rights and did not have sufficient cash to make such payments;

e) the Hansens comprised the key management of SLEC and had behaved fraudulently;

f) the detection of fraudulent acts by management, fraudulent misrepresentations

and breaches of warranty would deter any investor from acquiring a minority 40% interest, in particular whilst the fraudsters maintained 60% of the share capital;

g) in the circumstances, there was no prospect of the Housing Project having a viable future or being completed owing to the lack of resources and therefore there was no prospect of SLEC generating sufficient cash flows to enable SLEC to redeem the A Shares being redeemed within the three year period or at all;

h) there would therefore not have been any investor willing to acquire the Subscription Shares in SLEC at any price had the true position been known.

186. Mr Best's opinion is summarised in paragraph 6.6 of his report:

> "The Claimants' case is that they would have not acquired the Subscribed Shares at all had they known the true position. It is inconceivable to me that any financial investor considering the acquisition of the Subscribed Shares, in their right mind, would have concluded otherwise. There would therefore not have been any financial investor willing to acquire the Subscribed Shares and the market value of the Subscribed Shares is nil."

187. Mr Best further elaborated on his reasoning in his evidence in chief:

> "My Lord, the issue here is what would the market place pay for a 40 percent interest in the shares that were held by the claimants, both the Class A shares and the common shares combined. Mr Caldwell has ultimately adopted an approach of determining what cash could be derived from those shares if the company was put into liquidation, and in doing so he has made a number of assumptions, and he has ultimately derived a value for the business which is actually higher than the final figure he ascribes to the value of the shares, and if I may just refer to his report.
>
> I wanted to refer, first of all, to paragraph 977 on page 20. Effectively what he says is when you go through his calculation, the value of the company is 98.2 million, or the value that is attributable to the Class A shares and to the common shares is 98 million, but he then restricts his value of those shares to 44.1 and whatever the balance – 4.9 million shares for each class of share.
>
> Now, the position I have taken is that – I am comfortable with the approaches that Mr Caldwell talks about. You either value a company using an earnings basis, an asset basis or a liquidation basis, but at the end of the day what you are trying to assess is what is the – what would anybody in the market place pay for those shares, and what I have effectively said is that there must be – once you have gone through these calculations, and these are nothing more than mathematical calculations, there must be some form of reality check, and when I went through this process myself, the reality check that I made was, well, let us just

look at what is being placed on offer here. We have a company which – where the management and controlling directors, controlling shareholders, have been found to be fraudulent.

If you were to offer those shares in the market place, a prospective purchaser of those shares is going to ask – is going to go through a process, and the primary process is to understand and evaluate the risks associated with the – a potential acquisition, and then measure that against the benefits. The benefits, I do not think there is any question about, they have been defined in the business plan. It is the risks that need to be addressed, and it is the risks I look at. The—first of all, you have the normal business risks associated with the business, and those business risks were accepted by the claimants when they entered into the contract. But above and beyond that, when it is determined that the defendants had committed fraud, there is a raft of new risks which appear.

The first risk is that the fraud that has been identified is not the only fraud. The next risk is that once the fraud has been identified, that the Hansens will deny the fraud. You then have risks associated with the fact that the Hansens are also key management of SLEC, and they are also controlling directors of SLEC. So you start with that set of risks.

In addition to that, there are the risks of future fraud. I acknowledge that the money that has been paid into the company has been paid into a controlled bank account which requires joint signatures, and so it would be reasonable to anticipate that there is a small amount of risk associated with that, but there is always the potential for the risk of forgery in order to obtain those funds. I have no idea how large or small that risk might be. More importantly though, as management of the company, as directors of the company, and also with regard to SPNA, the legal representative and the holders of the company chops, the Hansens are in a position to be able to commit the company to liabilities, so you have a basic layer of risk.

Now, on top of that, if you then did proceed to acquire the company, there are further risks involved because you then have to make two choices – I am sorry, I did not mean acquire the company, I means acquire the 40 per cent shareholding, but you then have two choices: do you proceed- let the company proceed in accordance with its business plan? If you do that, there are a number of consequences of that decision. The first is the company needs more money. So as a prospective investor, the additional prospect is to inject further money into the business. However, you would not want to inject further money into the business whilst the Hansens were managing the business in key management positions. You would not want to invest where management is fraudulent, and so you would have to embark on

> the task of removing the Hansens from management. You certainly would prefer not to have them as directors of the company, because directors themselves are in a position to commit the company, and so you would want to embark upon the task of removing them as directors.
>
> Finally, you would not contemplate injecting money into the business whilst they were still holding 60 per cent of the equity of the business. They would be – ultimately therefore be rewarded by 60 percent of the profits, having not put any of the equity into the business at all, and so there would be a need to renegotiate the shareholding of the company.
>
> So this is another additional layer of risk and issue that one would have to take into account. The alternative scenario to proceeding with the business is liquidating the business. The liquidation of the company, however, requires a resolution, a special resolution, I understand, of the shareholders, and therefore there is a risk that that special resolution would not be forthcoming, and therefore your only recourse from a liquidation prospective would be to sit back and wait six years to March 31st, 2003, at which time the shareholders agreement permits you to, or gives you the right to, control the voting rights of the common shares held by the Hansens. There, of course, at that point in time would be a risk that they might challenge your right to exercise their voting rights, and so yet a further risk, and so the potential, from a liquidation prospective, is that you might have to wait a substantial amount of time before you were able to liquidate the company.
>
> So my conclusion fundamentally is that would be nobody in the market place who would be prepared to take on all of those risks, and therefore I just do not think that anybody would be prepared to buy the shares, or alternatively, given that we are talking about fair market value, they would probably be prepared to offer a dollar to take the shares off the claimants' hands, and the dollar being the amount to, I presume, enter into an enforceable contract to do so.
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> Lightman J. The whole of that exercise involves no substantive consideration of the underlying assets, or very limited
>
> The exercise is effectively a measure of the risks versus the rewards, my Lord."

188. I found Mr Best's evidence totally convincing and, though I ordered consecutive reports, Mr Caldwell neither in his report nor in his oral evidence ever challenged this evidence or put forward any rival market view, certainly of any significance.

189. Mr Caldwell adopted a different approach in his report. At paragraph 9.22, he stated that he:

> "would consider it highly unlikely that somebody holding the share capital of the Claimants at that time would have considered the market value of their investment to be nil."

Under cross-examination however, he accepted that the proper test is:

> "what price would be achieved in the open market between a willing vendor and a willing purchaser."

190. Mr Caldwell considered that the Claimants could have taken one of two basic approaches:

a) continue with the Housing Project as originally envisaged; or

b) consider a realisation of the assets and to provide for a return by way of liquidation, partial or otherwise.

191. Mr Caldwell stated that in order to meet the liability to pay the outstanding instalments to Huaxia, which was not part of the original Business Plan, SLEC could have sought the injection of additional funds from one of four main sources:

a) the Claimants themselves;

b) Sealand;

c) Third party investors;

d) providers of debt, such as banks.

192. He admitted, however, that he was "unaware of the propensity of any of the above as at the Closing Date to provide the appropriate funds"; "such fund providers would obviously have in mind the reasons for the need to raise finance". In cross-examination, Mr Caldwell explained that they would certainly want to know why the money was needed and they would be told that there had been a fraud.

193. Mr Best in his reply considered that it was unlikely that SLEC would have been able to raise additional funds:

a) the Claimants would have been reluctant as they would be providing all the funds but only holding a minority state;

b) Sealand did not have the capacity to inject additional funds;

c) third party investors would not invest once they had been made aware of the

fraud;

d) SLEC had no assets of substance that it could provide as security to providers of debt.

194. In cross-examination, Mr Caldwell admitted that he agreed with Mr Best that the honesty and integrity of management was very important and that the safety and security of the investment was also important. This is a most important concession.

195. At paragraph 9.41, Mr Caldwell admitted that due regard would have to be given to a revision of the Business Plan and a reconsideration of the various subscriber rights but concluded at paragraph 9.42 that:

> "without knowing precisely what such rights would be and how the funding would be achieved, it is not possible to put a precise value upon the interest of the Claimant in those circumstances."

196. He was not able to elaborate on what the revised subscription rights would be or by what means that would be introduced. When this was explored in cross-examination and Mr Caldwell was asked to confirm that on the basis of the Housing Project going ahead he was not able to come up with a market value for the shares. He replied:

> "Well, rather like the question posed, I mean, without knowing the liability or how it has to be discharged or how the funding might be provided, it is very difficult to say."

197. Mr Caldwell was not able to assist the court because, for the reasons given by Mr Best, at the Closing Date the market value of the Subscription Shares was nil.

198. The thrust of Mr Caldwell's report and evidence adopted an alternative approach. Mr Caldwell's alternative approach was to value the Subscription Shares on the basis of the price which would be paid for them by a third party on the basis that the purchaser could achieve a realisation of the assets of SLEC by means of a liquidation, partial or otherwise. Under questioning from me, Mr Caldwell clarified his position to explain that what he was analysing was the market value of the shares in SLEC on the basis that SLEC could be put into liquidation. He includes in his Report a series of calculations which arrive at a value of a net asset value of SLEC of US163,204,862: paragraph 9.68. This calculation is based on a number of false or over-optimistic assumptions:

a) that shareholders' funds as at the 31st March 1997 were in fact in excess of US$221,000,000 when it has been determined by the court that the 1997 audited accounts were false, inaccurate and failed to show a true and fair view of the Company at the time;

b) that SLEC was entitled to reclaim from SLGCC US$22,915,764 in respect of the Golf Course Land under the alleged indemnity in the LTOA. In fact, for the reasons set out above, no such indemnity existed;

c) that Mr Brooke's valuation of the Housing Land at US$125,000,000, should be

adopted, a valuation which is greatly exaggerated for the reasons set out below;

d) that the Claimants would obtain control on the Board and them embark on a realisation of assets before SLEC was put into liquidation.

199. Mr Caldwell acknowledged that what he was envisaging was a two-stage process whereby the continuing management realised the assets and the formal liquidation took place after that had been achieved. In his view, this was the only way in which this could be done as the Claimants did not have shareholder control and the ability to pass a resolution for a winding up.

200. Mr Caldwell's analysis is based on a false legal premise that simply because the Defendants were in breach of warranty, the Claimants could automatically take control of SLEC and realise its assets, and that a potential purchaser would be in the same position. This approach is misconceived. The assertion of the Claimants' legal rights necessarily involves the intervention of the TCI Courts and an extensive legal process involving delay, uncertainty and considerable expense. It would appear that Mr Caldwell was not properly instructed by his clients as to the true facts of what has occurred during the TCI proceedings commenced in September 1999. In cross-examination, Mr Caldwell acknowledged that legal procedures would have to be followed and that the length, difficulty and expense would be taken into account by any purchaser of a minority stake but had no view as to how long the process might take.

201. The only valuation which Mr Caldwell proffers (as he made clear in answer to questions from me in the course of his evidence) is on the basis of the purchase price which might be obtained from an investor purchaser, not as an ongoing project, but as a prelude to a sale of the assets of SLEC and subsequent liquidation.

202. Mr Best in his report in reply, after stating that Mr Caldwell's continuation scenario was extremely unlikely and its underlying assumptions difficult to support, and that Mr Caldwell did not reach any conclusion as to value based on this scenario, addressed Mr Caldwell's liquidation scenario. He challenges the conclusions reached and reaffirms his valuation of nil.

203. A number of issues reflect the differences between the figures arrived at between Mr Best and Mr Caldwell on a liquidation. I shall consider the relevant differences in turn. (a) The first is the valuation of the Housing Land. For the reasons already given I accept the valuation figure provided by Mr Wong (on which Mr Best relies) and do not accept that provided by Mr Brooke (on which Mr Caldwell relies); (b) the second is the entitlement of SLEC to recover the purchase price for the Golf Course Land payable to Huaxia from SLGCC an entitlement relied on by Mr Caldwell. I have already held that there is no right of recovery; (c) the third was the right of SLEC to recover from Sealand the (unpaid) subscription price of $33.6 million for its shares another entitlement relied on by Mr Caldwell. For reasons already given I am not satisfied that Sealand was good for any sum at all; (d) the fourth is the total liability of SLEC to Huaxia under the Land Use Contract. Contrary to Mr Caldwell's assumption Huaxia was (as I held in the Judgment and the evidence of the receivers confirms) insistent on full payment. An investor would have proceeded on this basis.

204. In my view, the evidence of Mr Best, which accords with common sense establishes that no prudent purchaser at the Closing Date would seriously entertain thoughts of

purchasing, let alone make an offer to purchase, the Subscription Shares whether with a view to a sale of assets and liquidation or with any other view in mind. Such a purchase of a minority holding in a company long-controlled by crooks necessarily involves a purchase of the certainty of heavy and protracted litigation with no certainty of any or any sufficient realisation sufficient to justify the venture. Mr Caldwell adopted what seems essentially to have been a theoretical exercise on figures provided by the Defendants. He never got to grips with the availability of and deterrents to a serious purchaser. He never countered (let alone effectively countered) Mr Best's evidence. I accordingly accept Mr Best's valuation that at the Closing Date the value of the Subscription Shares was nil. This conclusion is supported (if support is needed) by the fact that the Claimants never received a serious offer available for acceptance from a bona fide purchaser.

205. In view of my holding that the relevant date for valuation is the Closing Date, it is unnecessary in this judgment to examine the valuation exercises undertaken in respect of the value of the Subscription Shares at the date of the Inquiry. In the circumstances, having heard Mr Jacob's final argument, in order to save the costs of a further day's hearing I did not call on Mr Kosmin on this issue. But I should however say that the evidence satisfied me that the valuation at that later date would not be appreciably different. On this issue again I prefer the evidence of Mr Best as far more realistic, and on the basis of the valuation evidence of Mr Wong (which I accept) and that full allowance is made (as it should be) for the full sum due to Huaxia (including both additional interest and penalty) plainly the value of the Subscription Shares today remains nil.

VALUATION OF HOUSING AND GOLF COURSE LAND

206. My acceptance of Mr Best's evidence makes it unnecessary to examine the expert evidence on the value of the Housing and Golf Course Land. It could only be relevant if I adopted Mr Caldwell's view and assumed that there was a purchaser for the Subscription Shares who wished to assess what he would receive from the assets of SLEC in the event of the assets being realised and SLEC being subsequently placed in liquidation. But in view of the time and effort expended on this issue, and the fact that the conclusion to be drawn on this issue supports my conclusion on the value of the Subscription Shares, I shall turn to that evidence.

207. The Defendants' expert Mr Brooke gave a report dated the 6th June 2002 ("Mr Brooke's Report"). The Claimants' expert was Mr Wong who gave a report dated the 27th June 2002 ("Mr Wong's Report"). Both experts gave valuations of the Housing Land on the 31st March 1997 and the 31st May 2002. Both agreed that the valuation should be made using the "residual method" which (according to the Glossary of Property Terms" published by the Estate Gazette and as generally understood) can be defined as:

> "A method of determining the value of a property which has potential for development, redevelopment or refurbishment. The estimated total costs of the work, including fees and other associated expenditure, plus an allowance for interest, developer's risk and profits, is deducted from the gross value of the completed project. The resultant figure is then adjusted back to the date of valuation to give the residual value."

208. Mr Brooke alone gave a valuation of the Golf Course Land also on both dates. The two experts exchanged Reports and prepared a Joint Memorandum of Matters Agreed and Not Agreed dated the 4th July 2002, and later (as supplemented and corrected) dated the 19th July 2002 ("the Joint Memorandum"). Though this course was inconvenient, Mr Jacob (curiously but no doubt as he was entitled to) insisted that Mr Wong should give oral evidence first. This had serious unfortunate consequences which calling Mr Wong second would have avoided.

209. Mr Wong is a Professional Associate Member of the Royal Institute of Chartered Surveyors and an Associate Member of the Hong Kong Institute of Surveyors. He has had over 14 years valuation experience in Hong Kong and over 11 years of property valuations in PRC. In 1994 he was the first ever non-mainland valuer appointed by the Shanghai Municipal Government to carry out valuations of the historic buildings on the Bund in Shanghai for disposal purposes. He was a most impressive witness who had taken every care to investigate the available sources of information so as to provide a full and reliable report. I have complete confidence in his balanced and informed judgment and skill.

210. Mr Brooke is a Fellow of the Royal Institution of Chartered Surveyors and founder and former Chairman of Brooke International and is currently a consultant to its successor IB. This firm (but not Mr Brooke personally) has provided advice to SLEC and potential investors. He is a leading member of the Surveying profession and has had wide experience of the projects in Shanghai.

211. Mr Brooke was ill when he prepared his report and this fact no doubt contributed to its serious (indeed fundamental) deficiencies which he acknowledged in his cross-examination. The deficiencies were repeated in the Joint Memorandum. Mr Brooke plainly prepared himself to justify in his oral evidence what he said in his report and in the Joint Memorandum and to overcome the deficiencies exposed in the course of the Inquiry. In the course of such evidence he raised a multitude of new matters not previously disclosed and which were not raised at the Joint Meeting of experts or put to Mr Wong in cross-examination. I regret to say that I found the exercise unconvincing as well as unprofessional, unsatisfactory and unfair.

212. I was troubled by his evidence in a number of regards leading me to question how far I could rely on his expert opinion, most particularly when it was in conflict with that of Mr Wong. For example:

a) Mr Brooke did not either in the substantive part of his report or in Appendix E to his Report (which lists the documents relied on in his Report) refer to the ILC Report. Mr Brooke was present in court when Mr Palmer was cross-examined and the false assumption was revealed in the ILC Report to which I refer in the next paragraph. At the commencement of his cross-examination he showed a remarkable reluctance to accept that in his valuation of the Golf Course Land he had relied on the contents of the ILC Report, even after he was shown a fax which he had sent which clearly and unequivocally stated that he had done so. Only when pressed with the language of the fax did he finally accept that this was so.

b) Paragraph 8.5.1.18 of his Report reads:

> "[SLEC] is under an obligation to contribute financial support to the Golf Course Project in recognition of the value to [SLEC] of the use of the clubhouse facilities by residents of the villas. This support should amount to $500 per unit per month: however, due to the shareholders dispute, this contribution is currently not being paid."

In fact there has never been any such obligation or payment. Mr Brooke took this statement on trust from the ILC Report without any attribution of source or any inquiry as to its truth, and set out the passage cited as though it was a verified fact and treated it as such in his valuation.

c) His report made no allowance for Developers Profit. The explanation which he gave for this in a Joint Memorandum of the 19th July 2002 was as follows:

> "Mr Brooke has made no specific allowance for Developer's Profit on the basis that as at 31st March 1997, having secured the land, the Land Use Rights, approval of the Master Plan and significant pre-lease interest together with completion of the land formation and part of the associated infrastructure, the only inherent risk remaining was that of construction risk and market absorption, both of which he had allowed for in the adoption of a high construction cost and a phased programme of development."

In his cross-examination however he told me that the Developers Profit was at all times reflected in his high construction cost and a 10% "large site adjustment". That explanation does not readily accord with the passage in the Joint Memorandum: Mr Brooke acknowledged when pressed (and only when pressed) that risk is not the only ingredient of Developers Profit. Perhaps even more remarkably at no time did Mr Brooke in his Reports or in the course of the joint meetings of experts or the Joint Memorandum give this explanation or indeed (and on this issue I prefer the evidence of Mr Wong to that of Mr Brooke) refer to any "large site adjustment" (which has no place in his Report). I accept the evidence of Mr Wong that "large site adjustment" is a term that does not have any recognised meaning or significance, least of all in context of allowances for developer's profit.

d) Mr Wong in his expert evidence stated that Investors would be deterred from purchasing the Housing Project by the false representations and breaches of warranty by the Defendants and applied a discount to reflect this in the price obtainable. Mr Brooke's response in the Joint Memorandum was that this factor was "outside his instructions". In his evidence he went further and said that to give a valuation on this basis would place him outside his Professional Indemnity Policy. I cannot understand why an expert valuer should not be competent to express a view on the impact of such considerations on a

prospective purchaser and consequently on the price obtainable and why this factor may not significantly affect the price obtainable, as Mr Wong has told me that it would. His judgment is no doubt subjective in the sense that there may be no scientific proof or standard applicable, but it is the informed view of an experienced valuer in China where (according to paragraph 1.13 of Mr Brooke's report) "rational investors and developers frequently allow subjective rather than objective considerations to dominate their thinking".

e) I am also troubled by a number of errors and omissions in the instructions given to Mr Brooke. For example in paragraph 5.11 he stated as follows:

> "On 31st March 1997, SLEC entered into a lease agreement with SLGCC for the lease and possible transfer of Land Use Rights of the Golf Course Land to SLGCC for a nominal consideration. In consideration for this lease agreement SLGCC undertook to assume the obligations of paying Huaxia the Land Use Right Transfer fee of $3,988,363 which became payable after 31st March 1997."

The reference to the undertaking by SLGCC is a reference to the Two Party Assumption Agreement which was the subject of detailed argument at the First Trial and detailed consideration in the Judgment. Mr Brooke's valuations reflect the "entitlement" of SLEC under this undertaking (see e.g. paragraph 8.1.10). Mr Brooke assured me that he had carefully studied the Judgment and based his statement of facts upon its contents. If this is true, which I find difficult to credit, his reading must have been selective, for he plainly did not take notice of the holding that the undertaking had no legal effect.

f) In paragraph 5.12 Mr Brooke refers to the transfer in April 2000 of the Golf Course Land by SLEC to SLGCC. But (no doubt because he was kept in the dark) his Report is nowise reflects the subsequent transfer of the Golf Course Land by SLGCC to SHTI and indeed the subsequent mortgage of the Golf Course Land by SHTI.

g) I am troubled that Mr Brooke did not investigate the seven sales of villas effected by SLEC and require his clients to afford to him access to all necessary information for this purpose, though he spent a week in Shanghai investigating the Projects.

THE HOUSING LAND

213. Mr Wong gave his valuations on the alternative assumptions that the representations and warranties made and given by the Defendants were true and were (as I held at the First Trial) false. Mr Brooke gave his valuations on the alternative assumptions that the land use rights fees had been paid and (as I held) had not been paid. An agreed summary of their valuations reads as follows:

"SUMMARY OF VALUATIONS

NATURE OF INSTRUCTIONS	MR BROOKE	MR WONG
31 May 1997		
Housing Land (assuming full payment of the land use right fees)	$150 million	N/A
Housing Land (assuming non-payment of the land use right fees	$125 million	N/A
Housing Land (assuming representations and warranties were false	N/A	$67.40 million
Housing Land (assuming representations and warranties were true	N/A	$23.70 million (subject to further deduction of interest payment and penalties where applicable).
Golf Course Land (assuming full payment of land use right fees)	$26 million	Not Instructed
31 May 2002		
Housing Land (assuming full payment of land use right fees)	$160 million	N/A
Housing Land (assuming non-payment of land use right fees)	$135 million	N/A
Housing Land (assuming representations and warranties were true)	N/A	$106 million
Housing Land (assuming representations and warranties were false)	N/A	$60.70 million (subject to further deduction of interest payment and penalties, where applicable)
Golf Course Land (assuming full payment of land use and right fees)	US22 million	Not Instructed

214. Mr Wong and Mr Brooke agreed that the assets of the Housing Project as at the 31st March 1997 were 757,000 square metres of undeveloped land and residential infrastructure only; and as at the 31st May 2002 the assets were 757,000 square metres of undeveloped land, residential infrastructure and 51 villas, 7 of which had been sold on long leases, 33 were let on short leases and 11 were unlet. The Business Plan provided that the Housing Project would be developed in phases, and the experts agreed that the proposed development should be split into five phases, with the first three comprising the villas and the last two comprising the apartments. Both experts agreed that the most appropriate method of valuation for this case would be the Direct Comparison Method, but in view of the insufficient number of appropriate site transactions, both valuers agreed to resort to the Residual Method of Valuation for

valuations at both dates. There have been (as I have said) seven sales of villas, full details must plainly be known to the Hansens, but they have declined to disclose or provide information in respect of these sales. The clear inference is that this is because it would not assist the Defendants' case. Effectively all that has been forthcoming is a schedule relating to four sales, and all that is known and can be said in respect of these sales is that the purchase price in respect of one is overstated 50% and the purchase price in respect of another is not fully paid even today.

215. An agreed statement of the breakdown in the elements of the experts' valuations reads as follows:

"Element of valuation

	31 March 1997	31 May2002
(1) Gross Development Value (psm)		
(a) Mr Brooke	Villa: $2,700	Villa: $2,200
	Flats: $2,295	Flats: $1,760
(b) Mr Wong	Villa: $2,400	Villa: $2,100
	Flats: $1,680	Flats: $1,500
(2) Construction Cost (psm)		
(a) Mr Brooke	$1,000	$600
(b) Mr Wong	$800	$600
(3) Professional Fees		
(a) Mr Brooke	10%	10%
(b) Mr Wong	10%	10%
(4) Interest Rate		
(a) Mr Brooke	10.5%	7%
(b) Mr Wong	10.5%	7.5%
(5) Marketing Costs		
(a) Mr Brooke	inc. in Contingency	inc. in Contingency
(b) Mr Wong	3%	3%
(6) Contingency		
(a) Mr Brooke	10%	10%
(b) Mr Wong	10%	10%

Element of valuation	31 March 1997	31 May 2002
(7) Developer's Profit		
(a) Mr Brooke	See below	See below
(b) Mr Wong	22.5%	20%

Mr Brooke has made no specific allowance for Developer's Profit on the basis that as at 31 March 1997, having secured the land, the Land Use Rights, approval of the Master Plan and significant pre-lease interest together with completion of the land formation and part of the associated infrastructure, the only inherent risk remaining was that of construction risk and market absorption, both of which he has allowed for in the adoption of a high construction cost and a phased programme of development. As at 31 May 2002, the risk is considered materially less in that all of the infrastructure is complete for the entire development, villas have been constructed and the surrounding golf course and supporting facilities are in place.

(8) Valuation of Surplus Land and Town Centre		
(a) Mr Brooke	$470 psm	$461 psm
(b) Mr Wong	$123.9 psm	$161.7 psm
(9) Adjustment assuming false representations and breached warranties		
(a) Mr Brooke	Outside instructions	Outside instructions
(b) Mr Wong	-50%	-30%
(10) Adjustment for payment of Land Use Right Fees		
(a) Mr Brooke	$25m*	$25m*
(b) Mr Wong	$19.957m**	$19.957m**

* Assuming commercial settlement
** Assuming levy of interest and liquidated damages (unknown amount)

(10) Adjustment for payment of Land Use Right Fees (Cont'd)

Mr Brooke referred to the possibility of SLEC remaining responsible for the settlement of Land Use Right Fees for both the Housing and Golf Course Projects and for this reason valued the Golf Course Project to demonstrate that the value of the asset covered any outstanding Land Use Right Fee due in respect of the Golf Course Land as at 31 March 1997 and 31 May 2002.

(11) Completed Villas

	31 March 1997	31 May 2002
(a) Mr Brooke	N/A	$27.6m
(b) Mr Wong	N/A	$26.3m"

216. I shall say a word on the components in the experts' valuations where critical variations are apparent.

Gross Development Value

217. The variations between the experts reflect differences in the views as to the comparative attractiveness of the SLEC development (proposed in 1997 and actual in 2002) to other developments in Shanghai and the market value of villas and flats in the other developments. I accept the evidence of Mr Wong (preferring it where there is a conflict to the evidence of Mr Brooke) that at the Closing Date there were only two developments in Pudong comparable to SLEC for valuation purposes, namely Tomson Golf Villas ("Tomson") and Seasons Villas ("Seasons"); that both were located in much better locations with established traffic links; that villas at Tomson were pre-selling at $1,800 for decorated condition (i.e. including fitting and air-conditioning) and that villas at Seasons were pre-selling at $2,100. I also accept his evidence regarding the developments which he looked at outside Pudong at the top of the Shanghai residential market, namely Sassoon Park and Mandarin Villa. The premium prices achieved at Sasoon Park of between $2850 and $3,441 psm reflected that the location considered the premium product, namely the most prestigious residential spot, the very convenient traffic links and the 140,000 square metres of pine tree woodland.

218. The average prices of $2,000 achieved at Mandarin reflected one of the most upmarket low-density developments in a highly reputable residential location. After anxious consideration of the full material before me, I have concluded that Mr Wong's figures for villas and flats Gross Development Value ought to be accepted, and that the figures given by Mr Brooke are too high.

Construction Cost

219. Mr Brooke's figure was, it appears, taken by Mr Faulkner from a feasibility study carried out by Mr Brooke's firm in 1995, though his evidence in this regard was totally unsatisfactory. Mr Brooke told me for the first time in his evidence that his figure of $1,000 had two constituents, namely construction cost of $800 and $200 Developer's Profit. On this basis, both experts agree the construction cost at $800.

Marketing Costs

220. Mr Brooke and Mr Wong agreed a 10% contingency allowance. Mr Wong also provided 3% for marketing costs. Mr Brooke has included that 3% in his contingency 10%. It seems to me that a separate sum (distinct from the required 10% contingency) is required, as Mr Wong says, of 3% for marketing.

Developer's Profit

221. Mr Wong has included a developer's profit of 22½% as one of the crucial elements to be considered in arriving at a property valuation which he regarded as very moderate. This provision cannot and is not seriously challenged by Mr Brooke. Mr Brooke again for the first time in his evidence told me that this element was incorporated in the additional 20% added to construction cost and a 10% "large site adjustment" not referred to previously. I think that Mr Wong's figure is clearly to be accepted.

Surplus Land and Town Centre

222. According to the Business Plan surplus land with a site area of 41,527 square metres was permitted to be developed with a maximum gross floor area of 41,564 square metres for hotel residential development. There is no information as to the design and development available. There is no planning approval. There are no detailed designs. There is no construction programme. The likelihood of development is remote on this account. Mr Brooke has allowed a 50% discount from the average accommodation value of the Housing Project. Mr Wong considers that, in view of the uncertainties as to development potential, a prospective purchaser would only pay a nominal hope value for the remote development potential and his discount is for this reason 70%. There is a like difference between the experts regarding an area of 27,871 square metres designed for town centre development when for the same reason Mr Brooke suggests a discount of 50% and Mr Wong of 70%. In both cases I think that Mr Wong's more conservative approach is more realistic and should be adopted.

Fraud and Breach of Warranty

223. Mr Wong in his Report and under cross-examination maintained the view that, if any prospective purchaser was aware of the warranties and representations made by the Defendants and that they were false (and in the case of Sealand and the Hansens) made fraudulently, such a prospective purchaser would almost certainly have refused to consider making an investment in the Housing Project. Any prospective purchaser would under such circumstances have been extremely wary of making an investment where there were likely to be hidden liabilities, risks to the land and risks of litigation which could last for a long time and affect the proper transfer of the land. Owing to these factors the potential purchaser would have either looked for other more secure forms of investment (e.g. the purchase of another development site) or would have demanded a very substantial discount reflecting the inherent risk and uncertainty relating to the Project, which he placed at a minimum of 50%. The view he expressed was subjective, in the sense of being based on his own wide knowledge and experience of the market and investors. Mr Brooke made no provision for any such discount. I have already pointed out that his valuation was made simply on the basis whether or not the instalments of purchase price had been paid, without any reference to the misrepresentations and breaches of warranty. His explanation in the Joint Memorandum for his failure to make any provision was simply that this was outside his instructions. In his cross-examination he maintained this position, but added that he could not estimate the effect of the fraud and breaches because to do so would take him outside the scope of his professional indemnity policy. I therefore get no assistance from Mr Brooke on this element. I am fully satisfied that Mr Wong was fully

competent to express an opinion on the impact of the fraud and breaches of warranty on a purchaser in this market in China and his views appeared to me to be well reasoned and convincing. I fully accept his evidence on this matter and his discount.

Adjustment for Payment of Land Use Rights

224. Mr Wong has allowed the principal due under Housing Land Contracts to which must be added the accrued interest and liquidated damages. From only one source of material, namely the Judgment, Mr Brooke has assumed that a commercial settlement with Huaxia could have been reached in respect of all outstanding payments. I do not think that as at the 31st March 1997 the prospective purchaser could or would have assumed any such settlement. As I stated in the Judgment, Huaxia throughout the period leading to the First Trial insisted on full payment. That was the relevant scenario at the time, and the purchaser (in accordance with Mr Wong's valuation) would have insisted on full provision of all sums due.

Conclusion on Valuation of Housing Land

225. In the circumstances without hesitation I adopt Mr Wong's valuation as at the Closing Date of the Housing Land. The value of the Housing Land at the date of the Inquiry is not relevant. After hearing Mr Jacob's final speech, to save the costs of an extra day of the hearing, I did not hear Mr Kosmin on this issue. Nonetheless I may add that, if it were relevant having heard the full evidence and full argument by Mr Jacob and considered carefully the evidence of Mr Brooke, I would unhesitatingly accept Mr Wong's lower valuation as at the date of the Inquiry.

Valuation of Golf Course Land

226. The Defendants have provided a valuation of the Golf Course Land in an effort to establish that SLGCC was good for the sums alleged by the Defendants to be due to SLEC and that the debts accordingly constituted valuable assets in the valuation of SLEC. I agree with the Claimants this exercise on the part of the Defendants is both irrelevant and totally hopeless for a number of reasons leaving aside questions as to the valuation of the Golf Course Land undertaken by the Defendants, and for this reason the Claimants had good reason not to ask their expert to value the Golf Course. The exercise is irrelevant because there is no debt due from SLGCC to SLEC and the exercise is hopeless because (amongst other reasons) the Hansens and Mr Twa have failed to provide the information required to know the assets and liabilities of SLGCC either at the 31st March 1997 or the 31st May 2002 and (in particular) the scope of its dealings with SLEC, the Defendants and its subsidiary SHTI.

227. Looking at the situation on the 31st March 1997, the SLEC Business Plan (which was warranted by the Defendants to be complete and accurate in all respects) stated as follows:

> "Total costs to construct the Golf Course is budgeted at $12.1 million, approximately $3.1 million for Phase 1 of the Clubhouse ... only approximately $4 million additional funds needs to be raised."

The evidence before me is to the effect that the balance of the cost of construction (so far as it existed) was constituted by monies representing pre-paid memberships held in a trust account by TCS. The Defendants' case and Mr Stuart Hansen's evidence is to the effect that the money was paid over to SLEC for its purposes. As Mr Brooke confirmed, the cost figure of $12.1 million was an understatement and (with the misapplication of the trust monies) SLGCC did not on the 31st March 1997 pay for construction: recourse was necessary to the subscription monies subscribed by the Claimants. Looking at the situation on the 31st March 2002 regard must be had to the fact that in flagrant breach of an injunction which I granted on the 2nd November 2001 the Hansens in December 2001 caused SLGCC to transfer the Golf Course Land to SHTI, and SHTI to grant a series of mortgages to a bank and borrow (according to Mr Barry Hansen) approximately $4.25 million on the security of that mortgage. SHTI is only 79.6% owned by SLGCC, some 20.4% of its shares being held by Huaxia ICC, a subsidiary of Huaxia. The only interest of SLGCC in the Golf Club on the 31st May 2002 was what (if anything) SHTI (controlled by the Hansens) will ever wish and be able to pay to SLGCC in respect of the transfer of the Golf Course Land.

228. I should add a brief word on Mr Brooke's valuation of the Golf Course. His valuation of the Golf Course was in large part based on the false premise (to which I have already referred) that SLEC was under an obligation to pay the financial support (totalling some $5 million a year) to SLGCC. Mr Brooke's valuation is based upon his assumptions as to: (1) the number of Golf Club memberships already issued and paid for and the number remaining available to be sold and the likely rate of sale and price obtainable; (2) the likely revenue of the Club's operations; and (3) the receipt of the financial support from SLEC. The Report gave no explanation as to how the valuations were reached. In the circumstances Mr Kosmin properly and sensibly took the view that it was sufficient at the Inquiry to establish by evidence and cross-examination the fallacy of the assumption regarding receipts from SLEC. Without any prior notice, Mr Brooke prepared himself to deliver and did deliver when (but not before) he gave his evidence a detailed financial analysis purporting to explain his figures. No part of this analysis was previously disclosed, let alone put to Mr Wong. Mr Kosmin was in no position to deal with this new case. I do not think that he could or should have been required to do so. I therefore do not think it just or fair to allow the Defendants to present this new case or to arrive at a valuation on this novel basis. Nor could it in any event in anywise affect the outcome of the case.

PART VII

CONCLUSION

229. I accordingly conclude that in general answers to the questions raised in Part I of this judgment that: (1) the Subscription Shares must be valued as at the Closing Date; (2) the value of the Subscription Shares as at the Closing Date was nil; (3) the only credits to be given are by APGF for the $3,250,000 received from New York Life Insurance Company Limited and by Wardley (if anything) of $1; (4) no deduction from or reduction of the net sum arrived at after such credit falls to be made on any of the grounds advanced by the Defendants; (5) in particular the Claimants have not failed to mitigate their damage but have at all times acted entirely reasonably, honestly and properly notwithstanding the gravest provocation by the Defendants; and (6) the First

and Fifth Claimants in nowise sought to influence the expert evidence of Mr Brooke or interfere with his acting for the Defendants. The Claimants are accordingly entitled to the damages claimed of $49 million (less the credit of $3,250,001) and interest.

230. I should add that I provided Counsel and Solicitors with a draft of this judgment on Thursday the 21st November 2002 and invited them to respond to the following by 12 noon on Tuesday the 26th November 2002:

(a) any typographical, syntactical or grammatical errors – a combined list would be appreciated;

(b) any points where I had either misrepresented or not set out or dealt with their principal arguments;

(c) where I had misstated any agreed or obvious facts;

(d) any other points of which they thought that I should be aware.

231. Mr Kosmin forwarded his list of corrections, amendments etc (this was also sent to Mr Jacob). Mr Jacob informed my clerk that he and his junior were no longer instructed and for this reason did not comply with my request. On Friday the 29th November 2002 my clerk was informed by Mr Anthony Connerty's clerk that he had been instructed on behalf of the Hansens and a copy of the judgment was forwarded to him on the same day. On Monday the 2nd December shortly before 10 a.m. Mr Connerty was invited to make any comments that he had on the judgment by 1 p.m. of that day. In the course of the afternoon he informed my clerk that he had no comments.

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